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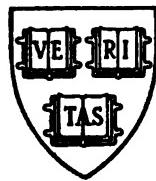
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THE
PACIFIC REPORTER,
VOLUME 12,

CONTAINING

ALL THE DECISIONS OF THE SUPREME COURTS

OF

California, Colorado, Kansas, Oregon, Nevada, Arizona,
Idaho, Montana, Washington, Wyoming,
Utah, and New Mexico.

NOVEMBER 4, 1886—MARCH 3, 1887.

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SUPREME COURT COMMISSIONERS OF CALIFORNIA.

Statutes of 1885, Page 101.

§ 1. The supreme court of the state of California, immediately upon the taking effect of this act, shall appoint three persons of legal learning and personal worth, as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to aid and assist the court in performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties they shall each take an oath to support the constitution of the United States and the constitution of the state of California, and to faithfully discharge the duties of the office of commissioner of the supreme court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner.

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BANK OF GARFIELD Co. and others v. BINGHAM and others.

(*Supreme Court of Oregon. April 28, 1886.*)

ATTACHMENT—PRIORITY OF LIEN—PROMISSORY NOTES.

Where both the appellants and the respondents procured writs of attachment on promissory notes held by a bank as collateral security for overdrafts drawn upon it by a bank which had failed, the respondents, having first procured their writ, were granted priority of lien, notwithstanding the fact that their original complaint alleged an action of tort in connection with contract; and in their amended complaint the amount claimed in the original complaint, which the attachment was sued out to secure, was enlarged; the facts of the case showing a distinct cause of action on contract, and that the amendment was made in furtherance of justice and without fraudulent intent.

Appeal from Multnomah county.

F. V. Holman, for appellants, Bank of Garfield Co. and others. *C. H. Carey*, for respondents, William Bingham and others.

THAYER, J. The appellant Suksdorf commenced a suit in the court below against the respondents to have certain attachment proceedings taken by the latter against J. S. Danford and D. Ainsworth, partners under the name of Spokane County Bank, declared fraudulent and void, and to have attachment proceedings he had taken against said parties decreed to have priority over those of the respondents. It appears that the said Danford and Ainsworth, who evidently are a couple of knaves, engaged in the banking business at Spokane Falls, in Washington Territory, and received deposits, discounted notes, and dealt in exchange; that about the seventeenth day of September, 1884, they failed in business, having at the time a large number of promissory notes in the possession of the First National Bank of Portland, Oregon, which were held by the latter bank as collateral security for overdrafts drawn upon it by said Danford and Ainsworth; that on the twentieth day of September, 1884, the respondent Bingham commenced an action in the said circuit court against Danford and Ainsworth to recover various claims on account of certain moneys deposited with them by divers parties which had been assigned to him, said Bingham, and thereupon filed an affidavit and undertaking for the purpose of procuring a writ of attachment to be issued in the said action, and which was thereupon issued by the clerk of said court, and under which said notes were attached; that subsequently to the commencement of the said action, and on the same day it was commenced, the respondents Webber & Foster also commenced an action in the said circuit court against said Danford and

Ainsworth on account of moneys deposited by the former with the latter, and also procured a writ of attachment to be issued in their action, under which said notes were also attached. Subsequently, and on or about the sixth day of October, 1884, said appellant commenced an action against Danford and Ainsworth in said circuit court on account of moneys he had deposited with them, and in which he sued out an attachment under which said notes were also attached. The suit was in the nature of a creditors' bill, and was brought on behalf of himself and all others in the same interest who would come in and contribute to the expense of maintaining it, and subsequently the Bank of Garfield County and one F. Yandell, who had similar claims against said Danford and Ainsworth, and who had commenced actions thereon in said circuit court, respectively, and sued out attachments therein, which were also levied upon said notes, came in and were made plaintiffs with said Suksdorf. The attachments in favor of the appellants and Yandell were subsequent to those of the respondents. The respondents filed answers in said suit, and upon the hearing thereof the circuit court dismissed the complaint, and from the decree entered thereon this appeal is brought. The said Yandell did not, however, join in the appeal.

The appellants claim that the respondents were not entitled to have attachments issued in their said actions, for the reason that said actions were in tort, and not upon contract, and that their procurement of said attachment to be issued was a fraud on the appellants' rights in the premises. No attachment against the property of another can legally issue in this state in any action except an action upon contract, expressed or implied, for the direct payment of money, and an attempt to procure the issuance of such process in any other kind of action is unauthorized, and the process, if issued, would be a nullity.

But the respondents' counsel claims that their said actions were not in tort, that they were upon contract, and that they were entitled, under the law, to have attachments issued therein. Under the Civil Code of this state there are no forms of action in actions at law. It expressly abolishes them. Their nature and character must therefore be ascertained from an examination of the facts alleged constituting the cause. The original complaint in Bingham's action is not a comely pleading, certainly. It would be difficult to describe its quality. The first count, which is more objectionable than any of the others, alleges, after the introductory part, the following: "And that on the twenty-sixth day of August, 1884, one John Bingham deposited with the defendants \$100, to be sent to Sea-board Bank, New York, and \$250, to be sent to First National Bank of Portland, Oregon, and that the defendants failed to send said sums to said Sea-board Bank of N. Y., and to the First National Bank of Portland, but converted the same to their own use, to plaintiff's damage in the sum of \$350." It is not easy to decipher what the pleader intended by this. The appellants' counsel insisted that his intention was to claim for a tortious conversion of the money; and that, possibly, may have been his idea. It is difficult to conclude what an attorney might mean when he employs such a jargon to express it. There is no possible way of reconciling his statement if the several allegations contained in it are given the full meaning which each imports if separately considered. Depositing the money with a bank to be sent to another bank implies a purchase of exchange. No one would suppose for a moment that the deposit was made with the view that the identical money would be forwarded. The deposit itself would operate to transfer the particular money to the bank, and create the relation of debtor and creditor between it and the depositor, and the alleged breach "that the defendants failed to send said sums" signifies that it was the *amount* of money deposited, and not *the same* money that was to be sent. The language is vague and very meager; but, standing by itself and in the light of its surroundings, I think it imports a contract to pay a sum of money in con-

sideration of a deposit of the amount. The pleader did not, however, stop there, but concluded with an allegation to the effect that the defendants converted the same to their own use, to plaintiff's damage of \$350. The appellant's counsel claims that this allegation was the gist of the action, and that it sounded in tort; but it will be noticed that the plaintiff in the action stated imperfectly a cause of action without this latter allegation. The statement that the money was deposited with the defendants therein, as bankers, to be sent to the other banks, and that they failed to send said sums, contained a cause of action, though not stated with that definiteness and certainty required in a pleading. And the concluding portion of the complaint, "that there is now due plaintiffs from defendants the sum of \$2,737.83," is a make-weight towards establishing the claim as a debt. It may be argued with much plausibility, at least, that the action was for a wrongful conversion of the money; but I think it can be claimed with more reason that it was upon contract for the payment of the money. At all events, it cannot certainly be maintained that it was an action for a tort any stronger than that it was an action upon contract. If the original complaint had confessedly been in tort, I do not think it could have been amended so as to have validated the attachment; but, where a complaint is so indefinite and uncertain that its real character in that respect cannot be determined, and the facts of the case are such that an action upon contract for the payment of money will lie, I think it can be amended so as to uphold an attachment that has been issued in the action. The plaintiff's attorney in said action very prudently filed an amended complaint therein, which removed the objection considered, and I think, under the view expressed, that he had the right to so amend the pleading.

As to the complaint in Webber & Foster's action, there can be no question but that it was upon contract. I think that it is too obvious to require any consideration. But the appellant's counsel contends that, in the amendment of Bingham's complaint, the amount claimed in the original complaint, and which the attachment was sued out to secure, was enlarged from \$2,737.83 to \$3,087.88, and that it had the effect to render the attachment invalid as against the appellant's attachment; and cites *Willis v. Crooker*, 1 Pick. 204; *Fairfield v. Baldwin*, 12 Pick. 888; *Page v. Jewett*, 46 N. H. 444. These cases seem to support the counsel's position; but it is claimed, in later cases, that there was an element of fraud connected with them which influenced the determination of the court therein. *Felton v. Wadsworth*, 7 Cush. 587; *Mendes v. Freeters*, 16 Nev. 396. I do not know how a court would be able to conclude that an amendment of the complaint in an action in which an attachment had issued would operate to dissolve the attachment, although a greater sum was demanded in the amended complaint than in the original, if the amendment were allowed in furtherance of justice. The attachment is only collateral to the action. The amendment in such case has no connection with it, and an exercise of the right cannot possibly mislead a subsequent attaching creditor to his injury, as his right in the property attached is subject to such right of amendment. The Code provides that any pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering shall expire, (section 97, Civil Code;) and thereafter, at certain stages in the action, such amendment may be allowed by the court upon such terms as may be just and proper. It cannot be unlawful to exercise a privilege accorded by law, especially where it is secured and acted upon in good faith. If the amendment had been made for the purpose of obtaining an undue advantage over the appellants, it would present a different question, but there is not the slightest proof in the case that such was the object. On the contrary, it appears that it was in furtherance of justice, and that ought not to prejudice the said respondent. It is not shown from the record that the amendment included any new cause of action, or embraced any other claim

than was contained in the original complaint, and I think it was virtually conceded on the argument that the discrepancy between the amounts claimed in the two resulted from an error of computation made when the original complaint was drawn.

The appellants' counsel also claims that it is not shown in the amended complaint that the cause of action alleged therein had accrued when Bingham's action against Danford and Ainsworth, in which the attachment issued, was commenced. The allegations therein concerning the \$100 item are that on the fifteenth day of August, 1884, the defendants, in consideration of the sum of \$100 to them paid by John Bingham, by their bill of exchange requested the Sea-board Bank of New York to pay said John Bingham \$100 at sight; also that the bill of exchange was presented to said Sea-board Bank on the fifteenth day of September, 1884, for acceptance, which was refused; that it was protested, and had not been paid. And a similar statement is set out in regard to the \$250 item. The counsel contends that these bills should have been presented for payment, instead of acceptance; that there are days of grace allowed on sight-bills, and therefore that the bills had not strictly been dishonored when the action was begun on the twentieth day of September, 1884. This question was before the circuit court in said action. It appears from the record that a demurrer was interposed on behalf of Danford and Ainsworth to Bingham's complaint therein, which the circuit court overruled, and awarded a judgment in Bingham's favor, which was rendered long before the appellants commenced their said suit. In giving judgment in the said action the circuit court necessarily determined that Danford and Ainsworth were liable upon said bills of exchange, and that decision cannot be reviewed in this proceeding. This court might impeach the judgment obtained in the said action for fraud, but it has no power to reverse it for error, except upon appeal therefrom. Consequently, whatever might be our view as to the correctness of the last point raised by the appellants' counsel, we can consider it only so far as it bears upon the matter of fraud alleged in the complaint. The respondents' claims stood upon the same footing as the appellants', and, so far as I can discover, are equally meritorious. They all arose out of the defalcation and rascality of Danford and Ainsworth, and one was as much entitled to payment, so far as I can see, as the other. The respondents gained an advantage in the matter by being first in time, and a mere irregularity in the proceedings to enforce them is not evidence of fraud. I am not prepared to say that their cause of action did not mature when the bills of exchange were presented, and the drawees refused to accept them; but, conceding that they should have been presented for payment, and the days of grace allowed before protesting them, it is a mere technical objection, which a court of equity cannot consider in this kind of suit, in the absence of actual fraud. I think the decree appealed from should be affirmed.

The chief justice concurs herein, except as to the effect of the amendment.

Upon a rehearing of this cause at the October term, 1886, it was held that, as it did not clearly appear that the difference between the sum claimed in the original complaint in the case of *Bingham v. Danford and Ainsworth*, and that claimed in the amended complaint, was the result of a mere clerical error, the lien of the attachment levied in said cause would extend only to the sum claimed in the original complaint.

(*14 Or. 3*)

NORTH PAC. LUMBERING & MANUF'G CO. v. CITY OF EAST PORTLAND.

(*Supreme Court of Oregon. October 11, 1886.*)

1. MUNICIPAL CORPORATIONS — CONTRACT TO BUILD ROADWAY — WARRANTS IN PAYMENT — FAILURE TO DELIVER WARRANTS.

Where a city agreed that, upon the completion and approval by it of an elevated roadway, it would deliver to the builders city warrants for a certain sum of money,

to be raised upon the property abutting upon the improvement in payment for it, and the builders complied with their part of the contract, but the city failed to deliver the warrants, as agreed, *held*, that the city was liable for the contract price of the improvement.

2. SAME—CITY CHARTER—AUTHORITY TO CONTRACT FOR IMPROVEMENTS—PAYMENT IN WARRANTS.

Where a city charter authorizes the city to contract for improvements only by paying for the improvements by warrants against the property abutting upon the improvements to be paid for, a contract by which the city agrees to pay for an improvement from its general fund, whether an original contract or a modification of one authorized by its charter, is void.

3. SAME—CONTRACT FOR IMPROVEMENT—TO BE PAID FOR UPON APPROVAL—CITY CANNOT DELAY APPROVAL.

Where a city, by its contract, agrees to pay for an improvement upon its completion and the approval of it by the city, it cannot avoid its liability by delaying to approve the work when it is completed according to the contract.

S. R. Harrington, H. T. Bingham, C. Taylor, and A. R. Coleman, for appellant, City of East Portland. *Williams & Willis*, for respondent, North Pac. Lumbering & Manuf'g Co.

THAYER, J. The respondent is a private corporation, and the appellant a municipal corporation. The former began an action in the lower court against the latter to recover the contract price for building a certain bridge or elevated roadway in said city. The city in the outset contracted with one J. E. Bennett to do the work, and the respondent alleged in its complaint that Bennett, after furnishing materials and performing labor, assigned his claim to the respondent; that the appellant (the city) recognized the respondent as a party to the contract in the place of Bennett, and that thereafter the respondent and appellant, by mutual agreement, so modified the contract that by the terms thereof, as so modified, the respondent was to furnish and put into said roadway, in addition to what had at that time been put into the same, four bents, which are described in the complaint; and that, upon the completion of the work required by the terms of the contract as so modified, the appellant was to pay the respondent the sum of \$5,042 therefor; and further alleged in its complaint that it had duly performed all the conditions on its part to be performed of said contract, as so modified, and demanded judgment against said appellant for said sum of \$5,042.

The appellant interposed an answer to the complaint, admitting certain formal parts thereof; also that it and one J. E. Bennett entered into a contract, by the terms of which Bennett agreed to furnish the material and perform the labor necessary for building the elevated roadway according to certain plans and specifications; but denied that it agreed to pay said Bennett therefor the sum of \$5,042, or any other sum of money, except in accordance with the provisions of a certain ordinance of the city referred to in the answer, under which said Bennett, upon the completion of the work and its approval and acceptance by the common council of the city, was to receive city warrants, for said sum to be raised for the payment of the improvement, upon property abutting upon the street covered by the improvement, which ordinance and agreement are set out in the answer. The appellant denied the assignment to the respondent of his claim, and denied the alleged mutual agreement between respondent and appellant modifying the original contract with Bennett, or that it agreed to pay the respondent, in consideration of any such modification, the sum of \$5,042, or other sum; also denied that respondent performed the conditions on its part of the alleged modified contract. The appellant also set out in its answer the proceedings had, under which the contract was awarded to Bennett, which appear to have been in the usual mode in which contracts for the improvement of streets are let in the city of East Portland, under its charter; and also set out the acts it alleged took place between the city authorities and the respondent, claimed

by the latter as a modification of the Bennett contract, but which the appellant alleged was no more than an arrangement between the parties to do certain acts which were to operate as a compliance of the terms of that contract, said Bennett having utterly failed to perform it, and, especially, that it was no modification of the original contract, so far as related to the compensation and manner of payment as provided therein; that the common council had not passed upon the improvement, or ascertained whether or not the same had been constructed according to the plans referred to; and that appellant was not in default in the premises.

The respondent filed a reply, controverting many of the allegations in the answer, and alleging matter in avoidance.

The cause was tried by jury, who returned a verdict in favor of respondent, and against the appellant, for the amount claimed, and upon which the judgment appealed from was entered. The appellant made a motion in the circuit court for judgment notwithstanding the verdict, which was denied, and, as there is no bill of exceptions in the record, there is no other question before the court to consider than that raised by said motion.

Two important questions were discussed at the hearing. One of them was whether the action could be maintained against the appellant to recover the contract price for doing the work, in any event; and the other one was whether it could be maintained until the work had been approved and accepted upon the part of the appellant.

The ordinary mode of improving streets in the city of East Portland, under its charter, after the publication of the notice of the intended improvement, is to ascertain and determine the probable cost of the making of the improvement, and assess upon each lot, or part thereof, abutting upon the same, its proportionate share of such cost. The board of trustees is then required to declare the same by ordinance, and to direct its clerk to enter a statement thereof in the docket of city liens. From the date of such entry the sum entered is deemed a tax levied thereon, and provision is made for its collection. This seems to have been the only mode by which the expenses for the improvement of a street could be raised. The city had no arbitrary powers to order the improvement of a street. It could only proceed in that direction upon the implied assent of a majority of the lot-owners whose lots abutted upon the portion of the street to be improved, and its authority in that particular is specifically pointed out in its charter. It can make no contract for the improvement, except in the manner indicated. The improvement is supposed to be a benefit to the lot-owners referred to, and the lots affected are charged with the cost of making it. The city occupies the relation in the affair more of an agent than a principal. It does not undertake to pay the contract price for making the improvement out of the general funds of the city. I do not think it has any power to enter into any such engagements for the improvement of a street. But it does undertake to perform all the acts required by the charter intended to supply the requisite fund to defray the expense attending it; and a failure to comply with any of the requirements of the charter by which the fund may be realized would subject it to a general liability. That was the case in *Frush v. City of East Portland*, 6 Or. 281. There the city diverted a portion of the fund from which the contract was entitled to be paid, and this court held that a general liability attached to the city in consequence.

In the case at bar it was the duty of the city, after ascertaining the probable cost of building the elevated roadway, and assessing upon the lots and parts thereof abutting upon the same their several proportionate shares of such cost, to have issued a warrant for the enforcement of the payment of the various shares, and have realized therefrom the amount, or as much thereof as a sale of the various lots would have produced, and issued to the respondent a warrant for the payment of the contract price upon the completion of

the improvement upon its part in accordance with the terms of the contract between the parties. The main contest at the trial of the case seems to have been that the action could not be maintained at all; that the respondent's remedy was against the officers of the city, to compel them to issue the warrants upon the special fund in payment of the contract price for making the improvement; and counsel for the appellant contended, upon the hearing, in favor of that view, and cited authorities from other states sustaining it; but there are other authorities that hold to the view herein indicated, that a general liability will attach in case the city fails to observe the various requirements of the charter by which the fund is realized, and this court must have adopted that view in *Frush v. City of East Portland, supra*, and I think we will be compelled to adhere to it. The appellant denied that the respondent had performed the contract, and that raised a material issue in the case, and, had it been maintained by the appellant, it would have been a complete defense; but the jury seems to have determined otherwise, and we cannot review their finding, especially when no bill of exceptions has been sent up with the record. If the respondent had performed the contract, as it alleged in its complaint that it did, then the appellant had no defense except payment or a tender of the warrants upon the special fund, and a compliance with the requirements of the charter to realize it. The appellant undertook to do that, and in default thereof the right of action accrued to the respondent.

The respondent set up in its complaint a modified contract, and counted upon such contract. I am quite certain that this would have been fatal to its recovery in the action, if it were shown by the pleadings that the original contract had been changed in any material particular, and that its performance did not amount to a performance of the original contract. Such a contract can no more be modified by changing a material part of the original than a new one could be made without a compliance with the charter. The respondent's attorneys apparently tried to plead themselves out of court, but the attorneys for the appellant came to their rescue. They denied that the original contract had been modified, and it is impossible to determine, from the pleadings, that any material stipulation therein was waived or materially altered; and we must, after verdict, presume in favor of the judgment.

The second question seems to have occurred to the appellant's counsel at the hearing. It appears from the answer and exhibits that the improvement was not to be paid for by the appellant until its approval and acceptance, either by the board of trustees or by other of its officers; and this is not denied in the reply, but it is alleged in the reply "that said roadway or structure was completed by the plaintiff, (respondent,) in accordance with the terms of said modified contract, on or before the fifteenth day of August, 1884, at which time, and ever since, the defendant (appellant) and her common council had due notice and full knowledge of such completion;" and that it was at the time of its completion, ever since had been, and still was, a better, stronger, and more substantial structure than that provided for or contemplated by the original contract, or than it would have been if it had been completed in accordance with the terms of said original contract only. If this is true, and we must presume it under the circumstances of the case, and the original contract not departed from, it was the duty of the city authorities to accept the work within a reasonable time after its completion. The action appears to have been commenced on the twenty-sixth day of September, 1884, and the work is alleged to have been completed on the fifteenth day of August, same year. It was the duty of the common council to have approved or disapproved of it during that interval. I think there must be a distinction between a contract in which the work is not to be paid for until a certificate is produced from some third person, showing that it has been performed in accordance with the provisions of the contract, and one in which it is to be paid for upon its approval and acceptance by the party for

whom it is performed. In the former case the production of such certificate is a condition precedent to the right to demand the payment, and the party seeking to enforce payment must aver and prove its performance. In the latter case it is the duty of the party to approve and accept the work, if performed substantially as required by the contract; for certainly the law will not permit such party to capriciously withhold his approval in such case, and thereby avoid the payment of a just claim. The common council of the city had entire management of this affair. It was the main organ through which the appellant acted, and its acts and omissions, committed within the line of its duty, were the acts and omissions of the appellant. What the real facts were in this case this court, as before intimated, has no means of ascertaining. It has before it the pleadings, verdict of the jury, and judgment only, and it cannot look beyond them in determining the questions arising upon the appeal. The law requires an appellate court, in such cases, to give every reasonable intendment in favor of the judgment. Every material allegation in the respondent's pleadings must be presumed to have been established by the testimony at the trial, and only in case that that would not entitle the respondent to the judgment have we the right to disturb it. I am unable to discover any such defect in the pleadings of the case as would justify an arrest of the judgment.

LORD, J. If several of the propositions of law discussed were available on this record, I should be for a reversal. But, as the case stands, I do not see how I can do otherwise than concur in the result reached.

(14 Or. 10)

SMITH v. KING, Sheriff.

(*Supreme Court of Oregon. October 11, 1886.*)

TAXATION—ASSESSMENT—EXCESSIVE ASSESSMENT—REMITTING OF EXCESS BY SHERIFF—
SECTION 99, CH. 57, MISC. LAWS OR.

Section 99, c. 57, Misc. Laws Or., imposes upon the sheriff as a duty the remitting of the excess of property wrongfully taxed, upon the property owner's making an affidavit that the same was wrongfully assessed, and the giving under oath a list of all his property liable to taxation.

John Burnett and *John Kelsay*, for appellant, G. B. Smith. *R. S. McFadden*, for respondent, Sol. King, sheriff.

THAYER, J. This case come here from the judgment of the circuit court for the county of Benton refusing to allow a *mandamus* to issue to the respondent as sheriff of said county, and command him to remit an excess of property alleged to have been wrongfully assessed to the appellant by the assessor of said county for the year 1883. It appears from the transcript that the appellant presented a petition to the said circuit court, duly verified, showing that he was a resident of said county, and owned both real and personal property therein liable to taxation, which was assessed for the year 1883 by the then assessor of that county for the general purposes allowed by law, and that said assessor, according to the statements in said petition, through mistake or otherwise, in making said assessment, returned as taxable property to the appellant a greater amount than should have been assessed to him; that the tax upon said excess of property so assessed amounted to \$393.47; that appellant had duly made an affidavit of such wrongful assessment, and had also made and presented to the said sheriff a list, duly verified, of property liable to taxation, the amount of excess, and a copy of the assessment roll of his assessment for said year in said county, and requested him to remit said excess, which the respondent, as such sheriff, failed and refused to do. The petition and other papers referred to were duly presented to said circuit court, and the application for the said writ of *mandamus* duly applied

for thereon, which the said court refused to allow, and from the judgment thereon this appeal was taken.

Section 99 of chapter 57, Misc. Laws Or., reads as follows: "Sec. 99. Whenever the assessor in any county, through mistake or otherwise, shall return as taxable property a greater amount than should be assessed to any person, the sheriff may remit the excess, upon the person owning such property, or his agent, making affidavit that the same was wrongfully assessed, and giving under oath a list of all his property liable to taxation; and the sheriff shall report the name of the person and the property so illegally assessed, and shall be credited by the county court with such excess."

The transcript includes a copy of the said affidavit of wrongful assessment referred to in said petition, and it appears therefrom that the property so assessed was property the appellant denied he owned, and certain real property which he stated was situated in the county of Polk, and that, according to the affidavit, no part of it could have been legally assessed to appellant by said assessor, and that the said assessment, so far as it included the amount of the property therein specified as having been wrongfully assessed, was a nullity. But it is claimed by the respondent's counsel that the appellant could not peremptorily require the respondent, as such sheriff, to remit it, for that would make the appellant sole judge and arbiter in the affair. He claimed that the sheriff, in such a case, has a discretion to exercise; that he must judge whether the excess should be remitted or not; and that the section of the statute above set out is merely permissive; otherwise a tax-payer, through fraud and perjury, could avoid the payment of taxes with impunity. I am unable to concur in that view. In the first place, a sheriff, under our law, is not the kind of officer that is clothed with judicial functions; and it is reasonable to suppose that, if it had been the intention of the legislature that the remission of the tax should depend upon his judgment, some mode would have been provided for ascertaining the facts upon which it was to be exercised. The language of the section, it is true, is permissive in form. It reads, "The sheriff may remit the excess," but it certainly cannot be contended that it is to be left at his option, as that would lead to the most absurd consequences. There could be nothing more ridiculous, in my opinion, or unjust, than to vest in sheriffs arbitrary power of that character. It would be very easy for a sheriff, when some favorite presented an affidavit that the assessor had returned an amount of property that should not have been assessed to him, to remit it; but when some one who had opposed his election presented such a claim, to conclude that he was not entitled to a remission, and refuse it, and no responsibility whatever would attach for such unjust discrimination. The sheriff, being a judge *pro hac vice* could not be made answerable for an injustice of that character. It may be claimed, however, that the sheriff in such a case should, before determining the matter, make inquiry as to the truth or falsity of the affidavit presented, but the statute does not authorize him to do that, and no presumptions are allowed in favor of officers exercising special and limited jurisdiction of that character. They have just what authority the statute in express terms gives them, and no more. The section of the statute in question specifies the evidence upon which the sheriff is to act,—the affidavit of a tax-payer, with a list, given under oath, of all his property liable to taxation. It cannot, therefore, be claimed that the sheriff would have the right to act upon his own knowledge, or of that of any other person, unless he is dignified by construction of the statute into something more than a court of inferior jurisdiction, which I hardly think will be attempted by any ordinary lawyer.

But, again, what better mode could have been devised in order to ascertain whether the assessor had returned as taxable property a greater amount than should have been assessed to the appellant, than that pointed out in said section 99? Mr. G. B. Smith knew better than any other living person as to

what property he owned. No witness within the limits of earth could be produced who would have been so well informed upon that subject as himself. He may not have sworn to the truth, might possibly be suggested. So might be said of a whole army of witnesses; but that does not preclude oral proof in the most important human affairs which occur. Perjury is probably committed in courts of justice every day, and the means of detecting and punishing it are very scanty, indeed. But would a party be as liable to commit perjury who is supposed to be responsible, has property subject to taxation, where he is compelled to expose himself to sure and certain detection in case he should do so? The legislature that enacted the statute in question, it is to be presumed, well understood the importance of the character of proof given by the appellant in this case. The affidavit, standing alone, would be very unsatisfactory; but, when the affiant is required, as a condition of the remission of the tax wrongfully assessed, to give under oath a list of all his property liable to taxation, he is placed in a condition in which few persons with any claims to responsibility would dare swerve from the truth. Our lists of property for the purposes of taxation are made upon far weaker testimony than that. Section 18 of said chapter 57, Misc. Laws, provides that "it shall be the duty of every assessor to swear every person subject to taxation to give a true account of his or her property according to the best of his or her knowledge and belief; and should any person or persons, when so required, refuse to testify as aforesaid, the assessor shall ascertain the taxable property of such person or persons from the best information to be derived from other sources." This provision is less effectual in eliciting the fact, for the reason that the tax-payer is able to elude taking the oath, though section 28, same chapter, subjects him, in case of a refusal to furnish a list under oath, to a forfeiture of \$20; and the former section (section 18) clearly indicates that the other sources of information to ascertain the taxable property of the person are less satisfactory than the oath of the person to give a true account of his or her property. So, also, does said section 28. Otherwise we may infer that the legislature would not have fixed a penalty for not furnishing under oath a list of property liable to taxation. The federal system of income taxation was carried out in a similar manner. There is, therefore, no force whatever in the argument that said section 99 of the statute ought not to be construed as mandatory upon the sheriff to remit the wrongful tax in consequence of any pernicious effect arising from such a construction. See *Livingston v. Hollenbeck*, 4 Barb. 9. It is a wholesome provision of law, intended to prevent oppression and wrong, and is securely guarded against mischievous results,—more so, by far, than if the construction contended for by respondent's counsel were to be adopted.

As has been suggested, however, the word "may" is used in the section made applicable to the duty of the sheriff in the remission of the portion of the tax wrongfully assessed, instead of the word "shall," and, ordinarily, it would import that the duty imposed was directory. But when the public interest is concerned, or the rights of third persons are affected, the two words are construed to mean the same thing. This rule is too well settled to require a citation of authorities to sustain it. It is only necessary to consider whether it is applicable to the case under consideration, and I am of the opinion that it is. The public interest is concerned just as much in preventing a wrong to a citizen as in exacting from him the payment of a lawful obligation. The highest duty of the public is to prevent injustice; and what could be a greater wrong than to extort from a member of the community, under the form of law, that which he did not owe,—an illegal and void claim? It would be incompatible with the principles of a free government, and consistent only with tyranny. The appellant's interest, of course, is concerned in the respondent's discharge of the duty. He was unlawfully required to pay nearly \$400, and he had a right to demand that the respondent,

as a public officer, promptly observe a duty which the law imposed upon him by virtue of his office. He had full right, under that law, to demand that the sheriff remit the excess of taxes wrongfully assessed against him, and of which the former was attempting to compel a forced payment. The government that would refuse to shield him from so unjust an exaction would not deserve any revenue whatever.

It has been made a question whether the writ of *mandamus* was the proper remedy. That question usually arises where any extraordinary remedy is applied. Theories have frequently been advanced in such cases, which, if maintained, would render that class of remedies wholly impracticable. The writ of *mandamus*, as it is termed in our Code, may be issued to any inferior court, corporation, board, officer, or person to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. The gist of the remedy is to compel the performance of a duty resulting from an office, trust, or station, in order to prevent a failure of justice. It will not issue where there is a plain, speedy, and adequate remedy in the ordinary course of law. The Code so declares, but the same result would follow if there were no such provision. Nor will it be issued to control the judicial discretion of a court, board, officer, or person; but will, when they refuse to act, set them in motion. Subject to these qualifications, the remedy by *mandamus* is as ample and complete as any remedy given by law, and, in my opinion, was a very appropriate remedy in this case. The respondent, as tax collector, was endeavoring, under a tax-roll and warrant issued to him, to enforce the payment of taxes. Nearly \$400 of the amount, according to the said affidavit and petition, had either been assessed upon property the appellant did not own, or upon property not within the jurisdiction of the assessor of Benton county. The appellant was powerless,—must either submit to the illegal exaction, or allow his property to be sold to satisfy it. Said section of the statute herein set out made it the duty of the respondent, as sheriff, to remit the illegal tax upon the appellant's doing certain acts which he fully complied with; and it is idle, under the circumstances, to contend that the writ should not have issued to compel the performance of the duty. The judicial discretion of the sheriff in the matter, if he had any, could not have been controlled by the writ. But what discretion could he have had in the premises? He was required to perform a simple act, was empowered to do it, and was fully indemnified against any consequences arising therefrom. He had a right to require the appellant to comply with the condition of the statute referred to, and his refusal, after its performance, was a contumacy of the law he had sworn to support. Unless the officers of the law respect it, I do not know who can be expected to.

The judgment appealed from should be reversed, and the case remanded, with directions to issue the writ prayed for in appellant's said petition.

LORD, J. I have been unable to find any statute or decided cases which throw much light upon the question involved. I concur in the result with some reluctance.

(14 Or. 20)

DALY v. MULTNOMAH Co.

(Supreme Court of Oregon. October 11, 1886.)

CONSTITUTIONAL LAW—FEES OF WITNESSES IN CRIMINAL PROCEEDINGS—"PARTICULAR SERVICES"—ARTICLE 1, § 18, CONST. OR.—GEN. LAWS OR. 1885, p. 10.

The act of the legislature of Oregon 1885, providing that "in all criminal actions and proceedings witnesses residing within two miles of the place of trial, or the place where they are required to appear and testify, shall not be entitled to receive either witness fees or mileage," held not to be in conflict with article 1, § 18, Const. Or., providing that the "particular services" of any man shall not be demanded without just compensation.

A. L. Frazer, for appellant, William A. Daly. *Henry E. McGinn*, for respondent, Multnomah Co.

LORD, J. This was an action to recover \$2.20 for one day's attendance, and mileage, as a witness in a criminal action. Upon demurrer, judgment went for the defendant, from which this appeal is taken. The object of the action is to test the validity of an act entitled "An act to prescribe the fees of witnesses in Multnomah county," which provides that "in all criminal actions and proceedings, witnesses residing within two miles of the place of trial, or the place where they are required to appear and testify, shall not be entitled to receive either witness fees or mileage." Gen. Laws Or. 1885, p. 10.

The contention of the plaintiff is that his attendance and mileage, admitted to have been performed in obedience to a subpoena issued in a criminal action, are "particular services," within the meaning of the constitution, and of which he cannot be deprived "without just compensation," and that, consequently, the legislative act in question, being in direct conflict with article 1, § 18, of the constitution, which declares, "* * * nor the particular services of any man be demanded without just compensation," is void. We are unable to assent to this construction.

In *Israel v. State*, 8 Ind. 467, it was held that the services of witnesses, in criminal cases, are not "particular services," within the meaning of the constitution, but are of the class of general services which every man is bound to render for his own and the general good. The court say: "It is as much the duty and interest of every citizen to aid in prosecuting a crime as it is to aid in subduing any domestic or foreign enemy; and it is equally the interest and duty of every citizen to aid in furnishing to all, high and low, rich and poor, every facility for a fair and impartial trial, when accused, for none is exempt from liability to accusation and trial. These are matters of general interest and public concern,—are vital, indeed, to the very existence of free government, and render the services of witnesses on such occasions matters of general public interest, and not particular in the sense of the constitution."

In *Buchman v. State*, 59 Ind. 12, and *Dills v. State*, Id. 18, the construction given in *Israel v. State, supra*, that the services of witnesses in criminal cases are not "particular services," within the meaning of the constitution, that "no man's particular services shall be demanded without just compensation," was referred to and approved, although the court was not of accord in the construction to be given to this provision, as applied to the services rendered by experts in criminal cases, with which we have no concern.

The services which the plaintiff has rendered as witness in a criminal proceeding, and for which he has brought this action, not being "particular services" for which just compensation may be demanded within the sense of the constitution, but of that class of general services which every man is bound to render for the general as well as his own individual good, it follows that the act is not in conflict with the constitutional provision, and that the judgment must be affirmed.

(35 Kan. 603)

CITY OF MILTONVALE v. LANOUÉ.

(Appeal from Cloud County.)

In re LANOUÉ.

(Original Proceedings in *Habeas Corpus*.)

(Supreme Court of Kansas. October 7, 1886.)

1. CRIMINAL LAW—APPEAL—SUSPENSION OF JUDGMENT.

The defendant was convicted, first before a police judge, and afterwards in the district court, for violating an ordinance of a city of the third class, and he then ap-

pealed to the supreme court. The sentence was that he should pay a fine and the costs of suit, "and that he stand committed to the jail of the county until the amount of said fine and costs shall be paid." Held, that the entire judgment of the district court, including that portion providing for the imprisonment of the defendant in the county jail, is suspended pending the appeal in the supreme court.

2. SAME—PUNISHMENT—VIOLATION OF CITY ORDINANCE.

And further held, in such case, that the order of the district court providing for the imprisonment of the defendant in the county jail, which order is in compliance with section 1 of chapter 84 of the Laws of 1879, (Comp. Laws 1879, par. 943), is not erroneous, notwithstanding section 66 of the act relating to cities of the third class, and notwithstanding the fact that the ordinance provided for imprisonment in the city jail, and not in the county jail.

S. B. Bradford, Atty. Gen., and *J. W. Sheafor*, for appellee and respondent. *Crans & Houston*, for appellant and petitioner.

VALENTINE, J. Two cases, arising substantially out of the same facts, have been presented to this court. It appears that on February 12, 1885, a prosecution was commenced before the police judge of the city of Miltonvale, a city of the third class, in Cloud county, Kansas, in the name of the city, and against S. C. Lanoué, for an alleged violation of a city ordinance prohibiting the sale of intoxicating liquors. The complaint contained two counts. The defendant was tried and convicted on both counts, and afterwards appealed to the district court, where he was again tried and convicted on both counts, and it was adjudged that he "pay a fine of \$100 on the first count in said complaint, and a fine of \$100 on the second count in said complaint, and the costs of this prosecution, taxed at \$281.20, and that he stand committed to the jail of Cloud county, Kansas, until the amount of said fine and costs shall be paid; and hereof let execution issue." The defendant then appealed to the supreme court, and completed his appeal on July 21, 1886, by filing in the supreme court a transcript of the proceedings of the courts below. On July 27, 1886, the defendant applied to the supreme court for a writ of *habeas corpus*, alleging that he was unlawfully restrained of his liberty by Edward Marshall, sheriff of Cloud county, Kansas, in pursuance of the foregoing judgment and order. The writ of *habeas corpus* prayed for was allowed and issued, and the sheriff made a return thereof, admitting that he restrained the defendant of his liberty in pursuance of said judgment and order up to July 27, 1886, when he released him from his custody, in pursuance of an order from the supreme court. The defendant now claims (1) that the court below erred in ordering that he be committed to the county jail, and, indeed, he claims that the court below had no jurisdiction to make any such order; and further claims (2) that even if the court below had jurisdiction to make any such order, and even if the order when made was valid and proper, still that when the defendant appealed to the supreme court the appeal had the effect to suspend such order, and, indeed, to suspend the entire judgment of the district court pending the appeal, and that the defendant was then entitled to be discharged from custody until the appeal should be determined, and finally, unless the judgment of the district court should be affirmed.

We shall consider the last question first. We think the defendant is entitled to be discharged from custody pending his appeal in the supreme court. We have previously had occasion to examine this question, and have decided it in other cases, although no written opinion has ever before been delivered. Where the payment of a fine and the costs of suit are imposed upon the defendant, it is always the duty of the trial court to order "that the defendant stand committed to the city prison, or the jail of the county, in which the judgment is rendered, until the judgment is complied with." Laws 1879, c. 84, § 1; Comp. Laws 1879, par. 943. See, also, Crim. Code, § 251; also Comp. Laws 1879, c. 83, par. 4876. And always, where an appeal is taken in such a case, the judgment itself, with regard to the fine and costs, is suspended pending the appeal. *State v. Volmer*, 6 Kan. 379, 384. Indeed, it is a gen-

eral rule that an appeal suspends the judgment or order appealed from, and everything connected therewith, unless the statute in express terms, or by the clearest of implications, provides otherwise; and there is no statute providing otherwise in the present case. In an ordinary criminal prosecution, where imprisonment is imposed upon a defendant as a part of the punishment, then the statute provides that there shall be no stay of the execution of the judgment pending the appeal. Crim. Code, § 287. But there is no statute providing that there shall be no stay where the judgment imposes only a fine and costs. Hence a judgment imposing only a fine and costs must be stayed pending an appeal; and, if the judgment for the fine and costs is to be stayed, it would seem to follow that all incidents thereof—all judgments or orders having for their object merely the enforcement of the judgment for the fine and costs—should also be stayed or be suspended pending the appeal. And clearly, we think, such is the case. The imprisonment fixed by the trial court in cases of this kind is not for the purpose of punishment, but, like the issuing of an ordinary execution, is resorted to merely as a means of enforcing the judgment for the fine and costs. Comp. Laws 1879, c. 19a, pars. 928, 943, 944; *In re Boyd*, 34 Kan. 573; S. C. 9 Pac. Rep. 240.

Now, if the imprisonment in cases of this kind is resorted to only for the purpose of enforcing the judgment for the fine and costs, and if the judgment for the fine and costs is suspended pending the appeal, it would be improper during such suspension to imprison the defendant, or to issue an execution against him. It would be improper to imprison him for the purpose of requiring him to do something which for the time being he is not required to do. It would be improper to imprison him for the purpose of requiring him to pay a fine or costs, when for the time being he could not legally or properly be required to pay the same. But if he should pay the fine and costs for the purpose of avoiding the imprisonment, then what would become of his appeal? From the time of such payment his appeal would be valueless. Pending the appeal in the supreme court we think the entire judgment is suspended,—that with regard to the imprisonment as well as that with regard to the payment of a fine or costs. The doubt expressed in the case of *In re Chambers*, 30 Kan. 455, S. C. 2 Pac. Rep. 646, was there inserted in deference to the opinion of an able and learned district judge of this state; but, after a careful examination of the entire question, we are of the opinion that there is not much room for such doubt.

The only other question presented in this case is whether the court below erred in ordering that the defendant be committed to the county jail of Cloud county until the fine and costs adjudged against him should be paid. We do not understand that it is claimed by the defendant that the ordinance under which the defendant was convicted and sentenced is invalid or void. Indeed, we think he admits that it is valid; and, that it is valid, we would refer to the case of *Franklin v. Westfall*, 27 Kan. 614. But the defendant claims that there was no authority for the court below to commit the defendant to the county jail; that if there was any authority to commit him at all, it was to the jail of the city of Miltonvale, and not to the jail of Cloud county. Now, this is a question of but slight importance; for if the court below had the power to commit the defendant to the jail of the city, and not to the jail of the county, then we could order that the judgment of the court below be modified and corrected to that extent. But is not the judgment of the court below correct? It is true that section 66 of the act relating to cities of the third class, which took effect April 3, 1871, provides, among other things, that cities of the third class shall have the power to pass ordinances for the confinement of persons in the city prison who may fail to pay fines, forfeitures, etc., and does not mention the county jail. Comp. Laws 1879, par. 928. And it is also true that the ordinance under which the defendant was convicted provided for the imprisonment of violators of the ordinance in the

city jail, and did not provide for imprisonment in the county jail. But section 1 of chapter 84 of the Laws of 1879, which amends section 81 of the act relating to cities of the third class, and which took effect on March 15, 1879, provides, as already stated, that in cases of this kind "it shall be part of the judgment that the defendant stand committed to the city prison, or the jail of the county in which the judgment is rendered, until the judgment is complied with." From this section it clearly appears that the court in rendering the judgment has a discretion whether to commit the defendant to the city prison or to commit him to the county jail; and this statute, being the last expression of the will of the legislature upon the subject, must govern, and we do not think that the city, or the city council, has the authority, by ordinance or otherwise, to take away this discretion from the court trying the cause. Besides, it does not appear that there was any city jail in existence at Miltonvale at the time the judgment in this case was rendered. From anything appearing in the case, there may not have been any such city jail; or, if there was, then it may not have been in a suitable condition for the confinement of prisoners in it. In all probability, the court below exercised a proper judicial discretion in committing the defendant to the county jail, and therefore we cannot reverse or modify its judgment because of any supposed abuse of judicial discretion.

In the case brought to this court on appeal the judgment of the court below will be affirmed.

In the *habeas corpus* case, it is adjudged, in favor of the defendant, that the imprisonment from July 21, 1886, to July 27, 1886, was illegal, and that from July 21, 1886, up to the present time the defendant has been entitled to his liberty; but, as the defendant's appeal has now been determined and adjudicated against him, his right to his liberty has also terminated. From this time on, until the fine and costs shall be paid, any imprisonment to enforce the payment of such fine and costs may be legal. The defendant will be remanded to the custody of the sheriff until such fine and costs are paid.

(All the justices concurring.)

(36 Kan. 668)

FINLEY v. FUNK.

(Supreme Court of Kansas. October 7, 1886.)

1. ARBITRATION—WHAT MAY BE SUBMITTED.

All controversies of a civil nature, including disputes concerning real estate, may be the subject of arbitration. *Stigers v. Stigers*, 5 Kan. 652, referred to and disapproved.

2. CONTRACT—CONSIDERATION—DISPUTED BOUNDARY.

A dispute had long existed between the plaintiff and defendant in regard to the boundary line, running north and south, dividing two contiguous tracts of land which they owned. The defendant claimed that a certain hedge was standing upon the true line, while the plaintiff claimed that it was three rods further east. A written agreement was finally entered into, establishing the boundary on the line claimed by the defendant. As a part of the contract the defendant agreed to pay the plaintiff for the strip of land lying between the established line and the one claimed by the plaintiff, which was ascertained to be two and one-half acres, the value thereof to be fixed by arbitration. Held, in an action on the agreement to recover the value of the land, that the mutual concessions of the parties in fixing the disputed boundary line, and the relinquishment by the plaintiff of his claim to the disputed strip of land, is sufficient consideration to support the defendant's promise to pay the value of the strip, and that the contract is valid, and should be upheld. JOHNSTON, J., dissenting.

Error from Labette county.

This was an action brought by James T. Finley against Adam Funk, in the district court of Labette county, to recover the sum of \$300 alleged to be due under a certain agreement, which is set out at length in the petition. The petition and agreement are as follows:

"The plaintiff, James T. Finley, for cause of action against the defendant,

Adam Funk, alleges that he, the said plaintiff, is the owner of the S. E. quarter of section 26, township 31, range 17, Labette county, Kansas; that the said defendant was, at the date first hereinafter mentioned, the owner of the S. W. quarter of said section; that for many years past there has been a difference between said plaintiff and said defendant relative to the true location of the quarter-section corner on the south line of said section, the same being the corner marking the south end of the dividing line between the land owned by plaintiff and defendant as above described, and the true location of said line has been doubtful and uncertain,—the said plaintiff, as he believed, rightfully claiming to own the land up to a line running to a point equidistant from the S. E. and S. W. corners of said section, and the defendant claiming to own the land up to a line running to a point three rods east of said central point, which would make his quarter section about six rods longer on its south line than plaintiff's quarter section.

"And the plaintiff alleges that the same question as to the true location of said quarter-section corner existed between J. B. Swart and H. Bouton, land-owners in the north half of section 35, lying immediately south of said section 26; that the county surveyor of said county, pursuant to notice received from said J. B. Swart, had notified all of said parties that on the twelfth day of June, 1884, he would establish said corner; that at the time named all of said parties were present, and said Swart and Funk had made and submitted to said surveyor certain affidavits, and the said plaintiff and the said Bouton had submitted a portion of their evidence, when a difference arose as to the right of said plaintiff and Bouton to have inspection of the affidavits submitted by said Swart and Funk,—the said plaintiff claiming the right to look at said affidavits, and the said surveyor refusing them permission to do so; that thereupon said plaintiff and Bouton refused to proceed further with their evidence before said surveyor, and stated that they would appeal from any report thereof which said surveyor might make adverse to their interests; that thereupon all of said parties agreed to dispense with the services of said county surveyor in establishing said corner, and, as a means of avoiding all difficulties and litigation concerning the location of said corner, entered into and executed the written agreement, a copy of which is hereto attached, marked 'A,' and made a part hereof, and said corner-stone was thereupon, by said parties, located and established in conformity with said agreement, and said defendant, Funk, has ever since been in the quiet and undisputed possession and control of the strip of land described.

"And plaintiff alleges that said county surveyor computed the quantity of land for which said defendant agreed to pay as aforesaid, and the same amounted to $2\frac{1}{2}$ acres, and there were and are in fact two and one-half acres in said strip; that said plaintiff has in all respects on his part complied with the provisions of said agreement, and, in pursuance thereof, selected an arbitrator to value said land as agreed, and the said defendant also selected one, but afterwards the said defendant, wrongfully and without cause, induced the arbitrator selected by him to refuse to act in the matter, and since then the said defendant has refused to select another arbitrator, and has notified plaintiff that he will not submit the valuation of said land to arbitration, as provided by said agreement, and that he will not pay for the same, and has ever since refused to pay for said land, or to submit the question as to the value thereof to arbitration, as agreed, though often requested by said plaintiff so to do,—all to the great damage of plaintiff, in the sum hereinafter named.

"And plaintiff alleges that on the thirtieth day of June, 1884, said county surveyor filed in the office of the register of deeds in and for said county a plat and notes of said survey, establishing said quarter-section corner at the point agreed upon, the same as if said corner had been established by him upon the evidence, instead of upon the agreement of the parties as aforesaid.

and by reason of the facts hereinbefore set forth no appeal has been taken therefrom; that the value of said land in said strip, for which said defendant agreed to pay as aforesaid, is, and was at the date of said agreement, not less than \$300. Wherefore said plaintiff asks judgment for the sum of \$300, together with interest and costs."

"EXHIBIT A.

"Articles of agreement between J. B. Swart, owner of the N. W. quarter of section 35, township 31, range 17, Labette county, Kansas, and H. Bouton, owner of the west half of the N. E. quarter of the same section, and J. T. Finley, owner of the S. E. quarter, and Adam Funk, owner of the S. W. quarter, of section 26, town 31, range 17, in said county and state, witnesseth:

"Whereas, there has heretofore been a dispute and question about the location of the quarter-section corner common to the land described on the line between said sections 26 and 35, now it is agreed:

"(1) That said quarter-section corner of said line between said sections 26 and 35 shall be, and hereby is, forever established on a line with the hedges dividing the land of said Swart and Bouton and Funk and Finley.

"(2) That said Swart shall pay to said Bouton the value of the strip of land lying west of the hedge between the said lands of said Swart and Bouton, and east of a line drawn or extended southerly from a point this day, by actual measurement, found to be equidistant between the N. E. and N. W. corners of said section 35, towards the quarter-section corner in the south line of said section.

"(3) That said Funk shall pay to said Finley the value of the strip of land lying west of the hedge between the land of Funk and Finley, and east of a line extended northerly from the point this day ascertained to be equidistant from the S. E. and S. W. corners of said section 26, towards the quarter-section corner on the north line of said section.

"(4) All parties agree that the county surveyor shall compute the quantity of land in each of the strips described, and the value thereof shall be fixed by three disinterested arbitrators, one to be chosen by Swart and one by Bouton, and the two to choose a third, for the land in section 35; and one to be selected by Finley and one by Funk, the two so chosen to select a third, for the land in section 26. One set of arbitrators may value the land in each section, if agreed; and all parties hereby agree to abide the decision of said arbitrators, and said Swart and Funk agree to pay the amount of their respective awards within ten days from the date of such award; arbitrators to be selected within ten days from the date hereof. The parties to whom said awards are to be paid, as above provided, may declare this contract void as far as it affects them, unless said awards are paid as above provided, or they may enforce said awards by any proceedings necessary to collect the same.

"Dated this eleventh day of June, 1884.

[Signed]

"J. B. SWART.

"ADAM FUNK.

"JAS. T. FINLEY.

his

"H. X BOUTON."

mark.

The defendant filed an answer, to which the plaintiff replied. At the trial of the cause the defendant objected to the introduction of any evidence under the petition, on the ground that it did not state facts sufficient to constitute a cause of action. This objection was sustained, and judgment rendered in favor of the defendant for costs, to which ruling and judgment an exception was taken by the plaintiff, who brings the case here for review.

Kimbull & Osgood, for plaintiff in error. *Perkins & Morrison*, for defendant in error.

JOHNSTON, J. Two principal reasons are urged against the sufficiency of the petition, the first of which is that the cause of action attempted to be set forth is based on an agreement to arbitrate a dispute concerning real estate, and it is argued that such a dispute is not the subject of arbitration. This position cannot be maintained. It seems that in an early day there was some doubt whether controversies concerning land could be submitted to arbitration, but this doubt can hardly be said to exist now.

In discussing what may be the subject-matter for submission, Mr. Morse, in his work on Arbitration and Award, says: "In England, in old times, the right to submit to arbitration disputes concerning real estate, especially where the actual title was in dispute, was regarded with great jealousy. But any doubt concerning the validity of such submissions has been long since entirely dissipated. In the United States few traces of the ancient doctrine are to be found, and there is no question that any dispute whatsoever relating to realty may be submitted to arbitration." And he cites numerous authorities to sustain the conclusion which he has reached. Morse, Arb. 54.

Mr. Caldwell, in his treatise on Arbitration, (page 3,) after speaking of the doubt which formerly existed upon the question, concludes as follows: "Indeed, at the present day it is quite clear that any disputes concerning land may be referred to arbitration, and that one party may be directed to execute all the necessary conveyances to the other, and to perform all such acts as may be requisite to confer the right and the possession."

The only case cited to sustain the objection is that of *Stigers v. Stigers*, which is noted in the appendix of 5 Kan. 652. No opinion was written in the case, and the grounds upon which the decision was based cannot now be definitely ascertained. It appears to have been an action to recover real estate, and the plaintiff offered in evidence an arbitration bond executed by the parties, and an award of the arbitrator, which were excluded by the court for reasons not stated. It is true, the syllabus of the case, as it is reported, sustains the view contended for by the defendant; but whether the syllabus was prepared by the justice who pronounced the decision in the case, or by the reporter, is not known. At the time the decision was made, there was no statute, as there is now, providing that the justice delivering the opinion shall prepare and file a syllabus of the points decided in the case. The syllabus of the case, by whomsoever prepared, states a doctrine which is in conflict with well-settled law, that we cannot approve or follow. If there was ever any doubt in this state of the right to submit such controversies to arbitration, it has been settled by recent legislation. In 1876 it was enacted "that all persons who shall have any controversy or controversies may submit such controversy or controversies to the arbitration of any person or persons to be mutually agreed upon by the parties." Laws 1876, c. 102, § 1. The language of this provision is broad and inclusive, and covers disputes concerning real estate equally with disputes relating to personal property.

The other objection to the petition is that it fails to show that the plaintiff ever had any interest in the strip of land for which he demands payment, or that he relinquished any right thereto to the defendant, or that the defendant received anything at his hands that he was not already entitled to, and therefore that there was no consideration for defendant's agreement to pay for the disputed strip of land. From the petition it appears that the plaintiff and the defendant were the owners of adjoining tracts of land; the plaintiff owning the S. E. $\frac{1}{4}$ of section 26, and the defendant the S. W. $\frac{1}{4}$ of the same section. For many years a dispute existed between them relating to the true location of the boundary line dividing these tracts. Finley claimed that the true line of division was one lying equidistant from the east and west lines of the section, while Funk claimed that his land extended to a line three rods east of the middle boundary as claimed by Finley, which would make Funk's quarter section six rods longer on its south line than Finley's quarter sec-

tion. On the twelfth of June, 1884, they undertook to have the boundary line established by the county surveyor, as provided by statute; but, a dispute arising as to the procedure, they agreed to dispense with the services of the county surveyor in establishing the corner, and they fixed upon a boundary line by an agreement between themselves. The agreement was in writing, and by it the boundary was established on the line contended for by Funk, and upon which a hedge was standing. As a part of the agreement it was stipulated that "said Funk shall pay to said Finley the value of the strip of land lying west of the hedge between the land of Funk and Finley, and east of the line extended northerly from the point this day ascertained to be equidistant from the south-east and south-west corners of said section 26, towards the quarter-section corner on the north line of said section." It was stipulated that the county surveyor should compute the quantity of land in the strip described, and its value was to be determined by three arbitrators, one to be chosen by Finley and the other by Funk, and the two so chosen to select a third; and the parties agreed to abide the decision of these arbitrators, and that Funk should pay the amount of the award within 10 days from the time it was made, and that, unless the award was paid in the time stated, Finley was at liberty to declare the contract void so far as it affected him, or he might enforce it by any proceeding necessary to collect the same. It is alleged that the county surveyor computed the quantity of land in the strip, and found that it amounted to two and one-half acres, and that the plaintiff has complied in every respect with the provisions of the agreement, but that the defendant has refused to select an arbitrator, and has notified the plaintiff that he will not pay for said land, nor submit the question as to the value thereof to arbitration, as agreed, and that the value of the land included in the strip was \$300.

This agreement is somewhat ambiguous in its terms, but the majority of the court are of the opinion that it is valid, and that the petition states a cause of action. The view taken by the court is that all the provisions of the agreement must be taken together; and if, by any reasonable construction, it can be upheld, it should be done. By this agreement the parties sought to settle a perplexing question of boundaries, and avoid what might be a protracted and expensive litigation. The agreement is one they had a right to make, and its purpose is looked upon by the courts with favor. It has been said, in a case where disputed boundary lines were involved, that "it is the policy of the law to allow parties to settle and adjust doubtful and disputed facts between themselves; and, when such a matter, which before was uncertain, has been established by agreement between the parties upon good consideration passing between them, they are not permitted afterwards to deny it." *Vosburgh v. Teator*, 32 N. Y. 567.

The fact that the parties entered into an agreement is evidence that they desired as far as possible to waive and dispense with formalities; and, even if the agreement was formally defective, the court should seek to uphold it, and carry out the obvious intent of the parties. The defendant claimed that his land extended to the hedge, while the plaintiff insisted that the hedge stood three rods over on his land. They employed a surveyor, and testimony was taken in an ineffectual effort to ascertain the true line. The line was fixed, and the defendant, as a settlement of the question, agreed to pay the value of the disputed strip. The consideration for the agreement, as the plaintiff contends, is the mutual concessions of the parties in fixing the dividing line, and the abandonment by the plaintiff of any claim to the disputed strip, which is deemed by the court to be sufficient to sustain the defendant's promise. The other view, and the one entertained by the writer of this opinion, is that the agreement was without consideration, and is invalid. The subject of the controversy between the parties was, where was the true line of division between their farms? It was expressly agreed by them that

the boundary is forever established on a line with the hedge, which, by another provision of the agreement, is said to divide the land of Funk and Finley. It seems to me that the parties did not seek to make a new boundary line, nor to change the old line, but only undertook to find and fix the pre-existing line,—the true line of division between the two quarter sections. The land lying west of this line, including the strip in question, was owned by Funk, and in which Finley had no interest. He owned no more than the south-east quarter section, which extended eastwardly to a hedge, and no further, and he therefore had no interest in the strip west of the hedge, nor in any part of the south-west quarter, to convey. It is true that Funk agreed to pay Finley the value of two and one-half acres of land, and we should, if possible, uphold the agreement, and give effect to the apparent purpose of the parties; but no agreement can be upheld that is not founded upon a valid and sufficient consideration. The stated and only consideration for the promise of Funk is the two and one-half acres of land, which, as we have seen, he already owned, and in which the plaintiff had no interest to convey. If the agreement is interpreted as showing that the parties regarded the line three rods east of the hedge to be the true one, and that the land included in the strip belonged to Finley, which, from the language employed, would seem to be a strained interpretation, it would still fail of its purpose. In the opinion of the writer, the agreement is not effective as a conveyance, and would not operate to transfer the title of the disputed strip of land to the defendant. It is not alleged in the petition that any deed or instrument which would operate as a conveyance of any part of plaintiff's quarter section had been tendered to the defendant.

Another point presented against the petition by the defendant is that it contains an allegation that the surveyor proceeded with the survey alleged to have been begun by him, and filed his plat and notes with the register of deeds, showing that the corner was established on the evidence produced before him, instead of upon the agreement of the parties; and it is claimed that that survey is conclusive upon the parties. This point is answered by the allegation that the services of the surveyor in establishing the corner were dispensed with, and that the line was established by the agreement, which is here held to be valid. The action of the surveyor was taken subsequently to this agreement, and is not binding upon the plaintiff.

From the conclusion reached, it follows that the ruling of the district court holding the petition to be insufficient must be held erroneous, and its judgment will therefore be reversed, and the cause remanded for another trial.

(All the justices concurring, except as to the second paragraph of the syllabus, in which Justice JOHNSTON does not concur.)

(35 Kan. 659)

BAKER MANUF'G CO. v. FISHER and others.

(Supreme Court of Kansas. October 7, 1886.)

BAIL AND RECOGNIZANCE—VACATING ORDER OF ARREST—DISCHARGE.

The bail in an undertaking for a defendant arrested in a civil action, executed under section 159 of the Civil Code, is exonerated, if the order of arrest is erroneously vacated by the district court, or the judge thereof, on account of the alleged insufficiency of the affidavit upon which the order is issued, and no stay of the order of vacation is granted; as the right to arrest or surrender the defendant, given by the statute to the bail as their security, is taken away by such vacation and discharge.

Error from Sumner county.

On March 16, 1882, the Baker Manufacturing Company brought their action against G. W. Knotts and H. Wallace, partners as Knotts & Wallace, for the recovery of \$2,009.60, upon an account for goods, wares, and merchandise.

Summons was issued, and the defendants were legally served. At the issuance of the summons, an order of arrest was issued in the case, and thereon G. W. Knotts was arrested and held in custody until the execution of a bail-bond, signed by himself and L. H. Fisher, W. O. Barnett, E. L. Brown, J. W. Fisher, and J. R. Messerly, as sureties. Thereupon Knotts was released. On March 22, 1882, the order of arrest was vacated and set aside by the judge of the district court on account of the alleged insufficiency of the affidavit upon which the order was issued. The judge refused to allow the plaintiff to amend the affidavit, and this ruling was excepted to. The case was then brought to this court by a proceeding in error, and the ruling of the district judge reversed. This court held "that the judge had power to permit the amendment, and, under the circumstances, ought to have done so; for the affidavit, if not sufficient, certainly showed dishonesty on the part of the defendants." *Baker Manuf'g Co. v. Knotts*, 30 Kan. 356; S. C. 2 Pac. Rep. 510. On April 8, 1882, the plaintiff recovered judgment against Knotts & Wallace for the sum of \$2,017.24, and also for \$28.28 costs. On September 29, 1883, in pursuance of the mandate of this court, and by leave of the district court, plaintiff filed an amended affidavit for an order of arrest. On October 5, 1883, the plaintiff sued out an execution upon the judgment against the person of G. W. Knotts, directed to the sheriff of Sumner county. On November 30, 1883, the sheriff made return upon this order that he was unable to find Knotts within his county. The amount due upon the judgment at the commencement of this action was \$2,017.24, with interest from April 8, 1882, at 7 per cent. per annum, and costs.

The bail-bond is in words and figures as follows:

"Know all men by these presents that G. W. Knotts, as principal, _____, as sureties, are held and firmly bound unto the Baker Manufacturing Company in the full sum of four thousand nineteen and 20-100 (\$4,019.20) dollars, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, forever. The condition of the above obligation is such that whereas, the above Baker Manufacturing Company have begun a civil action in the district court of Sumner county, Kansas, against the firm of Knotts & Wallace, for the sum of two thousand and nine and 60-100 (\$2,009.60) dollars; and whereas, the Baker Manufacturing Company have filed their affidavit charging the said Knotts & Wallace with fraud in disposing of their goods and merchandise; and whereas, the above-bounden G. W. Knotts (member of the firm of said firm Knotts & Wallace) has been arrested under an order of arrest issued by the clerk of said district court; now, therefore, if judgment shall be rendered in said action against said Knotts & Wallace, said G. W. Knotts will render himself amenable to the process of said court. Then and in that event this obligation shall be null and void, otherwise to remain in full force and effect in law.

"Witness our hands this sixteenth day of March, 1882.

"G. W. KNOTTS.
"L. H. FISHER.
"E. L. BROWN.
"J. W. FISHER.
"W. O. BARNETT.
"J. R. MESSERLY.

"Approved March 17, 1882.

"J. M. THRALLS, Sheriff."

The plaintiff brought its action to recover upon this bond, setting up all the foregoing facts. To its petition the defendants filed a demurrer, alleging that the same did not state facts sufficient to constitute a cause of action. On April 16, 1884, this demurrer was sustained, the plaintiff excepting.

Thereupon judgment was rendered against plaintiff, and it excepted, and brings the case here.

W. P. Campbell, for plaintiff in error. *McDonald & Parker*, for defendant in error.

HORTON, C. J. The question in this case is whether the bail have been exonerated from the obligation of the undertaking executed by them March 17, 1882. Judgment was rendered against Knotts & Wallace on April 8, 1882, and Knotts, who was released at the time of the execution of the undertaking, has not rendered himself amenable to the process of the court below. It appears that he cannot be found in Sumner county. If the terms of the undertaking solely controlled, the bail would be charged; but sections 168, 169, and 170 of the Code are very important in the consideration of this question. These sections are as much a part of the undertaking as if their terms were incorporated therein. Section 168 provides "that the bail may surrender the defendant to the sheriff at any time before the return-day of the summons, in an action against them;" and section 169 authorizes the arrest of the defendant by his bail at any time, for the purpose of surrender. Section 170 further provides: "The bail will be exonerated * * * by his [defendant's] legal discharge, or his surrender to the sheriff of the county in which he was arrested."

On March 22, 1882, the judge of the district court vacated the order of arrest on account of alleged insufficiency of the affidavit upon which the arrest was made. At the time of the vacation of the order of arrest the plaintiff asked leave to make the affidavit sufficient by amendment; but leave was refused, the judge holding that he had no power at chambers to grant leave to amend. To this ruling the plaintiff excepted, and on March 20, 1883, nearly a year after the discharge of the defendant, filed its petition in error in this court to review such ruling.

On September 6, 1883, the opinion of this court was handed down, reversing the ruling of the district court, and remanding the case, with instructions to the court to permit the amendment of the affidavit. No stay of the ruling of the district court was obtained by the plaintiff; and from March 22, 1882, until September 6, 1883, the bail had no legal right to arrest or surrender the defendant. The sheriff had no right to hold him even for an instant, and had no right to accept his surrender from the bail. Therefore, the right to arrest and surrender their principal, given by the statute to the bail as their security, was by the statute taken away when the defendant Knotts was discharged on March 22, 1882. The sureties executed the undertaking signed by them upon the faith of the provisions of the law that permitted them at any time to arrest and surrender the defendant. The discharge of the defendant on March 22, 1882, exonerated the bail. At that time the defendant Knotts was entitled to his immediate discharge, and neither the bail, nor the sheriff, had any custody or control of him. *Duncan v. Tindall*, 20 Ohio St. 567.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(35 Kan. 663)

SEATON and others, Partners, etc., *v.* HIXON and another.

(*Supreme Court of Kansas*. October 7, 1886.)

1. MECHANIC'S LIEN—ACTION—PREMATURE ACTION—BAR.

Where an action to foreclose a lien for materials furnished for a building is prematurely brought, and the judgment is rendered in the case against the plaintiff for that reason, held, that such judgment is not a bar to another action brought subsequently, and within proper time, against the same parties, to foreclose the same lien.

2. SAME—LIMITATIONS.

And where the plaintiff commenced his second action within less than one year after his failure in the first action, though more than one year after the building

was completed, *held* that, by virtue of the provisions of section 23 of the Civil Code, the action is not barred by the one-year limitation prescribed by section 4 of the mechanic's lien law.

3. SAME—DESCRIPTION OF LAND.

Where a description of real estate is true in every particular, and no other property answers to such description, and the property may easily be found by any one who may be acquainted with such description, and with the facts which exist, and which may easily be ascertained upon inquiry, *held*, that the description is sufficient; and *further held*, that the description in the present case is sufficient.

Error from Atchison county.

Everest & Waggener and *Tomlinson & Eaton*, for plaintiffs in error. *W. W. Guthrie* and *Jackson & Royse*, for defendants in error.

VALENTINE, J. This was an action brought by G. C. Hixon and A. W. Pettibone, partners as G. C. Hixon & Co., in the district court of Atchison county, Kansas, against William Sanderson, James P. Tracy, and John A. Tracy, partners as Sanderson & Tracy, and John Seaton, to foreclose a mechanic's lien for the value of materials furnished by the plaintiffs, as subcontractors, to Sanderson & Tracy, the contractors, and placed in a building upon land owned by Seaton. On April 13, 1880, the building was completed. On May 6, 1880, the plaintiffs filed in the proper office their affidavit for a lien upon the land on which the building was situated, and on the same day commenced an action in the district court against the aforesaid defendants to foreclose such lien, which action was consolidated with three other cases of like character, brought by other plaintiffs against the same defendants. On August 4, 1881, this consolidated action was tried, and in such action judgment was rendered in favor of the plaintiffs G. C. Hixon & Co., and against Sanderson & Tracy, for the amount of their claim against them; and judgment was further rendered against the plaintiffs G. C. Hixon & Co., and in favor of Seaton, denying their right to foreclose their lien, upon the ground and for the reason only that the plaintiffs had commenced their action prematurely, and within less than 60 days after the completion of said building. This judgment was afterwards affirmed by the supreme court. *Macdonald v. Seaton*, 27 Kan. 672.

On May 29, 1882 this present action was commenced. The plaintiff's petition set forth the foregoing among other facts. To this petition the defendant John Seaton demurred, upon the ground that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court. The defendant John Seaton then filed an answer to the plaintiffs' petition, setting forth, in substance—*First*, a general denial; *second*, a special denial as to the ownership of the property; *third*, a plea of a former adjudication of the matter in controversy; *fourth*, a plea of a certain statute of limitations. The plaintiffs replied to this answer. The other defendants made default. On July 22, 1884, this action was tried upon the foregoing pleadings, before the court without a jury, and the court found special conclusions of fact and of law, and upon these conclusions rendered judgment in favor of the plaintiffs, and against the defendant Seaton, for the foreclosure of plaintiffs' lien, and all the defendants, as plaintiffs in error, have brought the case to this court. The only controversy, however, in this court, is between the plaintiffs G. C. Hixon & Co., who are now defendants in error, and Seaton.

It is claimed that the court below erred in overruling the demurrer of the defendant Seaton, and also erred in its conclusions of law. But the real questions presented by counsel are as follows: (1) Is the judgment rendered in the first action brought by G. C. Hixon & Co. a bar to the prosecution of this present action? (2) Is this present action barred by the one-year limitation prescribed by section 4 of the mechanic's lien law? (3) Is the description of the property, as set forth in the plaintiffs' statement for a lien, suffi-

cient, or is it too indefinite and uncertain? These questions we shall consider in their order.

1. Is the judgment rendered in the first action a bar to the prosecution of the present action? Does such judgment amount, in effect, to a *res adjudicata*? We think not. Such judgment was nothing more than that the first action, as between the plaintiffs G. C. Hixon & Co. and John Seaton, for the foreclosure of the plaintiffs' lien, was brought prematurely; that it was brought within less than 60 days after the completion of the building, which, under the statutes, is too soon. Mechanic's Lien Law, § 2; Comp. Laws 1879, par. 4169.

2. Is the present action barred by the one-year limitation prescribed by section 4 of the mechanic's lien law? We think not. That limitation requires that an action to foreclose the lien shall be commenced within one year after the building has been completed; but it also provides that "the practice, pleadings, and proceedings in such action shall be in conformity with the rules prescribed by the Code of Civil Procedure, so far as the same are applicable," (Comp. Laws 1879, par. 4171;) and section 23 of the Code of Civil Procedure reads as follows:

"Sec. 23. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or if he die, and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure."

It is claimed by counsel for Seaton that the words "within due time," as used in the foregoing section, mean a time within which the action may be prosecuted,—a time not too soon nor too late,—and mean only such time; and therefore that as the first action was commenced prematurely, and before the action could have been prosecuted as against Seaton, the action was not commenced "within due time," and therefore that this action does not come within the saving clause of said section 23. We do not think that the words "within due time," as used in the foregoing section, have the full meaning which counsel for Seaton claim they have. These words are used with reference to the full running of statutes of limitations, and the absolute barring of actions thereby, and not with reference to anything else. All that they require to bring the action within said section 23 is that the action shall be commenced before any statute of limitations has barred a recovery. If the action is commenced before it has been barred by any statute of limitations, then it is commenced "within due time," within the meaning of the foregoing section; but if it is not commenced until after it has been barred, then it is not commenced "within due time." In the present case this second action was brought within less than one year after the plaintiffs' failure in the first action in the district court, and within less than one year after their failure and the affirmance of the judgment in the supreme court; and hence we do not think that this present action is barred by the limitation prescribed by section 4 of the mechanic's lien law.

3. Is the description of the property, as set forth in the plaintiff's statement for a lien, sufficient, or is it too indefinite and uncertain? This statement describes the property as being in the city of Atchison, Kansas, and the property upon which the aforesaid building was erected, and as owned by John Seaton, and as "lots 15 and 16, block AA, corner Q and South Fourth streets." We think the description is amply sufficient, under the findings of the court. The description is true in every particular. No other property answers to this description, and the property may easily be found by any one who may be acquainted with this description, and with the facts which exist, and which may easily be ascertained upon inquiry. Such a description, when it can be so aided by existing facts, is always sufficient. The property

is in the corporate limits of the city of Atchison, although it is also in an addition to that city south of the original boundaries of the city, and is usually described or designated as "South Atchison." In such addition there is a block designated as "A.A." and there is no such block in any other part of the city, or in any other addition thereto. The south-west corner of said block A.A is at the north-east corner of the intersection of Fourth and Q streets, and the last-named street is situated wholly within the foregoing "South Atchison" addition, and there is only one "Fourth street" in Atchison, a part of which is in "South Atchison," and of course "South Fourth street" must be in "South Atchison."

The description of the property contained in the deed of conveyance under which John Seaton claims is as follows: "That part of block A.A of South Atchison [an addition to the city of Atchison] commencing at the southwest corner, running 75 feet north; thence 150 feet east; thence 75 feet south; thence 150 feet west, to the place of beginning; said plat of ground being known on the official plat of the city of Atchison as lots 15 and 16 of block A.A."

We presume that lots 15 and 16, in block A.A, South Atchison, have well-defined and well-known or easily ascertained boundaries, and that such boundaries are specifically shown by the official plat. There is certainly nothing in the record showing the contrary.

Finding no material error in the rulings or judgment of the district court, its judgment will be affirmed.

(All the justices concurring.)

(35 Kan. 622)

MISSOURI PAC. RY. CO. v. STEVENS.

(*Supreme Court of Kansas. October 7, 1886.*)

1. NEGLIGENCE—RAILROAD CROSSING—WHISTLE.

It is the duty of a railroad company, in running its trains over its track, to have the whistle of its engines sounded three times, 80 rods from the place where the railroad crosses any public highway, except in cities and villages. Where no whistle is sounded, or other alarm given, and damages are sustained by a train of cars running over cattle upon the highway, the company is chargeable with negligence; and it is not relieved from its liability therefor merely by the evidence of the owner of the cattle, in charge of the same, that he saw the smoke and heard the puffing of the engine drawing the train more than half a mile from the crossing, because no one is bound to conclude that the engine or train will cross the highway without sounding the whistle 80 rods from the crossing.¹

2. EVIDENCE—CHARACTER OF RAILWAY TRAIN.

Where a person has lived several months on a farm near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one.

Error from Atchison county.

Action by Stevens against the Missouri Pacific Railway Company to recover \$45, the value of a cow alleged to have been killed on September 18, 1883, by the negligence of the company, upon a public highway about three miles southwest of the city of Atchison. Trial had March 14, 1885, before the court, with a jury. Verdict for the plaintiff for \$45. The jury also made the following special findings of fact:

"(1) Was said cow killed at a public crossing? Answer. Yes.

"(2) Was the whistle blown three times, 80 rods east of said crossing, as said train moved west? A. No.

"(3) As soon as the engineer on said train discovered cattle near said crossing, did he at once reverse his engine, and use all the power at his command to stop said train? A. No.

¹See note at end of case.

"(4) Did the plaintiff know that said crossing was a dangerous one? *A.* Yes.

"(5) Did plaintiff use ordinary care to prevent his cattle from being run over at the time said cow was killed? *A.* Yes.

"(6) Was said cow killed on September 18, 1883? *A.* Yes; or near this date.

"(7) Did plaintiff have charge of said cow, with others, at the time of the killing of said cow? *A.* Yes.

"(8) Was plaintiff driving said cow with others towards said track on the public highway for the purpose of crossing? *A.* Yes.

"(9) Before getting so near said track that said cow could be controlled, did plaintiff or his employes look up and down the track to see if train was coming? *A.* Yes.

"(10) Before any of said cattle crossed said track, did plaintiff and his employes hear an engine puffing east of there? *A.* Yes.

"(11) Did plaintiff or his employes, after hearing the noise of an approaching engine, drive a portion of said cattle across and over said track? *A.* No.

"(12) Could the plaintiff, by the exercise of ordinary care, have prevented the collision which resulted in death of said cow? *A.* No."

Thereupon the railway company filed a motion for a new trial, which motion was overruled. Judgment was entered in favor of plaintiff, and against the defendant, in accordance with the verdict, and for costs. The railway company excepted, and brings the case here.

Everest & Waggener, for plaintiff in error. *J. J. Greenawalt*, for defendant in error.

HORTON, C. J. This was an action brought by William B. Stevens, against the Missouri Pacific Railway Company, to recover \$45 as damages for the killing of a cow on September 18, 1883, upon a public highway about three miles south-west of the city of Atchison. There was evidence before the jury tending to show that the whistle attached to the engine of the train doing the injury was not sounded 80 rods from the place where the railway crosses the highway. There was also evidence before the jury tending to show that one of the persons in charge of the drove of cattle, when about to cross the highway as the train was approaching, was on the track on horseback, waiving his hat; that no attention was paid to this, and no attempt made to slacken the speed of the train, or to prevent it from running into the drove. Therefore there was sufficient evidence before the jury to sustain the verdict. Section 60, c. 23, p. 226, Comp. Laws 1879; *Railroad Co. v. Rice*, 10 Kan. 426; *Railroad Co. v. Phillipi*, 20 Kan. 12; *Railroad Co. v. Wilson*, 28 Kan. 637.

Counsel for the company assert that the killing of the cow was not caused by the omission to sound the whistle of the engine. In support of this it is said that the plaintiff testified he heard the engine about half a mile away; that he could see the smoke at that distance; and therefore it is argued that he had ample notice of the train approaching the crossing. The evidence on the part of the plaintiff was to the effect that the train was about 60 or 70 rods from the crossing when he and his employe in charge of the drove of cattle, about 40 in number, first saw it; that it was then running at the rate of 15 miles an hour; that, at the time, the drove was near to or upon the track; that the whistle was not sounded until the engine was close to the cattle; that a part of the cattle crossed the track, and his employe, on horseback, waived his hat from the track as a signal to the train to stop, and at the same time tried to keep the balance of the drove, which had not crossed over, off the track. As soon as the parties in charge of the cattle saw the train coming they did all they could do, according to their evidence, to save the cattle from being run over. Although it is shown by the plaintiff's testimony that he heard the engine of a train puffing more than half a mile from

the crossing, and also saw the smoke of a train, he was not bound to conclude therefrom that the train would cross the highway unless the whistle sounded 80 rods from the crossing; but it is not conclusive from the evidence that the plaintiff thought the smoke he saw, and the puffing of the train he heard, was upon defendant's road which crossed the highway where the cow was killed. In answer to one question, he said that it "might have been on the Omaha extension of the Missouri Pacific." This road did not cross the highway, but the Santa Fe and the central branch of defendant's road did.

At the time of the killing of the cow the regular passenger train crossed the highway each day at about 3 o'clock P. M., and the next regular train passed at 5 P. M. It was usual for Stevens to drive his cattle from his pasture, over the crossing, to his barn, to feed, soon after the 3 o'clock train passed. He was driving his cattle from his pasture at the usual time on the day that his cow was run over. The train that ran into the drove seems to have been an extra or an irregular one, and therefore Stevens could not have anticipated that the train he heard a half mile distant would pass the crossing unless the whistle was sounded 80 rods therefrom.

We perceive no error in permitting the witness Bardshar to testify that the train doing the injury was an extra or an irregular one. He had worked for Stevens for several months before the killing of the cow, and had lived all this time at his house, which was very near the track. He had crossed the track where the cow was killed about twice a day from the first of July previous, and was able to tell the time the regular trains passed the crossing. Therefore he had sufficient knowledge of the running of trains to testify.

The court directed the jury "that it was the duty of the plaintiff to keep a lookout for trains, and not to drive his cattle upon or across the track at a time of apparent danger; and it was the duty of the servants of the defendant to keep a lookout for obstructions at crossings, and, if cattle were seen on the track in time to prevent injuring them, to exercise ordinary care in endeavoring to do so; but if the animal killed got upon the track so suddenly, and so near to the approaching train, as to make it impracticable to prevent the injury, then there could be no recovery for the loss of the animal, unless upon the ground of a failure to sound the whistle, causing the plaintiff and his servant to act differently in the management of his cattle from what he would have done if it had been sounded."

With the directions given, there was no material error in refusing the instruction of the company as to the duty of the plaintiff taking proper precautions in crossing the track with his cattle.

The judgment of the district court will be affirmed.

(All the justices concurring.)

NOTE.

NEGLIGENCE—RAILROAD CROSSINGS—OMISSION TO COMPLY WITH STATUTORY REQUIREMENTS. The failure of a railroad company to comply with statutory requirements is in itself such negligence as will render the company liable for all injuries caused thereby. Bitner v. Utah Cent. R. Co., (Utah) 11 Pac. Rep. 620; Cincinnati, H. & I. R. Co. v. Butler, (Ind.) 2 N. E. Rep. 138 and note; Williams v. Chicago, M. & St. P. R. Co. (Wis.) 24 N. W. Rep. 422; Ransom v. Chicago, St. P. M. & O. R. Co., (Wis.) 22 N. W. Rep. 147; Hoppe v. Chicago, M. & St. P. R. Co., (Wis.) 21 N. W. Rep. 227; Faber v. St. Paul, M. & M. R. Co., (Minn.) 13 N. W. Rep. 902; unless the negligence of the plaintiff contributed to the injury, Bitner v. Utah Cent. R. Co., 11 Pac. Rep. 620; Schofield v. Chicago, M. & St. P. R. Co., 5 Sup. Ct. Rep. 1125; S. C. 8 Fed. Rep. 488; Holland v. Chicago, M. & St. P. R. Co., 18 Fed. Rep. 243; Field v. Chicago, B. & Q. R. Co., 14 Fed. Rep. 332; Cincinnati, H. & I. R. Co. v. Butler, (Ind.) 2 N. E. Rep. 138; Williams v. Chicago, M. & St. P. R. Co., (Wis.) 22 N. W. Rep. 422. Nor is the company liable, unless such failure caused or contributed to the injury, Field v. Chicago, B. & Q. R. Co., 14 Fed. Rep. 332; Pittsburgh, C. & St. L. R. Co. v. Conn, (Ind.) 3 N. E. Rep. 636; Knight v. New York, L. E. & W. R. Co., (N. Y.) 1 N. E. Rep. 108; but such failure need not be the efficient cause of the accident: it is enough if that would not have happened but for such omission, Hayes v. Michigan Cent. R. Co., 4 Sup. Ct. Rep. 369.

A traveler approaching a railroad crossing is entitled to suppose that the company

and its servants will not violate their legal duty. *Staal v. Grand Rapids & I. R. Co.*, (Mich.) 23 N. W. Rep. 795. But see, to the contrary, *Wabash, St. L. & P. R. Co. v. Central Trust Co.*, 23 Fed. Rep. 738.

As to the duty of one about to cross a railroad track, see *Chase v. Maine Cent. R. Co.*, (Me.) 5 Atl. Rep. 771, and note.

(35 Kan. 626)

STATE v. HUGHES.

(*Supreme Court of Kansas. October 7, 1886.*)

1. BIGAMY—INDICTMENT—FIRST MARRIAGE.

In a prosecution for bigamy it is not necessary to allege in the information or indictment the exact time and place of the first marriage. It is sufficient, in that respect, to allege and prove that the marriage relation existed between the accused and his first wife at the time of the second marriage.

2. SAME—EVIDENCE—ADMISSIONS—REPUTATION.

In such a prosecution, the deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, is evidence tending to prove an actual marriage, upon which a jury may convict.

3. SAME—RES GESTÆ.

The declarations of the defendant, made in his own favor, respecting the first marriage, which formed no part of any statement or conversation called out by the state, and which were no part of the *res gestæ*, are inadmissible for the defense.

4. CRIMINAL LAW—INCREASING—PUNISHMENT.

The district court may, until the term ends, revise, correct, or increase a sentence which it has imposed upon a prisoner, where the original sentence has not been executed or put into operation.

Appeal from Shawnee county.

S. B. Bradford, Atty. Gen., and Charles Curtis, for the State. Jetmore & Son, for appellant.

JOHNSTON, J. This is an appeal from a judgment of conviction rendered against the appellant for bigamy. It was alleged in the information that "Chasteen Hughes, at the county of Shawnee, in the state of Kansas, aforesaid, and within the jurisdiction of this court, on the twenty-first day of March, 1885, did then and there unlawfully and feloniously marry one Loretta Cavender, and her, the said Loretta Cavender, then and there had for his wife, and the said Chasteen Hughes then and there being a married person, being then and there married to one Mary Hughes, she, the said Mary Hughes, being then and there alive, and the bond of matrimony between the said Chasteen Hughes and Mary Hughes then being still undissolved."

It is insisted by the appellant that the information is defective in this: that it did not state the time and place of the first marriage; and the refusal of the court to quash the information upon that ground is the first objection which is made. The objection is not good. There is nothing in the statute, nor in the nature of the offense, requiring such particularity of averment. The offense, as defined by statute, consists in marrying a second time while the husband or wife of the defendant is still living. That the accused had a wife living at the time he contracted the second marriage is an essential allegation, which should be stated with precision. But information of the exact time and place of the first marriage is not always available to the prosecution, nor is it very important to the defense. It is enough to allege and show that the marriage relation had been entered into and existed between the accused and his first wife at the time of the second marriage. The information clearly charged that the defendant had a wife living at the time of the second marriage, and the first wife is identified and described by name, which is sufficient to apprise him of the particular offense against which he was required to defend. The substantial rights of the defendant upon the merits could not have been prejudiced by the absence of these averments, and the ruling of the court upon the motion cannot be held erroneous. Crim. Code,

§ 110; *Hutchins v. State*, 28 Ind. 34; *State v. Bray*, 18 Ired. 289; *State v. Armington*, 25 Minn. 29.

The principal question presented upon the appeal is the competency and sufficiency of the testimony offered to establish the alleged first marriage of the appellant. This question arises upon an objection to testimony offered by the state of the admissions and conduct of the defendant with respect to the first marriage, and upon the charge of the court.

The learned judge who tried the case refused to charge the jury that there must be proof of a formal celebration of the marriage ceremony, but gave the following instruction: "The marriage between a man and a woman in this state is a civil contract, to which the assent of the contracting parties is essential, and may be proven in this case like any other fact. The evidence of the admissions of the defendant that he and Mary Wheat intended to marry; the defendant's admissions that he and Mary Wheat were married; and the evidence that the defendant and Mary Wheat cohabited together as husband and wife, and that he held her out to his neighbors and friends as his wife, and that there was a child born to them while cohabiting together,—tends to prove the fact that the defendant and Mary Wheat were married, and were husband and wife." The doctrine of this instruction is denied by the appellant, and he contends that the admissions and evidence of cohabitation are inadmissible and insufficient to prove the first marriage until there is introduced some record evidence, or evidence by the officiator, or the testimony of an eye-witness of the formal solemnization of the marriage; and to support his contention he cites *Com. v. Littlejohn*, 15 Mass. 163; *People v. Humphrey*, 7 Johns. 314; *State v. Roswell*, 6 Conn. 446; *People v. Lambert*, 5 Mich. 349; *State v. Armstrong*, 4 Minn. 335, (Gil. 251.)

The course of decision upon this question has not been uniform. In the states of New York, Massachusetts, Connecticut, and Minnesota the rule contended for by the appellant has been held; but the weight of authority and the better reason support the proposition that the acts and declarations of the parties, coupled with cohabitation, is competent evidence to go to the jury in proof of marriage.

Mr Greenleaf, in discussing the proof necessary to sustain the charge of bigamy, lays down the rule that the first marriage "may be shown by the evidence of the persons present at the marriage, with proof of the official character of the celebrator, or by documents legally admissible, such as a copy of the register where registration is required by law, with the proof of the identity of the person, or by the deliberate admission of the person himself." 3 Greenl. Ev. § 204.

In his work on Criminal Law, Mr. Wharton states that "when the *lex fori* recognizes, as is the case in all those jurisdictions in which the English common law continues in force, consensual marriages, the admission of the parties may be received as tending to establish such marriages, whatever may be the weight to which they may be entitled, provided such admissions have not been extorted by force or fraud." 2 Whart. Crim. Law, § 1700.

As a general rule, the confession of a party, voluntarily and deliberately made, is evidence of the highest nature against him. The objections urged against testimony of this character in a prosecution for bigamy is that the confession may have been lightly made, or stated by parties living in a state of fornication for the purpose of avoiding public censure or public prosecution; but these are reasons which go to the credibility, rather than the competency, of the testimony. The force and effect of the testimony is to be weighed and determined by the jury, and depends upon the manner and circumstances under which it is made. If it was carelessly stated, or the circumstances under which it was made indicated a purpose to conceal from the public illicit relations existing between the parties, the jury should not, upon such unsupported confession, convict the defendant; but where it is freely

and solemnly made by parties cohabiting together, and frequently repeated to different persons, with no apparent motives to hide the real facts, it is clearly competent to go to the jury, whose province it is to determine its sufficiency. It is direct and positive proof of an actual marriage. Counsel for appellant conceded that a marriage might be proved by a witness present at the ceremony; and certainly a party to a marriage contract, who has complete knowledge of the facts, is as competent, and his testimony is of as high a nature, as a mere eye-witness, who may be mistaken as to the occurrence, the identity of the parties, or their capability to contract marriage.

The confession in this case was that the appellant and Mary Wheat were married in Missouri. In that state it is not essential to the validity of a marriage that there should be any ceremony or formal solemnization of the contract. An agreement entered into in good faith between parties capable of contracting marriage, followed by cohabitation, is there held to be sufficient to constitute a valid marriage, and to subject them to legal penalties for a disregard of its obligations. *Dyer v. Brannock*, 66 Mo. 391. By the terms of our statute, a marriage which is valid where it is contracted must be held valid in all courts and places in this state. Comp. Laws 1879, c. 61, § 9. If this marriage was, then, a mere consensual one, as it might have been, how could it be established? If the parties, by mutual consent, agreed to take each other as husband and wife, and thereafter cohabited as such, without any ceremony, religious or otherwise, how could the rule contended for by appellant be applied? In such a case there would be no record evidence, no officiator, and no eye-witness of the solemnization of the marriage. The best, and in fact about the only, proof that could be offered to establish such a marriage would be the acts and declarations of the parties themselves. Some of the courts have gone to the extent of holding the bare confessions of the party to be competent and sufficient to establish marriage; but, however that may be, the multiplied decisions are such that it may be regarded as the settled doctrine of the American courts that, in prosecutions for bigamy, the deliberate admissions of the defendant of a former marriage, coupled with cohabitation and repute, is evidence tending to prove actual marriage, upon which a jury may convict. *State v. Hughes*, 2 Kan. Law J. 395; *Warner's Case*, 2 Va. Cas. 95; *Wolverton v. State*, 16 Ohio St. 173; *Squire v. State*, 46 Ind. 459; *Com. v. Jackson*, 11 Bush, 679; *Cook v. State*, 11 Ga. 58; *Langtry v. State*, 30 Ala. 536; *State v. Hilton*, 3 Rich. Eq. 434; *Murtagh's Case*, 1 Ashm. 272; *Forney v. Hallacher*, 8 Serg. & R. 159; *State v. Britton*, 4 McCord, 256; *Williams v. State*, 54 Ala. 131; *Halbrook v. State*, 34 Ark. 511; *O'Neale v. Com.*, 17 Grat. 582; *State v. Seals*, 16 Ind. 352; *Finney v. State*, 3 Head, 544; *State v. Libby*, 44 Me. 469; *Jackson v. People*, 2 Scam. 231; *Com. v. Henning*, 10 Phila. 209; *West v. State*, 1 Wis. 209; *Miles v. U. S.*, 103 U. S. 304.

About the sufficiency of the testimony to sustain the verdict when assailed in this court there can be little doubt. The conduct of the defendant as detailed in the evidence is strongly corroborative of his repeated and deliberate declarations that he married Mary Wheat in August, 1883. It is in testimony that the defendant was a frequent visitor at the home of Mary Wheat during the summer of 1883, and that in August of that year he asked and obtained consent of Mary's father to marry her, and that on the fifteenth of August, 1883, the defendant and Mary started to Kansas City, Missouri, with the avowed purpose of getting married. Both parties subsequently declared that they were there married, and they exhibited a marriage certificate which purported to be duly signed and witnessed, dated August 16, 1883, by which it appeared that they had been married by a Methodist minister of Kansas City, Missouri. They lived together as man and wife in the cities of Leavenworth, Wyandotte, Kansas City, and Topeka, from August, 1883, until March, 1885. During this time they visited among

and were visited by their relatives and acquaintances, when the defendant introduced, spoke of, and in all respects treated, Mary as his wife. On December 13, 1884, while they were living and cohabiting together, a child was born to them. During the same time the defendant applied to become a member of the "Ancient Order of Foresters," and in the blank application for insurance, the blank being filled out in writing by himself, he designated Mary Hughes as his wife. This application gives the name of the defendant, his age, occupation, and post-office address, and designates his wife as beneficiary, stating her name, age, and condition of health. It is true there was contrary testimony offered on behalf of the defendant; but, as the second marriage was conceded, a finding of guilty on the foregoing testimony will certainly not be disturbed.

It is next contended that the court erred in excluding testimony offered by the defendant. Mrs. Dora Wheat was asked to state "what was said to her by the defendant and her daughter, while they were living together, as to their relations with one another with reference to being married." The objection to this question was properly sustained. It did not appear that the testimony sought for was a part of any conversation called out by the prosecution, nor can be regarded as a part of the *res gestae*, but rather as a self-serving declaration of the defendant, which was not admissible. The answer of the witness that Mary Wheat lived with the defendant in the relation of mistress, instead of wife, was a mere conclusion of the witness, and was also rightly excluded from the jury.

The final complaint made in the case is that the court erred in the sentence. When the defendant was first called for sentence, the court inadvertently adjudged him to confinement at hard labor in the penitentiary for a term of six months. This, of course, was erroneous; for no person can be sentenced to confinement at hard labor in the penitentiary for a term less than one year. Comp. Laws 1879, c. 31, § 291. Within an hour after sentence was pronounced the attention of the court was called to the mistake, and, the prisoner and his counsel being still in court, the case was again called, and the court proceeded to sentence the prisoner to imprisonment for a term of one year. It does not appear that a formal order was made setting aside the first sentence, but the court pronounced the second sentence upon the same verdict, stating in the record, as a reason for its action, that the statute did not authorize the judgment first pronounced. This was, in effect, a setting aside of the first judgment; and the only formal judgment recorded in the case is the one under which the prisoner is in custody, sentencing him to imprisonment for one year. The general rule is that the records of a court may be corrected or revised at any time during the term at which the judgment is rendered. The sentence first pronounced against the defendant was not executed or put into operation, and, "so long as it remained unexecuted, it was, in contemplation of law, in the breast of the court, and subject to revision and alteration." *Com. v. Weymouth*, 2 Allen, 147. We think it is clearly within the discretion and power of the court, until the end of the term, to amend and revise or increase the sentence which had not gone into effect. 1 Bish. Crim. Proc. § 1298, and cases cited. As nothing had been done under the sentence first pronounced, and as the final sentence did not impose a penalty in excess of that provided by law, the rights of the defendant were not infringed upon, nor has he any ground for complaint.

Finding no error in the record, the judgment of the district court will be affirmed.

(All the justices concurring.)

(35 Kan. 650)

STATE v. McLAUGHLIN.

(Supreme Court of Kansas. October 7, 1886.)

LARCENY—RECEIVING STOLEN GOODS—COMPLAINT.

A criminal complaint filed in a justice's court, charging, among other things, that the defendant, certain articles, "of the goods and chattels of one M., [who is not the defendant,] then lately before feloniously stolen, taken, and carried away, unlawfully and feloniously did buy and receive," "*contrary to the statute* in such case made and provided," charges a public offense, although it may not in express terms, but only impliedly, charge that the property was "stolen from another" than the defendant.

Appeal from Franklin county.

S. B. Bradford, Atty. Gen., and C. B. Mason, for the State. J. W. D-
ford, for appellant.

VALENTINE, J. The defendant in this action was prosecuted before a justice of the peace, and afterwards on appeal in the district court, on a criminal complaint charging him with unlawfully buying and receiving stolen property; and the only question presented to the supreme court is whether the complaint upon which he was prosecuted in the courts below is sufficient or not. The complaint reads as follows:

"State of Kansas, Franklin county—ss.: Edward Heckler, being duly sworn, on oath says that on the _____ day of October, A. D. 1885, in the county of Franklin and state of Kansas, William H. McLaughlin then and there one hand-saw, of the value of one dollar and fifty cents, one monkey wrench, of the value of fifty cents, of the goods and chattels of one David Miller, then lately before feloniously stolen, taken, and carried away, unlawfully and feloniously did buy and receive; he, the said William H. McLaughlin, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, as aforesaid,—*contrary to the statute* in such case made and provided, and against the peace and dignity of the state of Kansas."

This complaint was attacked in the court below by a motion to quash, by a motion for a new trial, and by a motion in arrest of judgment; all of which motions were overruled by the court below. The particular ground upon which it is claimed that the complaint is not sufficient is that it does not state that the property alleged to have been stolen was "stolen from another," within the meaning of section 92 of the crimes act, but states the supposed offense in such an equivocal or ambiguous manner as to leave it open to be inferred that the property might have been stolen from the defendant himself. Now, while the complaint is not as explicit as it might be, yet when fairly construed we think it is not open to the construction placed upon it by counsel for the defendant. The complaint states that the stolen property was "the goods and chattels of one David Miller, then lately before feloniously stolen, taken, and carried away," and also states that the defendant "unlawfully and feloniously did buy and receive" the same, "*contrary to the statute* in such case made and provided." Under such a complaint it must be considered that the property was stolen from David Miller, and not from the defendant himself, and that the defendant "unlawfully" and "*contrary to the statute*" bought and received the property so stolen, and did not *innocently* "buy and receive" his own property, which had previously been stolen from himself.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(35 Kan. 634)

BATES v. LYMAN.

(Supreme Court of Kansas. October 7, 1886.)

1. ERROR—TIME ALLOWED.

Where a petition in error is filed in the supreme court within one year after the making of an order overruling a motion for a new trial, the proceeding is in time for a review of all the rulings of the court made during the trial, and excepted to at the time, which are referred to in such motion.

2. EVIDENCE—BURDEN OF PROOF.

The burden of proof lies on the party who asserts the affirmative of the issue or question in dispute.

3. SAME—SALE—FAILURE TO DELIVER.

In an action brought to recover damages for breach of a written contract to deliver good, merchantable corn, the plaintiff alleged and proved, and the defendant admitted, the payment of the money under the contract, and the non-delivery of the corn. The answer stated a tender of the amount and quality of the corn contracted for, and the plaintiff's refusal to accept it. The reply denied that any corn of the quality contracted for was tendered; and further alleged that the corn tendered by the defendant was light and damaged. *Held*, that the burden was upon the defendant to prove that the corn tendered by him was good, merchantable corn, as he asserted the affirmative in his answer that a tender of such corn had been made.

Error from Neosho county.

T. J. Hudson, for plaintiff in error. *Hutchings & Keplinger* and *J. L. Denison*, for defendant in error.

HORTON, C. J. A preliminary question is presented in the motion made to dismiss the petition in error upon the ground that it is barred by the statute of limitations. Section 2, c. 126, Laws 1881. The case was tried April 10, 1884, and judgment appears to have been entered upon the same day. A motion in arrest of judgment, and for a new trial, was filed April 12, 1884, heard April 16, 1884, and upon that day overruled. Among the grounds for a new trial it was alleged in the motion that there were errors of law occurring at the trial, which were excepted to by the plaintiff. Said section 2 provides: "No proceeding for reversing, vacating, or modifying judgments or final orders shall be commenced, unless within one year after the rendition of the judgment or making of the final order complained of." The petition in error in this case was filed April 14, 1885,—less than a year from the time of the overruling of the motion for a new trial. This court has the authority to reverse, vacate, or modify an order that grants or refuses a new trial. Section 542. Code. Upon the hearing of a motion for a new trial, all of the rulings of the court made during the trial, and therein referred to, and excepted to at the time they were made, should be again considered by the court. *Backus v. Clark*, 1 Kan. 303; *Da Lee v. Blackburn*, 11 Kan. 190; *City of Ottawa v. Washabaugh*, Id. 124. As the order complained of is the overruling of the motion for a new trial, and as the petition in error has been filed within one year from the making of the order complained of, the motion to dismiss must be overruled. *Osborne v. Young*, 28 Kan. 769; *Thompson v. Wheeler & W. Manuf'g Co.*, 29 Kan. 476, 481.

The plaintiff, for his cause of action against the defendant, alleged in his petition that on September 1, 1881, he entered into a contract with the defendant, whereby the latter agreed to furnish him 500 bushels of good, merchantable corn, at 40 cents per bushel, to be delivered at the Douglas farm, west of Thayer, or in the vicinity of Altoona, Kansas, at the option of the defendant; the corn to be measured at 4,000 inches to the bushel, and to be cribbed by December 1, 1881. The petition also alleged that the plaintiff paid the defendant \$200 as the purchase price of the corn; that on April 10, 1882, he demanded of the defendant delivery of the corn contracted for; that the defendant refused to comply with his contract, and failed to

deliver any corn, and at the time of such refusal, good, merchantable corn was worth, at the place of delivery, 85 cents per bushel. The defendant in his answer stated, among other things, "that, in pursuance of the written contract between himself and plaintiff, he purchased five hundred bushels of good, merchantable corn, and caused the same to be cribbed at the place designated in the contract, during the month of November, 1882, and held the same until April 10, 1883; that plaintiff refused to receive the corn, and wholly failed to comply with the conditions of the contract." To this answer the plaintiff filed a reply, denying generally the allegations contained in the answer, except those specifically admitted. He denied that any corn of the quality contracted for, was delivered or tendered to him. He further alleged that the corn tendered or offered to him by the defendant was light and damaged corn; that subsequently the defendant took the corn and appropriated it to his own use.

The important question upon the trial was whether the corn tendered by the defendant was good, merchantable corn. The plaintiff asked the court to instruct the jury that the burden was upon the defendant to prove that the corn tendered was good, merchantable corn. The court refused this instruction and charged the jury "that the burden of proof was upon the plaintiff to satisfy them, by a preponderance of the evidence, that the corn tendered was not good, merchantable corn." It appears from the evidence that there was great conflict in the testimony as to the quality of the corn cribbed and tendered, and this was the substantial issue in the case.

We think the trial court mistook the scope of the allegations contained in the reply of the plaintiff. There is no admission therein that the defendant cribbed or tendered any corn of the quality described in the written contract. The reply stated "that the corn tendered or offered to plaintiff by the defendant was light and damaged." If the plaintiff had filed a reply containing a general denial only, we suppose it would be conceded that the burden of proving a tender of good, merchantable corn would have rested upon the defendant, as he asserted affirmatively that a tender of such corn had been made by him. We do not think the allegations in the reply change this burden in any respect. The plaintiff alleged and proved, and the defendant admitted, the payment of the money under the contract, and the non-delivery of the corn. As a compliance with the contract, the defendant alleged a tender of the amount and quality of the corn, and the plaintiff's refusal to accept it. In order to establish a tender of the corn, it was necessary for the defendant to show that a tender of good, merchantable corn was made. The rule is that where a party pleads a tender or payment, the burden is upon him to prove it. Best, Ev. §§ 268-270; *Burton v. Boyd*, 7 Kan. 32; *Lathrop v. Davenport*, 20 Kan. 285.

In this case, under the pleadings, the burden was upon the defendant to prove that he made a tender of good, merchantable corn. There is no admission in the reply of the plaintiff of a tender of good, merchantable corn, and the trial court committed material error in throwing upon the plaintiff the burden of proving the corn tendered was not good and merchantable.

The judgment of the district court will be reversed, and case remanded for a new trial.

(All the justices concurring.)

(35 Kan. 652)

HOFFMAN and another v. GROLL.

(*Supreme Court of Kansas. October 7, 1886.*)

1. TAXATION—SALE—DEED.

A tax-sale certificate and tax deed, assigned and issued under the provisions of chapter 43, Sess. Laws 1879, depend for their validity upon the regularity of the anterior tax proceedings, and upon the sale which was made when the land was

bid in by the county; and the omission to state in the notice of such sale that the land would be sold at public auction is a defect which renders the tax deed voidable.

2. SAME—MORTGAGE—LIEN.

When a tax deed is set up in an action to foreclose a mortgage with a view of extinguishing the mortgage lien, the mortgagee has a right to question and have settled the validity of the tax deed, and in such a case no tender of the taxes paid was necessary.

3. SAME—RECOVERY OF AMOUNT PAID.

Where such a tax deed is held to be invalid, the holder can only recover the reduced amount actually paid by him under the order of the county commissioners upon the tax-sale certificate, together with the interest thereon, instead of the full amount of taxes, interest, and penalties, which were legally charged against the land.

4. SAME—INTEREST.

When a tax deed has been adjudged invalid, the holder can only recover interest on the amount found due for taxes at the rate of 7 per cent. per annum from the date of the judgment. *Corbin v. Young*, 24 Kan. 198.

Error from Anderson county.

This was an action begun by S. J. Groll, to recover upon a promissory note, and to foreclose a mortgage given upon a tract of land in Anderson county to secure the payment of the note. J. J. Hoffman, one of the defendants, claimed to have acquired title to the land by tax proceedings, and that the mortgage lien had been extinguished by virtue of a tax deed executed by the county clerk of Anderson county on the fourth day of November, 1884. Belinda A. Foster, another of the defendants, claimed an interest in the same land through a mortgage executed on the fifteenth day of April, 1884, by J. J. Hoffman, to secure the payment of his promissory note for \$326.50. A trial was had at the March term, 1885, without a jury, and the following special findings of fact and conclusions of law were made by the court:

"(1) On and prior to September 15, 1870, one E. S. Nicolls was the owner in fee of the lands in question, to-wit, the S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ S. 29, T. 20, R. 20, in this county. On that day he mortgaged said lands (his wife joining him) to the plaintiff, to secure the payment of his note of the same date for \$1,000, due in two years, with interest at twelve per cent. per annum. There is now due to the plaintiff on this note and mortgage the sum of \$2,480, and the plaintiff's mortgage is a lien on said land for the payment thereof, unless divested by the tax sale and deed thereon, hereinafter referred to.

"(2) This land was subject to taxation for the year 1873, and such taxes being delinquent on the eighth day of May, 1874, it was offered for sale at the tax sale for that year, and could not be sold for the taxes and charges thereon, and was therefore bid off by the county treasurer for the county of Anderson. The subsequent taxes of 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, and 1882 were not paid, but charged up against said land, and the certificate remained unassigned, no person having offered to purchase the same for the taxes, penalties, and costs due thereon; and the county treasurer did, on the first day of May, 1884, in pursuance of an order of the board of county commissioners, execute, and the county clerk did assign, the tax-sale certificate for said property to the defendant J. J. Hoffman for the sum of \$265.50, for the taxes of the years from 1873 to 1882, inclusive. A copy of this assignment is attached to the answer of the defendant Hoffman, filed herein August 2, 1884. J. J. Hoffman thereupon took actual possession of the land under this certificate on May 1, 1884, and has ever since remained in the actual possession of the same, and has made lasting and valuable improvements thereon of the value of ninety (\$90) dollars.

"(3) On the fourth day of November, A. D. 1884, pending this suit, the county clerk made and delivered to said J. J. Hoffman, a tax-title deed upon the ale and certificate above referred to, which deed is attached to and

made a part of the supplemental answer of the defendant Hoffman, filed herein January 14, 1885, and is made a part of this finding.

"(4) On the second day of September, 1884, at the tax sale in said county for that year, the said land was again sold to said J. J. Hoffman for the delinquent taxes of 1883, amounting, with costs and penalties, to \$6.34, and a certificate issued accordingly, a copy whereof is also attached to said supplemental answer.

"(5) On the tax-roll of 1873, in this county, the lands in question are thus described and assessed: '30 A. S. $\frac{1}{2}$ & S. $\frac{1}{2}$ of N. $\frac{1}{2}$ & N. E. of N. W. $\frac{1}{4}$, 29, 20, 20. Co. tax, \$1.80; Tp. 22 cts.; Sch. Dist. tax, \$3.15; Sch. Bond tax, \$3.15; Del. Rd. tax, 80 cts.; R. R. tax, \$3.38. Total tax, \$15.20, penalty, \$1.01.'

"(6) The tax-sale record of 1874 (taxes of 1873) shows with reference to this land as follows: 'No. of Cert., 580. May 11th. S. $\frac{1}{2}$ of N. E. of N. W. $\frac{1}{4}$, 29, 20, 20. Name of purchaser, Anderson county; Amt. for which sold, \$11.50. Tax '74, \$12.42; '75, \$13.79; '76, \$19.42; '77, \$13.59; '78, \$13.55; '79, \$12.31; '80, \$8.78; '81, \$8.13; '82, \$7.85. To whom assigned, J. J. Hoffman, May 1, 1884. Amt., \$265.00.' The amounts named opposite each year above are the delinquent taxes for the said years, respectively charged up against said land. At the date of the assignment to J. J. Hoffman there was due, taxes, penalties, costs, and charges on this land, computing interest and charges as allowed by law, \$455.29, not including taxes of 1883.

"(7) The delinquent tax notice for the taxes of 1873, published in 1874, was in the following form:

"COUNTY TREASURER'S OFFICE, GARNETT, ANDERSON COUNTY, KAN.,
" MARCH, 10, 1874.

"All persons interested are hereby notified that so much of each tract of land and town lot as may be necessary for that purpose will be sold by me at my office on the first Tuesday of May, A. D. 1874, and the days next succeeding, for the taxes of 1873, and charges thereon.

"E. S. HUNT, County Treasurer."

"Here follow numerous descriptions of land, among them this: 'S. $\frac{1}{2}$ of N. E. Qr. of N.W. Qr. S. 29, T. 20, R. 20.' The above notice was published as required by law.

"(8) The final (or redemption) tax notice for the taxes of 1873, published in December, 1876, was as follows:

"FINAL TAX NOTICE.

"Whereas, the following lands and town lots have been sold for taxes, to-wit, on the 6th day of May, 1874, and the following days to include the twelfth day of May, 1874; and whereas, said lands and town lots have not been redeemed from said sale as required by law: now, therefore, notice is hereby given that unless the said lands and town lots are redeemed on or before the 6th day of May, 1877, the same will be conveyed by tax deed to the purchaser. S. H. N. E. Q. of N. W. Q. S. 29, T. 20, R. 20. A., \$26.79. The amount set opposite each sale does not include the subsequent taxes.

"Given under my hand at Garnett, Kansas, December 19, 1876.

"E. PAYN, Treasurer."

"The above notice was published in a weekly newspaper of the county for four consecutive weeks from and after December 23, 1876.

"(9) On January 29, 1872, E. S. Nicolls and wife conveyed to D. Markel the S. $\frac{1}{2}$ of N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$ S. 29, T. 20, R. 20, 10 A.. which was recorded March 24, 1872, and before May 11, 1874, Markel paid taxes for 1873 on this 10 acres, \$5.

"(10) For certain county printing, including the delinquent list and notice, set out in the 7th finding, the county had a contract with the printer whereby it paid only two (2) cents for each description of land in said notice.

for each insertion; and for the final redemption notice, set out in the 8th finding, the county, by its contract with the printer, paid 35 per cent. less than legal rates. The full legal rates allowed for printing were charged up against this land for publishing said delinquent list, viz., 25 cents, instead of the lesser sums actually paid, and formed a part of the charges for which the sale was made.

"(11) On the fifteenth day of April, 1884, the said J. J. Hoffman executed and delivered a mortgage on said land, to secure the payment of his promissory note of the same date, to the defendant Belinda A. Foster, for \$326.50, upon which there is now due the sum of \$359.15.

"CONCLUSIONS OF LAW.

"(1) The delinquent tax notice was insufficient to uphold the sale made on the eighth day of May, 1874. The statute is mandatory, requiring that the notice shall state that the sale will be 'at public auction.' The notice in this case was fatally defective in this respect.

"(2) The sale is invalid because a larger sum was charged against the land for printing the delinquent notice than was actually paid therefor under contract with the printer, and because a part only of a tract of 30 acres assessed in bulk was sold for a portion of the entire tax.

"(3) The final or redemption notice was insufficient to uphold the deed based upon it in two particulars: *First*, the time stated for making tax deeds is indefinite and uncertain, and provided for a deed before the expiration of the three years; *second*, it omits what the statute plainly requires, namely, a statement of the amount of taxes and interest calculated to the last day of redemption.

"(4) The tax deed must be set aside, and an account taken of the taxes, interest, and charges paid by the defendant Hoffman, and the interest due him thereon, which is the first lien upon said lands, and out of said sum the defendant Belinda A. Foster must be paid the amount due her under the eleventh finding of fact.

"(5) A judgment of foreclosure and sale may be entered, and out of the proceeds arising therefrom the liens above declared are to be satisfied, in the order of their priority, together with costs."

A decree was entered which directed that the proceeds of the foreclosure sale should be applied—*First*, to pay Hoffman the amount of taxes, interest, and charges paid by him, together with the agreed value of the improvements upon the land, amounting in all to \$426.95, and directed, further, that the defendant Foster should, out of that amount, be paid what was necessary to satisfy her mortgage; *second*, to the costs of the case; *third*, to the satisfaction of the judgment for \$2,480 rendered in favor of the plaintiff, Groll. Hoffman excepted to the conclusions of law, and to the decree entered, and comes here seeking a reversal.

John W. Deford, for plaintiff in error. *Johnson, Poplin & Johnson*, for defendant in error.

JOHNSTON, J. The makers of the note and mortgage upon which this action was brought have made no defense. J. J. Hoffman who was made a defendant in the action, claimed under a tax deed which, if valid, would extinguish the mortgage lien, and vest the absolute title to the land in himself. The mortgaged land was subject to taxation in 1873; and, the taxes not being paid, it was offered for sale in 1874; and, there being no bidders, it was struck off to the county. The subsequent taxes for the years 1882 to 1884, inclusive, were not paid, but were charged up against the land. On May 1, 1884, the county clerk, by order of the board of county commissioners, and in accordance with the provisions of chapter 43 of the Session Laws of 1879, assigned the tax-sale certificate to Hoffman. The tax deed in question was

based on that assignment, and was issued on the fourth of November following, and its validity was the principal question before the court. It was held by the district court to be invalid for several reasons; the first of which was that the county treasurer, in his notice of the tax sale, omitted to state that the land would be offered for sale at public auction.

The statute in terms requires that the land shall be sold at public auction, and also that the notice shall contain the statement that the sale will be so made. It has been held that the omission of this statement in the notice, if taken advantage of before the statute of limitation runs, will defeat the deed. *Hafey v. Bronson*, 33 Kan. 598; S. C. 7 Pac. Rep. 239; *Belz v. Bird*, 31 Kan. 139; S. C. 1 Pac. Rep. 246; *Corbin v. Young*, 24 Kan. 198.

Counsel for Hoffman contends that the tax deed is not based on a sale made pursuant to the defective notice, but is based wholly on the authority of chapter 43, Sess. Laws 1879. The first section of that act reads as follows: "Whenever any lands or town lots that may have been or shall hereafter be sold for any taxes due thereon, that may have been or shall hereafter be bought in by any county for such taxes, are or hereafter shall be unredeemed for three years from date of such sale, and no person shall offer to purchase the same for the taxes, penalties, and costs due thereon, the county commissioners of the county where such lands or town lots are located may permit the owner, his agent or attorney, to redeem the same, or may authorize the county treasurer to execute, and the county clerk to assign, tax-sale certificates for such lands or town lots for any sum less than the legal tax and interest thereon, as shall be in their judgment for the best interest of the county, which assignment shall have the same force and effect as if the full amount of all taxes, interest, and penalties had been paid therefor: provided, however, that no deed shall be issued upon any certificate so assigned until six months after such assignment has been made."

There is no authority given to the county commissioners in this section to make a sale of the lands which have been struck off to the county. They are only authorized to order the execution and assignment of tax-sale certificates for lands that have been previously sold for taxes. The assignment in such a case differs from an assignment of lands held by the county in other cases only in this: that, instead of the purchaser being required to pay the full amount charged against the land, he may be allowed by the commissioners to purchase the interest of the county in the land for a reduced amount. The tax-sale certificate executed by the county treasurer and assigned by the county clerk under this statute, is based upon the anterior tax proceedings, and upon the sale which was made when the land was bid in by the county; and therefore a legal notice of the sale is prerequisite to the validity of the tax deed issued under the statute, and the omission to state in the notice that the land would be sold at public auction must be held to be a fatal defect to the deed in question.

The mortgagee was at liberty to question the validity of Hoffman's tax title, as he held under the original owner, and may protect the interest conveyed by the mortgage, to the same extent as the original owner might do. It being an action to foreclose the mortgage, Hoffman, who claimed an interest in the land, was properly made a defendant. He set up his tax title, which, if upheld, divested the mortgage lien, and it was the duty of the court to determine the existence and priority of the liens claimed by the respective parties, and in such a case no tender of the taxes was necessary. The whole matter was before the court for equitable adjustment, and as the foreclosure has been decreed, the proceeds of the sale will be brought into court for distribution, and the interest of the holder of the invalid tax deed is fully protected.

The only other question which we need to notice is as to the amount allowed by the court to Hoffman. He was allowed \$265.50, which was the

amount actually paid to the county on the tax-sale certificate, together with interest thereon and the value of the improvements; but he claims that he was entitled to receive \$455.99, the full amount of taxes, interest, and penalties legally charged against the land. Section 142 of the act relating to taxation provides that the successful claimant, in an action where the tax deed is found to be invalid, shall be adjudged to pay the holder of the tax deed, or the party holding under him, the full amount of all taxes paid on such land. By section 2 of the chapter under which the certificate was assigned and the deed issued, it is provided that the party desiring to redeem, as therein prescribed, "shall pay to the purchaser or holder of the tax certificate, his heirs or assigns, in money, the amount paid for the property, and all subsequent taxes paid thereon, with interest from the date of each payment, at the rate of twenty-four per cent. per annum." The court allowed the full amount to which he would have been entitled if the land had been redeemed, and he is entitled to no greater sum where the deed is held to be invalid.

The further claim of Hoffman for a greater rate of interest than was awarded by the court has been determined against him. By the terms of the decree he was to receive interest at 7 per cent. per annum on the amount of recovery from that date, the same as an ordinary judgment draws; and it has been decided that the amount due for taxes, in any action in which the tax deed is set aside, draws interest thereafter at the rate of 7 per cent. *Corbin v. Young*, 24 Kan. 198.

The judgment of the district court will be affirmed.
(All the justices concurring.)

(35 Kan. 611)

BILLARD v. ERHART and others.¹

(*Supreme Court of Kansas*. October 7, 1886.)

NUISANCE—PUBLIC NUISANCE—OBSTRUCTING SIDEWALK—RIGHT OF LOT-OWNER.

The owner of a lot in the city is not entitled, as a matter of right, to an injunction against a party obstructing a sidewalk or street in such city, where the owner's lot or land does not abut upon, and is not opposite or contiguous to, the obstruction, since the injury or nuisance complained of is not different in kind from that sustained by the public.

Error from Shawnee county.

On September 10, 1885, Joseph Erhart, W. S. Gordon, _____ Rosen, and Mrs. Pushaw filed their petition against J. B. Billard, alleging that they, and each of them, are citizens of the city of Topeka, in said county; that they, and each of them, own real estate, and reside, respectively, upon their said real estate, which said real estate, and the residences of plaintiffs respectively, are situate upon A street, (formerly Curtis street,) in said city, in the first ward thereof, usually called "North Topeka;" that said defendant, J. B. Billard, is the proprietor of and runs and operates a certain mill, situate upon said A street, at the intersection of said A street with Kansas avenue; that said Kansas avenue is the principal thoroughfare of said city, and, in order to reach almost every portion of said city, it is necessary for plaintiffs, and each of them, to pass from their said residences upon and over said A street to and upon said Kansas avenue; that adjoining said defendant's mill, and upon said A street, is situate a certain scale for weighing; that said scale is so situate in the sidewalk as to constitute and form a portion of said sidewalk, and occupies the entire width of said sidewalk, and extends a considerable distance lengthwise upon said sidewalk; that said defendant, for a long time prior to the commencement of this action, has been and still is in the habit of using said scale by driving, and causing to be driven, upon said

¹See *Hogan v. Central Pac. R. Co.*, (Cal.) 11 Pac. Rep. 876, and note.

scale and sidewalk, teams attached to wagons, and by weighing upon said scale wagons laden with grain, flour, etc., and said defendant thus uses and appropriates said sidewalk, by causing teams and wagons thus to stand upon said scale and sidewalk, and occupying said sidewalk with teams, both upon this portion occupied by the scale and other portions of said sidewalk contiguous thereto, thereby entirely obstructing said sidewalk almost continuously during the business hours of the day, and rendering it impossible for pedestrians to pass along and upon said sidewalk.

And plaintiffs say that said A street is a public street and highway, and that their said property and residences abut thereon, and by reason of said obstructions caused by the defendant, as heretofore set forth, they are, and each of them is, impeded, hindered, and delayed continually, and their free use of said A street is defeated and prevented, to their constant annoyance and injury, whereby they are, and each of them is, greatly damaged; that said damage is of a character not reasonably computable or repairable in money, and constantly recurring, and would be the subject of innumerable actions at law.

And plaintiffs say that by reason of said obstructions the value of their real estate, and of that of each of them, abutting upon said A street, as aforesaid, is greatly diminished and lessened, and they are denied thereby the tranquil enjoyment of their homes; and the continuous obstruction of said sidewalk by said defendant is a continuing nuisance to these plaintiffs, and an interference and abridgment of their rights as residents and tax-payers of said city, whereby plaintiffs, and each of them, have sustained and will sustain irreparable damage; and for the injuries thus sustained, and the wrongs thus perpetrated upon and against them by said defendant, plaintiffs say that there is no adequate remedy at law.

Wherefore, plaintiffs pray that a temporary injunction issue, restraining said defendant from further obstructing said sidewalk, and from keeping or causing horses or wagons to stand thereon, either for weighing upon said scale or for loading or unloading grain, until this cause can be finally heard and determined, and that upon the final hearing hereof said injunction be made perpetual; and plaintiffs pray judgment for costs and all proper relief.

Upon the day of filing their petition, the district judge of Shawnee county granted a temporary injunction, as prayed for in the petition, upon the condition that the plaintiffs execute to the defendant an undertaking in the sum of \$300. Subsequently, this undertaking was properly executed and filed. The defendant demurred to the petition upon the ground that it did not contain facts sufficient to constitute a cause of action. This demurrer was overruled, defendant excepting. The defendant brings the case to this court.

Waters & Chase and W. P. Douthitt, for plaintiff in error. Overmeyer & Safford, for defendants in error.

HORTON, C. J. The plaintiff in error, Billard, (defendant below,) is the owner of a mill located at the corner of Kansas avenue and A (formerly Curtis) street, North Topeka. For several years there has been a scale for weighing located upon the sidewalk of A street, near the corner, for the use of the mill. Doors were arranged along the north side of the mill, also on A street, east of the scale, for loading and unloading, from wagons, grain and other commodities. Erhart and the other plaintiffs below filed their petition asking that Billard, and all persons acting for him, be enjoined from using the scale, and from permitting wagons to stand upon the sidewalk for the purpose of loading or unloading grain, etc. The petition was demurred to upon the ground that the plaintiffs were not shown to have any interest in, or to have suffered any loss or injury by, the acts complained of, different from the public generally, and that the petition showed affirmatively upon its face that they had no special loss, and therefore that, as plaintiffs, they had no

capacity to bring the action. This demurrer was overruled, and the defendants excepted.

In *Mikesell v. Durkee*, 34 Kan. 509, S. C. 9 Pac. Rep. 278, it was held that, where a person or corporation attempts to construct a purely private railroad upon any of the public streets of a city, any abutting lot-owner whose property is or may be injured thereby may maintain an action to perpetually enjoin such person or corporation from making such use of the streets.

In *Heller v. Railroad Co.*, 28 Kan. 625, it was decided that where a part of a street is attempted to be vacated, and the owners of lots abutting thereon do not complain, the owner of a lot in another block, in front of whose lot the street is left its full width, and access to whose lot is in no respect disturbed or abridged, cannot maintain an action to restrain the vacation, although thereby the general course of travel will probably be thrown on some other street, and no longer pass in front of said lot-owner's property.

The question is by which of these decisions the present case is to be governed. Upon the whole we are satisfied that this case falls within the principles decided in *Heller v. Railroad Co., supra*. The difference in facts does not place them upon any different ground of principle. The obstruction complained of is not in front of the lots owned by the plaintiffs below, and their property is not opposite or contiguous to the construction. The case therefore differs from *Mikesell v. Durkee*, as in that case the defendants were attempting to excavate and build a private railroad in a public street in front of the plaintiff's lots. In *Heller v. Railroad Co.* the plaintiff alleged that the railroad company was occupying a portion of the street which the city council had attempted to vacate, and was commencing to lay tracks and erect buildings thereon; that thereby the travel was diverted from plaintiff's property, and, if the vacation of the street was permitted, that the property would cease to be of any value for business purposes, and of small value for residence purposes. In that case we said: "The fact that, as an indirect consequence, injuries may result, gives no cause for interference. Only when the injury is direct, when the individual suffers some special wrong,—something different from that experienced by other members of the community,—may the party injured challenge the action. It is not always easy to draw the dividing line between those cases in which the injury is direct and special, and those in which it is indirect and general. * * * Closing up of access to the lot is the direct result of the vacating of the street, and the owner, by the loss of access to his lot, suffers an injury which is not common to the public; but, in the case at bar, access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is that, by the vacating of the street away from the lots, the course of travel is changed. But this is only an indirect result. There is nothing to prevent travel from coming by the lots if the travelers desire it. The way to the heart of the city by the lots is a little more remote than it was before, but still free passage is open to all who wish to pass thereby. No one is compelled to stay away. Access to the lots is the same that it was before, so that the injury is only the indirect result of the action complained of, and it is an injury which, if it exists at all, is sustained by all other lots along the street west of the parts vacated." In this case the property of the plaintiffs below abuts on a part of the street distant from the alleged obstruction, and the damage they suffer is sustained by the public generally. High, Inj. (2d Ed.) §§ 594, 827; Id. § 819, and cases cited; *Williams v. Smith*, 22 Wis. 594, and cases cited; *Shaubut v. Railroad Co.*, 21 Minn. 502; *Craft v. Jackson*, 5 Kan. 521; *Bobbett v. State*, 10 Kan. 15.

The judgment of the district court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

(35 Kan. 616)

BILLARD v. ERHART and others.

(Supreme Court of Kansas. October 7, 1886.)

INJUNCTION—CONTEMPT—VIOLATING ORDER.

Where the district court has jurisdiction of the parties and of the subject-matter, the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been properly dissolved.

Error from Shawnee county.

Waters & Chase and *W. P. Douthitt*, for plaintiff in error. *Overmeyer & Safford*, for defendant in error.

HORTON, C. J. It is immaterial in this case whether the proceeding be called a civil or a criminal one. The record is singularly defective. The certificate to the record is as follows:

"*State of Kansas, Shawnee County—ss.*: I, B. M. Curtis, clerk of the district court within and for the county and state aforesaid, do hereby certify that the above and foregoing is a full, true, and correct copy of the pleadings and record entries in the above-entitled cause, as the same appears on file and of record in my office.

"Witness my hand and the seal of said court hereunto affixed, at my office in the city of Topeka, this seventeenth day of April, A. D. 1886.

[Seal.] "B. M. CURTIS, Clerk."

Even if we treat the record as a certified transcript, we cannot pass upon all of the alleged merits of the case. The petition in error alleges that the judgment, rulings, and decisions, of the trial court are contrary to law, and are not supported by the evidence. The record purports to contain a copy of the bill of exceptions, but it does not clearly appear that this bill was ever filed with the papers in the case. Treating the bill as properly filed, it is incomplete within the decision of *Railroad v. Wagner*, 19 Kan. 335. The bill of exceptions of December 16, 1885, referred to in the bill of exceptions contained in the record as having been introduced as evidence in the case, is not inserted in or attached to the record, and is in no way identified. We therefore cannot say what evidence was considered by the district judge. There are other defects in the bill of exceptions, but those noted are sufficient. It appears from the record that a temporary injunction was granted September 10, 1885. This injunction was never dissolved, and on March 31, 1886, Billard was adjudged in contempt for violating the injunction, and adjudged to pay, for his disobedience, the fine of \$100, together with all costs. The court had jurisdiction of the parties and of the subject-matter, and the fact that an order of injunction has been erroneously granted affords no justification or excuse for its violation before it has been dissolved. Section 247, Civil Code; 2 High, Inj. (2d Ed.) 921, § 1416.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(35 Kan. 639)

STATE v. ELROD.

(Supreme Court of Kansas. October 7, 1886.)

CRIMINAL LAW—APPEAL, HOW TAKEN.

Error from Ellsworth county.

L. H. Seavor and *Carter & Harrison*, for the State. *Garver & Bond*, for defendant in error.

PER CURIAM. T. H. Elrod, defendant in error, made complaint under oath before THOMAS J. NOBLE, a justice of the peace of Ellsworth county, charging

William Bohrer with the offense of unlawfully disturbing the members of a religious society while meeting together for the purpose of worship. The defendant was tried before the justice of the peace, and the case was subsequently heard in the district court. Judgment was rendered in that court relieving the complainant from costs. To review and reverse that decision a petition in error has been filed in this court. No appeal has ever been taken from the district court to the supreme court, and, as the case is not a civil action, it is not rightfully brought to this court, and the petition in error must therefore be dismissed. *Reisner v. State*, 19 Kan. 479; *McGilvray v. State*, Id. 481; *McLean v. State*, 28 Kan. 372.

(1 Cal. 72)

PEOPLE, etc., v. HUBERT and others. (No. 11,253.)

(Supreme Court of California. September 23, 1886.)

STATUTE OF LIMITATIONS—SWAMP-LAND ASSESSMENT—CALIFORNIA CODE CIVIL PROC. § 338, SUBD. 1.

An assessment for reclamation purposes is "a liability, created by statute," and under subdivision 1, § 338, Code Civil Proc. Cal., an action to enforce it is barred by the lapse of three years.

Commissioners' decision. Department 2.

A. C. Adams, for the People. Geo. P. Harding and Jno. W. Gorn, for respondents, Hubert and others.

BELCHER, C. C. In December, 1870, an assessment for reclamation purposes was levied upon the lands situate in reclamation district No. 108, and on the fifth day of May, 1871, it became delinquent. On the ninth day of August, 1884, this action was commenced to enforce payment of the assessment against certain lands in the district owned by defendant. The defendant demurred to the complaint upon the ground that the cause of action was barred by subdivision 1 of sections 338 and 339, and by sections 343 and 345, of the Code of Civil Procedure. The court below sustained the demurrer, and, we think, properly.

Under subdivision 1 of section 338, "an action upon a liability created by statute, other than a penalty or forfeiture," is barred if not commenced within three years after the cause of action accrues. In *Perry v. Washburn*, 20 Cal. 318, it was held that taxes are not debts, nor founded upon contract, but charges upon persons or property, to raise money for public purposes. In *People v. McCreery*, 34 Cal. 454, it is said that "taxes are charges, imposed by or under the authority of the legislature, upon persons or property subject to its jurisdiction." A swamp-land assessment is a charge imposed upon property by authority of the legislature, and is thus clearly a "liability created by statute." The fact that it is only a lien upon the property assessed, and not a direct charge against the owner, is immaterial. "A lien is a charge imposed upon specific property, by which it is made security for the performance of an act." Section 1180, Code Civil Proc. The act here for the performance of which the land was made security was the payment of the assessment. An action was required to enforce the performance of the act, and it could only be brought within the time prescribed by statute. *San Francisco v. Jones*, 20 Fed. Rep. 188; *State v. Yellow Jacket S. M. M. Co.*, 14 Nev. 226. The special act of the legislature referred to by the appellant (St. 1871-72, p. 696) has no application to the case. It provides only that warrants and assessments, while they remain unpaid, shall bear interest.

The judgment should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(71 Cal. 74)

In re BALDWIN, etc. (No. 11,133.)

(Supreme Court of California. September 23, 1886.)

1. EXECUTION—EXEMPTIONS—FARMING UTENSILS—CODE CIVIL PROC. CAL. § 690, SUBD. 3.

An expensive threshing outfit, owned by the judgment debtor and two or more other farmers in common, and used by them to a limited extent on their own lands, but principally used in doing work for others for hire, is not exempt under subdivision 3, § 690, Code Civil Proc. Cal., exempting from execution "farming utensils or implements of husbandry."

2. INSOLVENCY—EXEMPTIONS—PRACTICE ON PETITIONS TO SET ASIDE.

Creditors of an insolvent debtor who has filed a petition to have his exemptions set aside may appear and object without filing any paper setting forth their objections, and, if such a paper is filed, it need not be verified, nor served on the debtor.

Commissioners' decision. Department 2.

J. B. Webster and L. M. Elliott, for appellant. *F. T. Baldwin, Ansel Smith*, and *J. C. Campbell*, for respondents.

BELCHER, C. C. John Baldwin was a farmer, and was adjudged an insolvent debtor, under the provisions of the insolvent act of 1880. After the order adjudging him an insolvent was entered, he petitioned the court to set aside to him certain personal property as exempt from execution, and, among other things, a Cahoon seed-sower, and a "threshing rig," consisting of a threshing engine, three tanks to hold water for the engine, a thresher, a derrick and forks, a seed-cleaner, a feeding-machine, a feeding-rack, and a cook-house. S. P. Bailey, one of the creditors of the petitioner, filed a paper, objecting to the property being set aside, on the ground that it was not, by law, exempt from execution. The petitioner moved that the paper be stricken out on the ground that it was not verified, and no copy of it was served on him or his attorney. The court denied the motion, and an exception was reserved to the ruling.

The matter was then heard, and, from the evidence introduced, it appeared that Baldwin owned and farmed 200 acres of land in San Joaquin county, and that he rented other lands, and usually cultivated about 320 acres in grain annually. He owned the Cahoon seed-sower, which was worth \$10, and another seed-sower, which was set apart to him, worth \$90. The two seed-sowers were used for sowing grain broadcast, but were operated in a different manner. He and his son, who was also a farmer, owned jointly the threshing rig. The engine was used to furnish motive power for the thresher, and it required sixteen men and six horses, in addition to the steam-power, to operate it. The threshing rig was used to thresh the grain of its owners, but it was used principally for the purpose of threshing grain for others. It was also shown that the implements above described were all necessary implements to enable a farmer to profitably carry on the business of farming, and to harvest and prepare his crops for market; that it was of great advantage to a farmer to own and control implements for threshing, in whole or in part, for the reason that the grain, while in stack waiting to be threshed for hire by threshing implements of others, was liable to be injured by fire, early rains, shelling out, etc.; that it was not an unusual thing for several farmers to purchase, and use in common, threshers, engines, derricks and forks, feeding-machines, cleaners, headers, mowers, seed-sowers, plows, and other implements, for the reason that the size of their own farms, and the amount of their capital, would not warrant the investment by each individual farmer in the whole of such implements; that only about one farmer in 40 or 50 owned a threshing rig, and only farmers owning tracts of land several thousand acres in extent could afford to have a complete threshing outfit; and that most of the threshing was hired done, and the men, generally, who owned threshing outfits operated them for profit outside the regular business of farming.

The petitioner offered to prove that, by reason of his land being principally river bottom land, his grain largely grew up with sun flowers, and hence he could not raise grain, and make a living, if compelled to hire it threshed at current prices for threshing; therefore he was compelled to own and control an interest in a thresher, so as to be enabled to entirely harvest his own grain. The creditors and assignee objected to this evidence as irrelevant and immaterial, and the objection was sustained, the petitioner reserving an exception.

After hearing the evidence the court refused to set aside as exempt any of the implements above mentioned, but ordered them turned over to the assignee; and the appeal is from that order.

Section 60 of the insolvent act of 1880 makes it the duty of the court having jurisdiction of the proceedings to exempt and set apart, for the use and benefit of the insolvent, such real and personal property as is by law exempt from execution. Subdivision 3 of section 690 of the Code of Civil Procedure exempts from execution "the farming utensils or implements of husbandry of the judgment debtor; also two oxen, or two horses, or two mules, and their harness, one cart or wagon, and food for such oxen, horses, or mules for one month."

The principal question presented for decision is, does the Code exempt from execution an expensive threshing outfit, which is owned by two or more farmers in common, and is used by them, to a limited extent, on their own lands, but is used principally in doing work for others for hire?

In *Brewer's Lessee v. Blougher*, 14 Pet. 178, it is said on page 198: "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

It should be observed that the subdivision above quoted does not, by any express words, limit the exemption provided for to judgment debtors who are farmers, nor say that, to be exempt, the oxen, horses, or mules must be *work* oxen, horses, or mules; and yet it has been held by this court that the language used must be so construed as to make the exemption applicable only to such judgment debtors as are engaged in the business of farming, and only to such oxen, horses, or mules as are suitable and intended for the ordinary work conducted on a farm. *Brusie v. Griffith*, 34 Cal. 302; *Roberts v. Adams*, 38 Cal. 388.

In the case last cited, after reviewing the different provisions of the section providing for exemptions in the old practice act, (section 219,) the court said: "From this summary of the act it is entirely plain that its purpose was to secure to the judgment debtor the means to prosecute his vocation, and thus earn a support for himself and family. In securing to a farmer two oxen, horses, or mules, with their harness, a wagon or cart, his farming implements, and his seed grain or vegetables for planting, the legislature intended, by this exemption, to enable him to prosecute his business of farming, in the ordinary sense of that term; and the oxen, horses, or mules which are reserved to him must be such as are suitable and intended for that use."

In our opinion, the legislature meant by the words, "the farming utensils or implements of husbandry of the judgment debtor," such utensils or implements as are needed and used by the farmer in conducting his own farming operations, and it was not intended that all farming machinery which a farmer may own should be exempt, because, while he uses it chiefly by renting it out, or in doing work on others' farms for hire, he still uses it, to a small extent, on his own land. To hold otherwise would enable the farmer who cultivates 40 acres to invest a large amount of money in expensive implements, and to hold them free and clear of his creditors, though they were

used but for a day on his own land, and for all the balance of the year were rented or hired out to others. A reasonable construction should be given to the statute, and not one which would pervert its benevolent design, and enable gross frauds to be perpetrated under color of law.

In support of their claim that the property should have been set aside, counsel for appellant cite *McCue v. Tunstead*, 65 Cal. 506; S. C. 4 Pac. Rep. 510. In that case the plaintiff owned and cultivated in grain, etc., a farm of 150 acres. He also owned a stallion, which he used as a work-horse on the farm, and in serving mares which were brought to the farm and agisted thereon. In summing up the case this court said: "On the question of the value and gender of the horses used in husbandry the Code is silent. It is restrictive as to the number and use only. If the plaintiff is engaged in husbandry, he is entitled to the exemption of two horses, if the same be used by him in such husbandry, the value and gender of which are immaterial. The findings of the court, in our opinion, establish two propositions: (1) That plaintiff is a farmer; and (2) that the horse which he claims as exempt was one of two which he used on his farm in the cultivation and tillage thereof." It was accordingly held that the horse was exempt, and the judgment of the court below holding otherwise, was reversed. We do not think that case a controlling authority in this case. The result reached might have been different if it had appeared that the stallion, though sometimes used to do work on the farm, had been principally used to stand for mares in other places.

As to the Cahoon seed-sower. It was worth but \$10, and the petitioner had another seed-sower, which was worth \$90, and was set aside to him, both being used for the same purposes, though operated in a different manner. The cheaper implement may have been useful to the petitioner, but, as it did not appear that the one set aside was not sufficient for all his purposes, we cannot see any such violation of duty on the part of the court below in refusing to set it aside as should lead to a reversal of the order.

There was no error in refusing to strike out the paper filed by Bailey. It was not necessary that it be verified or served on the petitioner or his attorneys. The creditors had the right to appear, and object to the property being set aside, without filing any paper setting forth their objections.

So we can see no material error in the ruling of the court excluding certain evidence offered by the petitioner. If admitted, it could not have changed or affected the result.

On the whole we think the order appealed from should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(71 Cal. 197)

WALLACE and others v. AH SAM and others. (No. 11,378.)

(*Supreme Court of California*. September 30, 1886.)

DAMAGES—MEASURE OF—FAILURE TO CONSTRUCT LEVEES—FUTURE CROPS.

In an action for a breach of contract for the construction of levees the probable profits on crops not planted, but to be raised by a tenant of the owner of the land, who went into possession under a lease at thirds, executed subsequent to the contract for the levees, are too remote to form a ground for damages.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Joaquin.

J. H. Budd and J. C. Campbell, for respondents, Wallace and others. *William L. Dudley and R. Thompson*, for appellants, Ah Sam and others.

SEARLS, C. On the first day of April, 1881, William S. Moss entered into an agreement with John Wallace, Frank T. Baldwin, and H. T. Compton,

Jr., whereby, in consideration of the covenants, and agreements to be kept and performed by the parties of the second part, he bound himself to convey to them the northern half (less 150 acres) of a certain tract of land by him owned in the county of San Joaquin. The tract was swamp and overflowed land, and the consideration upon which the conveyance was to be made required the parties of the second part to reclaim the whole tract from overflow, by means of levees, dams and flood-gates, to be by them constructed at their own cost and charge. The agreement specified the dimensions of the levee, etc., and contained a further provision that, upon the completion of one-third of the length of the levee, Moss would join with the second parties in the execution of a mortgage on the entire tract of land, to secure the payment of such sum or sums of money as it might become necessary to raise to complete the work.

No time was specified within which the work was to be done, but it was provided that, upon a failure to comply with the provisions of the contract, the agreement to convey should become null and void, and the second parties should forfeit all right thereto. On the twenty-fifth day of July, 1881, Wallace, Baldwin, and Compton, who had agreed to build the levee, entered into a written agreement with Ah Sam, Soon Fook, and Lee Fook, defendants herein, whereby the latter undertook to construct the earth-work of the levee at a given price per cubic foot. The work was to be commenced by the first day of August, 1881, and completed by December 1, 1881.

This second contract recites generally the making of the contract with Moss for the sale of the land, the agreement with him to construct the levees, and refers to the record of that contract, etc. There are a number of other provisions in the second contract, one of which is that authorizing the parties of the first part to hire and put on men to work, provided they should be satisfied the parties of the second part were not likely to complete the work within the time limited; but such additional men were not to be employed until the expiration of the first month, and, if employed, were to be so located as not to interfere with the work of the second parties. The contract also recited the provision for a mortgage as specified in the contract with Moss, and provided for a further loan from defendants, to be secured by a second mortgage on the land to be conveyed to Moss, etc.

The two contracts are set out in the pleadings, and we have only recited such of their provisions as are deemed material to the questions hereinafter considered. Defendants did not complete the levees by December 1, 1881; there being at that date about one mile thereof remaining to be constructed. They continued to work upon this unfinished portion until on or about March 19, 1882, when they abandoned the work, and, a flood coming on, the land was overflowed, and could not be cultivated during the year 1882.

The court below, in making up the account between plaintiffs and the contracting defendants, allowed the former \$7,500 damages on account of the loss of a crop upon the land for the year 1882.

The evidence upon which this finding is based tended to show the quantity of grain that could have been produced upon the land in 1882 had the levees been completed in 1881 as per contract, and the prices at which the same could have been sold; also, that in February, 1882, plaintiffs had leased the land in question, or 1,210 acres of it, to sundry persons for a term of five years, from November 1, 1881, they, the said plaintiffs, to receive as rent therefor, one-third of the crops raised each year, delivered to them in Stockton. This evidence was all admitted against the objections of defendants, who excepted to the rulings of the court admitting it, and now assign its admission as error.

The contention of appellants is that the probable profits on crops not planted are too remote to be allowed in this, an action to recover damages for a breach of contract for the construction of levees. The argument is

based upon the idea that the leases were not made until February, 1882,—long after the contract for constructing the levees had been entered into, and could not have been contemplated by the parties when the contract was made.

In *Giaccomini v. Bulkeley*, 51 Cal. 261, which was an action in tort for destroying a fence, it was held that evidence to prove that the land would support a given number of cows and hogs, and showing the profits that might have been reaped from them, (it not appearing that plaintiff had such animals,) was too remote and speculative. See, also, *Friend v. Miller*, 8 Pac. Rep. 40, and cases there cited.

In *Hadley v. Baxendale*, 26 Eng. Law & Eq. 398, it was said: "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances for such a breach of his contract."

Ordinarily, the measure of damages for the breach of a contract to construct levee, a fence, or any similar work is: (1) If payment has been made, the cost of constructing the work. (2) If payment has not been made, the excess of the cost of the work over the contract price. This we term "general damages," and it involves the loss which naturally flows from, and is presumed from, the contract and its breach. In addition thereto, there may be a recovery of such further loss or detriment occasioned by the breach of the contract, and proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. This last we term "special damages," and it is awarded upon the theory that the parties who contracted with a full knowledge of the facts, circumstances, and objects of the agreement, may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach.

In the present case there is such reference made to the contract of plaintiffs with Moss that we are authorized to conclude that defendants contracted to build the levee with full knowledge that it was to be the consideration or condition upon which the land was to be conveyed to plaintiffs, and that the completion of the levee was a condition precedent to the conveyance.

When, therefore, the defendants violated their contract to complete the levee by December 1, 1881, they must be presumed to have done so with full knowledge that the direct and immediate consequence of such violation was to prevent plaintiffs from procuring a conveyance of the land until the levee was completed. It follows that, under such circumstances, defendants should be held liable for the use and occupation of the land in its then condition, during such reasonable time as was necessary for plaintiffs to complete the violated contract, and thus entitle themselves to a conveyance from Moss, if prevented from occupying and using the land by the non-completion of the levee.

It does not necessarily follow, however, that the method adopted in the court below was a proper one for estimating the value of the user of the land. The leases offered in evidence were executed, not only after the defendants had entered into the contract, but after its breach. The land, except a small portion of it, was not cultivated, or sown to grain of any kind, and, had it been, we are at a loss to see how plaintiffs would have been entitled to the crops raised upon land which they did not own.

It seems to us that the rule adopted in the court below, if applied to con-

tracts of this character, would tend largely to place it in the power of parties entitled to recover damages to regulate the amount of recovery to suit themselves. There would be but little risk in contracting to give one-third of a crop which the parties all knew could not be raised.

If it be said the leases were for five years, and therefore any inference of a want of good faith, because the land was not susceptible of cultivation during the first year, is unfounded, we reply that, while it tends to meet the objection named, it at the same time suggests another, viz., that it may well be that a tenant could afford to give one-third of the crops raised upon lands of this character for a term of five years, yet, owing to the inherent difficulties of cultivating such lands in the first instance, he would be unwilling to give a like quantity or proportion the first year. We have no reason to believe that plaintiffs acted in bad faith in executing the leases specified in the record, and we only refer to the possibility of such conduct for the purpose of showing that the rule under which such a course may be pursued, is inherently vicious.

Had defendants contracted with plaintiffs to crop the land for the year 1882, yielding in return one-third of the crop, and then failed to comply with their agreement, the basis adopted here would have been proper. In such a case it could properly be said they contracted with a view to the damages proven.

Again, had the leases been executed before defendants agreed to construct the levee, and had their agreement been made with full knowledge of such leases and their conditions, it might with propriety be held that their liability should be measured by the conditions in the leases. Here, however, the measure of damages is made to depend upon a subcontract with which the defendants had nothing to do, of which they knew nothing, and with a view to the terms of which they cannot be supposed to have contracted. In other words, the subcontracts of plaintiffs with their several lessees, and the possible profits which they might have derived therefrom, are substituted for the value of the premises during the year 1882.

This we think was, under the circumstances of this case, erroneous. *Olmstead v. Burke*, 25 Ill. 86; *Rhodes v. Baird*, 16 Ohio St. 581; *Fox v. Harding*, 7 Cush. 522; *Devlin v. Meyer*, 63 N. Y. 25; *Masterson v. Mayor, etc.*, 7 Hill, 61.

The judgment and order appealed from should be reversed, and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(72 Cal. 55)

PACIFIC TRUST CO. v. DORSEY. (No. 11,153.)

(Supreme Court of California. September 30, 1886.)

CORPORATIONS—STOCK—ISSUING CERTIFICATE FOR NOTE—CONST. CAL. ART. 12, § 11; ST. 1875-76, PAGE 729, § 1; PEN. CODE, § 560.

A note given by a subscriber to the capital stock of a bank, in payment of a first assessment, the certificate for the stock being issued thereupon, is not void under section 11, art. 12, Const. Cal., providing that "no corporation shall issue stock except for money paid," etc., nor under section 1, St. 1875-76, p. 729, or section 560, Pen. Code.

Commissioners' decision.

Department 2. Appeal from superior court, county of San Joaquin.

D. S. Terry and Baldwin & Smith, for respondent, Pacific Trust Co.
Jas. A. Louttit, for appellant, Caleb Dorsey.

v.12r.no.2—4

BELCHER, C. C. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying a motion for a new trial. The action was based upon a promissory note, and the contention of appellant is that the contract, in the execution of which the note was given, was against public policy, and prohibited by law; and so the note was void.

The facts, as shown by the record, are as follows: In August, 1883, the Pacific Trust Company, plaintiff herein, was organized as a corporation to do a banking business at the city of Stockton. Its capital stock was fixed at \$500,000, divided into 5,000 shares, of the par value of \$100 each. The defendant subscribed for 100 shares of the capital stock. After the corporation was fully organized the subscribers for stock were called upon to pay an assessment of 10 per cent. upon the amounts severally subscribed by them. The defendant paid nothing upon his subscription till the third day of December, 1883, when he made the note in question for the amount of his assessment, payable to the plaintiff, or order, one day after date, with interest at the rate of 10 per cent. per annum. The note was delivered to the president of the company, and thereupon a certificate for a hundred shares of stock, properly signed and sealed, was delivered to the defendant, and by him indorsed and delivered back to the president, to be held by the company till his note should be paid. The note was not paid, and on the fourth of September, 1884, this action was commenced to recover the amount due upon it.

Was the note void? In support of their claim that it was, counsel for appellant cite section 11 of article 12 of the constitution, section 1 of "An act concerning corporations and persons engaged in the business of banking," approved April 1, 1876, (St. 1875-76, p. 729,) and section 560 of the Penal Code.

The section of the constitution referred to reads as follows: "No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock or bonded indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law."

The evident purpose of this section was to prevent the fictitious increase of the stock or indebtedness of corporations, and it does not touch the question involved here. The defendant had subscribed for 100 shares of the stock, and was liable to pay for it as the money might be needed and called for. And if it be conceded that the certificate was improperly issued to him before the actual payment of the money, or some part of it, still that fact cannot render void his promise to pay at a subsequent time, and so release him from all liability. But it is by no means clear that the certificate was improperly issued. The provision is that no stock shall be issued "except for money paid, labor done, or property actually received." The word "property" includes property real and personal; and the words "personal property" include "things in action and evidences of debt." Section 14, Civil Code. The defendant's note was actually received by the corporation, and was a thing in action or evidence of debt.

The first section of the "Act concerning corporations and persons engaged in the business of banking" requires every corporation and all persons doing a banking business in this state, in January and July of every year, to publish and file for record a sworn statement "of the amount of capital actually paid into such corporation, or into such banking business: provided, that nothing shall be deemed capital actually paid in except money *bona fide* paid into the treasury of such bank, and under no circumstances shall the promissory note, check, or other obligation of any director or stockholder, or of the proprietors or proprietor of any such bank, be treated, computed, or in any manner considered, any part of such actually paid-in capital."

Under this statute the defendant's note could not be advertised to the world or treated as a part of the paid-up capital of the bank. The evident purpose of the statute was to inform the public twice a year of the actual capital which a bank might have in hand for its business, and to prevent the perpetration of frauds upon the public by a pretended or fictitious capital. But why should the note be held void because the amount of it could not be included in the advertised capital? It was given for a lawful and adequate consideration, and was in fact only a new promise to pay a debt which the defendant had contracted and was then obligated to pay.

Section 560 of the Penal Code is in a chapter that treats of "fraudulent insolvencies by corporations, and other frauds in their management." It provides that "every director of any stock corporation who concurs in any vote or act of the directors of such corporation, or any of them, by which it is intended * * * to discount or receive any note or other evidence of debt in payment of any installment actually called in and required to be paid, or with the intent to provide the means of making such payment, * * * is guilty of a misdemeanor."

It is unnecessary to consider when or under what circumstances this section makes the directors of a corporation liable to be prosecuted for a misdemeanor. The only question here presented is, does it make void the note of defendant, which, so far as appears, was made in good faith, and for the purpose of obtaining a little more time to discharge an obligation which he then recognized as legal and binding upon him? We do not think it can have that effect. If it could, then, by the same reasoning, it would follow that if he had gone to the bank with the best note that could be made in the state, and had had the note discounted with the intent to provide the means of making payment of his assessment, and with the money received had paid his assessment, still he could treat the whole transaction as void, and compel the bank to deliver back to him the note. Such a construction of the section would sanction fraud and unfair dealing, and we cannot, therefore, think it correct.

In our opinion the receipt of the note neither violated public policy, good morals, nor positive law, and the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(71 Cal. 192)

BROWN v. MANN. (No. 9,043.)

(*Supreme Court of California*. September 30, 1886.)

STATUTE OF LIMITATIONS—ADMINISTRATOR SUING HIMSELF—OPERATION OF STATUTE NOT SUSPENDED.

If a mortgagee is administrator of the estate of the mortgagor, a suit to foreclose the mortgage cannot be maintained for his benefit by one to whom he assigns the mortgage; and if such a suit is begun while he is administrator, and after he ceases to be administrator, he is substituted as plaintiff therein, the suit will be considered as begun at the time of such substitution, and will be barred by limitation if the statutory period has then elapsed.

Department 1. Appeal from superior court, county of Santa Cruz.

W. D. Storey, for appellant, Brown. *C. B. Younger, J. A. Barham, F. Adams*, and *A. Craig*, for respondent, Mann.

MYRICK, J. Foreclosure. The note and mortgage were dated May 4, 1870, payable in one year, to-wit, May 4, 1871. The proceedings had after the transfer of the note and mortgage by plaintiff (Charles Brown) to Adolphus Brown, with the suit thereon, must be disregarded, because Charles Brown,

being the administrator of the estate of Abel Mann, could not, under the name of Adolphus Brown, have an action for his own benefit against himself as administrator to foreclose the mortgage. He had ample means in other ways to obtain the benefit of his security. Not until he ceased to be administrator, and was substituted as plaintiff, which was after May 4, 1875, had he, Charles Brown, the plaintiff herein, commenced any proper action to foreclose the mortgage. At that time more than four years had elapsed after the note came due, and the action was barred.

In this view, the balance of the case, and the points and arguments presented on either side, are quite immaterial. Judgment and order affirmed.

We concur: MCKINSTRY, J.; Ross, J.

(71 Cal. 195)

PEOPLE v. CAROLAN. (No. 20,198.)

(*Supreme Court of California.* September 30, 1896.)

1. WITNESS—DISCREDITING—CROSS-EXAMINATION—MISDEMEANOR AND FELONY.

A witness cannot be asked, upon cross examination, for the purpose of discrediting him, whether he has been arrested and convicted of a misdemeanor, as section 2051, Code Civil Proc., limits such evidence to conviction of felony.

2. SAME—OFFENSE INVOLVING MORAL TURPITUDE.

A record of conviction of a misdemeanor, if admissible in any case, is so only when the offense involves moral turpitude or infamy.

3. FRAUD—PRESENTING FRAUDULENT CLAIM TO SUPERVISORS—WARRANT REGULARLY ISSUED.

In a prosecution for presenting a fraudulent claim to the board of supervisors, it is immaterial whether or not the warrant upon which a claim made for traveling expenses was based, was regularly issued.

Department 1. Appeal from superior court, county of Contra Costa.

The Attorney General, for the People. *Eli R. Chase, G. W. Bower and J. O'B. Wyatt*, for appellant, Carolan.

BY THE COURT. The defendant was indicted under section 72 of the Penal Code for presenting to the board of supervisors for allowance a false and fraudulent claim, and was convicted.

There is no merit in the points made by the defendant, that the claim as presented contained several items, or that the claim contained items not alleged to be false or fraudulent.

One Lowrey was examined as a witness for the prosecution. On cross-examination, for the purpose of affecting his credibility, the defendant's counsel asked him whether he had been arrested and convicted of a misdemeanor, and whether he had been incarcerated in the county jail. The court sustained objections to these questions. We see no error. Section 2051, Code Civil Proc., limits evidence of this character to conviction of a felony.

For the same purpose a record of the conviction of the witness Lowrey of a misdemeanor was offered, and the court rejected the evidence. If, in any case, a record of conviction of a misdemeanor is admissible for the purpose of discrediting, it should be made to appear that the offense involved moral turpitude or infamy, which was not done in this case.

The indictment was sufficient, charging the offense, as it did, in the language of section 72, Pen. Code.

It was immaterial whether or not the warrant was regularly issued, upon which the claim made by the defendant for traveling services was based. We see no error in the record.

Judgment and order affirmed.

(71 Cal. 204)

Ex parte THOMAS. (No. 20,243.)*(Supreme Court of California. October 6, 1886.)***CONSTITUTIONAL LAW—REGULATION OF COMMERCE—LICENSING SALE OF MERCHANDISE.**

An ordinance imposing a license tax for vending goods not manufactured or produced in the state is in violation of the federal constitution, being an attempt to regulate commerce between the states.¹

Department 2. On *habeas corpus*.

A. E. Bolton, for petitioner. *S. P. Hall*, for respondent.

BY THE COURT. This case involves the constitutionality of section 14 of an ordinance passed by the board of supervisors of Alameda county. The section referred to is in these words: "Every traveling merchant, hawker, or peddler, who vends goods, wares, or merchandise of any kind, other than the manufactures or productions of this state, or butchers' meat, must pay a license tax of \$10 per month, unless he uses a wagon, or one or more animals, for the purpose of vending such goods, wares, or merchandise, in which case he must pay a license tax of \$15 per month." No license is required for vending goods, wares, or merchandise which are the manufacture or product of this state, or butchers' meat.

The applicant for this writ was convicted of a violation of this ordinance in selling sewing-machines manufactured in another state. It is contended that this ordinance is in violation of the federal constitution, in that it is a regulation of commerce, control over which is by the supreme law of the land vested in congress. The identical question here presented was passed on by the supreme court of the United States in *Welton v. Missouri*, 91 U. S. 275, and in *Webber v. Virginia*, 103 U. S. 344. The statutes considered in the cases cited were of the same character as the ordinance in question herein, and they were held to be unconstitutional. See, also, *Brown v. Maryland*, 12 Wheat. 425; *Woodruff v. Parham*, 8 Wall. 123; *State Freight Tax*, 15 Wall. 232; *Mobile Co. v. Kimball*, 102 U. S. 691. In accordance with the judgments in the cases above cited, we are bound to hold that the ordinance before us is unconstitutional and void.

The prisoner must be discharged from custody. So ordered.

(71 Cal. 205)

COUNTY OF SAN MATEO *v.* MALONEY and others.*(Supreme Court of California. October 9, 1886.)***TAXATION—COLLECTION OUT OF PERSONAL PROPERTY—DECISION OF ASSESSOR, CONCLUSIVE—COMMISSION.**

The determination of an assessor, who is directed by Pol. Code Cal. § 3820, to enforce the collection of taxes out of personal property whenever, in his opinion, the lien upon the real property would be insufficient to secure payment of the taxes upon the real and personal property, that it is necessary to resort to the personal property, is binding on the courts; and upon personal property taxes thus collected he is entitled, without further question, to a commission under St. Cal. 1883-84, p. 125, giving him a commission on personal property tax collected by him as authorized by section 3820 of the Political Code. MYRICK and THORNTON, JJ., dissenting.

In bank. Appeal from superior court, county of San Mateo.

¹NOTE.

As to the illegality of laws imposing higher rate of taxation on the products of other states, see *Walling v. State of Michigan*, 6 Sup. Ct. Rep. 454, and note, 460.

A tax imposed by one state on the sale of the products of another within its limits, which in purpose or effect discriminates against said products, is void. *Ex parte Hanson*, 28 Fed. Rep. 127, and note; *In re Watson*, 15 Fed. Rep. 511, and note; *City of Marshalltown v. Blum*, (Iowa,) 12 N. W. Rep. 266.

Edward F. Fitzgerald, for respondent, County of San Mateo. *Sawyer & Burnett*, for appellants, Maloney and others.

McKEE, J. This was an action against the defendant Maloney, as assessor of San Mateo county, and the sureties upon his official bond, to recover the sum of \$638, which, it is alleged, he collected as taxes for the county, and, instead of paying the same over to the county treasurer, as it was his duty to do, he converted the same to his own use.

It appears by the finding of the court that between the first Mondays of March and July, 1886, the assessor served the executors of the last will of John Parrott, deceased, with a demand in writing to render to him a statement in writing, under oath, as required by law, of the specific real and personal property belonging to the estate of their testator, in their possession, or under their control, at 12 o'clock M. on the first Monday in March, 1886, to be taxed according to law. With the demand the executors neglected and refused to comply, and, upon their refusal, the assessor arbitrarily estimated the value of the personal property of the estate in their possession and under their control on that day at \$1,292,879, and the real property at \$62,695. Upon the assessment thus made taxes were levied on the personal property, amounting to \$20,039.63, which were collected by the assessor from the personal property, "because, in his opinion, said taxes were not a lien upon any real property;" and, after enforcing the collection of the taxes on the personal property in that way, he paid all of them over to the county treasurer, except the sum of \$638, which he retained as commissions for collecting said taxes.

The county contends that the assessor had no legal right to enforce the collection of the taxes against the personal property, and that he was not entitled to retain the money in his hands as commissions for collecting said taxes; and that is the question.

Upon the facts found by the court, there is no question that the assessment of the personal property, the levy of the taxes thereon, and their collection by the assessor, were lawfully made. The assessment was made under the provisions of the revenue law, which imposed upon the assessor the duty of arbitrarily estimating the value of the real and personal property of a tax-payer who neglects or refuses, after demand by the assessor, to render a statement in writing under oath of the specific real and personal property owned by him, or in his possession, or under his control, at 12 o'clock noon on the first Monday of March in each year. Sections 3629, 3633, Pol. Code. The levy of the taxes upon the assessment was also made under provisions of the same law; and the law made both the assessment and levy conclusive. The assessment was not subject to be reduced by the board of equalization. The tax levied had the effect of a judgment against the tax-payer, the levy was declared to be a lien upon the personal property itself, and also upon the real property of the tax-payer, with the force and effect of an execution levy upon both the real and personal property, and the judgment could not be satisfied, nor could the lien be removed until payment of the taxes in the manner provided by law. Sections 3716, 3717, 3752, Pol. Code, and 1669, Code Civil Proc. And, in addition to the statutory lien upon all the property, power was conferred upon the assessor to enforce collection of the taxes on the personal property whenever, in his opinion, the lien upon the real property would be insufficient to secure payment of the taxes upon the real and personal property. Section 3820, Pol. Code.

It was under that section of the Code that the taxes were collected. They were therefore lawfully collected. But the court below gave judgment for the plaintiff upon the ground that "said taxes were a lien upon the real property, and the real property was sufficient to secure the payment of said taxes;" and it decided "that said defendant, Maloney, as assessor, was not enti-

tled to any compensation or commissions for the collection of said \$20,039.63." But the law authorized the assessor to ascertain and determine whether the real property was sufficient to secure payment of the taxes upon the real and personal property; and if, "in his opinion," it was not, the law cast upon him the imperative duty of enforcing collection of the taxes against the personal property. That duty was regularly performed by the assessor, (sub. 15, § 1963, Code Civil Proc.;) and the judgment or opinion which he formed, and upon which he acted, is not reviewable by the courts, after he has collected and paid over the taxes to the county treasurer. It is well settled that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. *Gaines v. Thompson*, 7 Wall. 347. As was said in *Porter v. Haight*, 45 Cal. 639: "When the state, by legislative act, confers upon a board of public officers jurisdiction to exercise their judgment and discretion upon matters within their power to perform, the courts cannot review the question whether that discretion was properly exercised." See, also, *People v. Hagar*, 52 Cal. 179.

The taxes were therefore lawfully collected under section 3820 of the Political Code. And the law provided: "The assessor shall be entitled to receive and retain for his own use 6 per cent. on personal property tax collected by him, as authorized by section 3820 of the Political Code." St. 1883-84, p. 125. The assessor had therefore the right to retain the money in controversy as his percentage for collecting the tax.

Let the judgment be reversed, and the cause remanded. So ordered.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

We dissent: MYRICK, J.; THORNTON, J.

(71 Cal. 212)

Ex parte SCHMIDT. (No. 20,220.)

(Supreme Court of California. October 27, 1886.)

WITNESSES—DIVULGING PROCEEDINGS BEFORE GRAND JURY—INDORSING NAMES OF WITNESSES ON INDICTMENT.

A grand juror summoned as a witness upon the hearing of a motion to set aside an indictment on the ground that the names of all the witnesses examined before the grand jury have not been inserted or indorsed thereon, cannot refuse to testify as to what witnesses were examined before the grand jury.

In bank. On *habeas corpus*.

John B. Harmon, for petitioner.

BY THE COURT. A person had been indicted for an offense, and that person moved the court, under section 995, Pen. Code, to set aside the indictment on the ground that the names of all the witnesses examined before the grand jury had not been inserted at the foot of the indictment, or indorsed thereon. On the hearing of the motion, and in support thereof, the petitioner, a member of the grand jury, was called and sworn, and was interrogated as to whether any person was examined as a witness before the grand jury whose name was not inserted at the foot of the indictment or indorsed thereon. The petitioner refused to answer the questions, on the ground that he would thereby be disclosing secrets of the grand-jury room; and such refusal was by the court below adjudged a contempt, and the petitioner was committed. Hence this writ.

Section 948, Pen. Code, declares that the names of the witnesses examined before the grand jury, or whose depositions may have been read, must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court; and by section 995 the failure to so insert or indorse the names

of all the witnesses is made ground for setting aside the indictment. By section 925, no person, except the district attorney and witnesses under examination, are permitted to be present at the sessions of the grand jury. If, therefore, neither the members of the grand jury nor the district attorney could be called upon to state whether any witnesses were examined other than those whose names have been inserted or indorsed, a barren right to move to dismiss is given without the power to ascertain whether or not the statute has been complied with. Under our statute, the names of witnesses before the grand jury are not secrets to be undivulged, at least for the purpose herein referred to; because the moment an indictment is presented that moment the names should be a part of the record.

The petitioner is remanded, and the writ is discharged.

(14 Or. 17)

TRABANT v. RUMMELL, Defendant, and others, Respondents.

(*Supreme Court of Oregon. October 11, 1886.*)

ATTACHMENT—WHEN MAY BE MADE—CONTRACT—ACTION UPON—STATUTE OF OREGON.

Under the statute of the state of Oregon the remedy by attachment is given upon those contracts for the direct payment of money which are made or are payable in the state. If the contract is not made in the state, there must be an express stipulation that it shall be paid in the state, to entitle a party to a writ of attachment in an action upon it.

B. Killin and J. C. Moreland, for appellant, Henry Trabant. *Alex. Bernstein*, for respondents, Hexter & May.

LORD, C. J. The plaintiff brought an action against the defendant on a promissory note, which is as follows:

"\$800. OAKLAND, CAL., December 1, 1877.

"On demand, I promise to pay Henry Trabant eight hundred (\$800) dollars, money received, with interest at six per cent. per annum.

"OTTO RUMMELL."

Upon an affidavit setting forth the above note, and the undertaking in such case required being filed, a writ of attachment was issued, and certain property of the defendant, Rummell, was levied upon. Thereafter, and on the twelfth day of July, 1884, the defendant, Rummell, confessed judgment in favor of the plaintiff, Trabant, and a judgment order was duly entered on that date, together with an order to sell the property heretofore attached. On the tenth day of July, 1884, and before the plaintiff, Trabant, had recovered judgment against the defendant, Rummell, Hexter & May brought an action against the defendant, Rummell, filed the required affidavit and undertaking, and a writ of attachment was issued, which was duly executed by levying upon the same property which had been attached by the plaintiff, Trabant. Thereafter Hexter & May, duly recovered judgment against the defendant, Rummell, and an order issued that the attached property be sold to satisfy said judgment. Subsequently, and during the same term of the court, on an order to show cause, it was ordered "that the judgment order entered in the case of *Trabant v. Rummell* be modified, and that the clerk pay the money in his hands to Hexter & May," etc.; which is the order from which this appeal is taken.

There is but one question which we are required to consider on this record: Was the plaintiff, Trabant, entitled to a writ of attachment in an action on the contract as alleged and set forth? Under the statute of this state, the remedy by attachment is given upon those contracts, for the direct payment of money, which are made or are payable in this state. If the contract is not made in this state, there must be an express stipulation that it shall be paid in this state, to entitle a party to a writ of attachment in an action upon it.

This has been directly adjudicated under a statute of like import, and from which our statute is presumed to have been taken.

In *Dulton v. Shelton*, 3 Cal. 206, the court say: "It is argued that, although the contract was not made, nor is by its terms payable, in this state, yet, because the defendants reside here, and the action is transitory, that, therefore, it is payable here, and entitled to the attachment. This construction would annul every distinction which is contemplated by the language of the act. All actions or contracts for the payment of money are transitory, and so the words of the act, 'is made or is payable in this state,' would have no meaning. The universally admitted rule of construction requires effect to be given, if possible, to every part of the law. We can only follow the rule in this case by denying the right of attachment, except where the contract is made within this state, or, if made without it, then accompanied by a stipulation between the parties to it that the money is to be paid here. A subsequent promise to pay here cannot affect the question in any manner, when the suit is brought upon the original contract."

More recently, however, this same statute has been re-examined by the court upon a point quite identical with that under consideration. See *Eck v. Hoffman*, 55 Cal. 501. The contention there was, as here, that although the bills were drawn at one place in Germany, and payable in the same country, on their dishonor they became payable wherever the defendants might be found. To this argument the court responded: "That is true in a general sense, but that is not the sense in which the phrase 'is made or is payable in this state' is used in the statute. If a contract is not made in this state, there must be an express stipulation that it shall be paid in this state, to authorize the issuance of an attachment in an action upon it. That was settled more than a quarter of a century ago in *Dulton v. Shelton*, 3 Cal. 206; and although there have been several revisions of the statute since, and changes have been made in the very sections containing the clauses construed in that case, these clauses have remained unchanged. Upon well-settled principles, the court must regard the construction given to the statute in that case as a correct interpretation of the intention of the legislature; otherwise that body would have changed the statute in that respect."

These authorities bear directly upon the questions presented here, and, independent of their intrinsic merits, they derive additional weight from the familiar rule of construction that the legislature, in adopting the statute of another state, adopts along with it the judicial construction of that state, as understood at the time. Upon this same statute, but directed to another matter, this rule of construction was recognized and applied by this court. See *Crawford v. Roberts*, 8 Or. 326.

Actions are usually designated as "transitory" or "local." When the action is transitory, the right of action exists wherever the defendant may be found. But a right of action may exist without the right to the aid of an attachment. That usually depends upon the existence of particular facts to authorize its issuance, which must be made to affirmatively appear by affidavit. Hence it often happens that a party may have a right of action where he has no right to the help of an attachment, for the want of the particular facts prescribed by the statute to authorize it. This case is illustrative of the difference. Here the plaintiff has a clear right of action against the defendant upon his contract, but, to entitle him to the aid of an attachment, his contract must have been made or be payable in this state. It was made in California, nor is there any express stipulation it shall be paid in this state, and consequently it is not within the terms of the statute which authorizes the issuance of the writ of attachment.

There was no error, and the judgment is affirmed.

(13 Or. 615)

CARTER and others v. KOSHLAND.

(Supreme Court of Oregon. October 26, 1886.)

GARNISHMENT—JUDGMENT—EXECUTION—JUDGMENT DEBTOR—CREDITOR.

Where, in garnishee proceedings, it is ascertained that a garnishee had, at the time of the service of the attachment, property in his possession belonging to the debtor, and refused to furnish a certificate designating the amount and description of it, and the creditor has recovered a judgment in the action against the debtor, in accordance with the amended statute of 1878 of Oregon, such creditor shall be entitled to a judgment against the garnishee for the value of the property, to the extent of the amount of the judgment against the debtor, with costs of the proceeding, to be satisfied out of such property wherever it may be found; and in case it cannot be found, or a sufficient portion thereof to satisfy the amount of said judgment and costs, the amount remaining due thereon shall be satisfied out of the property of the garnishee not exempt from execution. Modifying former judgment.

On rehearing. See 8 Pac. Rep. 556.

Zera Snow and E. B. Watson, for appellant, M. Koshland. *A. F. Sears* and *Raleigh Stott*, for respondents, Carter, Rice & Co.

THAYER, J. This case is here at this time for rehearing. It was supposed at the last term of this court that it was decided, and the mandate was sent to the lower court; but the matter having been brought to the attention of the court again, and it having been concluded that the mandate had been prematurely sent down, the court recalled it. The questions involved in the case have occasioned the court great perplexity in concluding as to the true construction of the act relating to garnishment proceedings, in view of the amendment of 1878. I have been of the opinion that, after the recovery of judgment against the debtor, and an adjudication that the property attached be sold to satisfy the debt, the creditor could not properly obtain a personal judgment against the garnishee,—that the two judgments would not be consistent with each other; nor did I believe that such a course would afford to the creditor the full benefit of the garnishment proceedings intended by the amendment referred to,—that is, the right to pursue the property, and have it applied to the satisfaction of his debt. If the right to recover such judgment were the only remedy, an irresponsible person, in possession of the debtor's property, might dispose of it, and leave the creditor only a worthless judgment against him. But the creditor, it is thought, should be entitled to some kind of adjudication against the garnishee, in case it be ascertained in the garnishment proceedings that he had property in his possession belonging to the debtor at the time of the service of the attachment. The authorities seem to be uniform that property attached in the hands of a third person is *in custodia legis* and that the garnishee has no right to dispose of it; and a creditor, under the law as amended, certainly should have the right to have it applied to the satisfaction of his debt. I cannot see how else a creditor would be able to realize the benefit which the amendment conferred, or the provision could be carried into full effect. The most reasonable construction of the statute, as it now stands, is that a creditor, in case it is ascertained in such a proceeding that the garnishee had, at the time of the service of the attachment, property in his possession belonging to the debtor, and has refused to furnish a certificate designating the amount and description of it, and the creditor has recovered a judgment in the action against the debtor in accordance with the provisions of said amendment, shall be entitled to a judgment against the garnishee for the value of the property to the extent of the amount of the judgment against the debtor, with costs of the proceeding, to be satisfied out of such property wherever it may be found; and that in case it cannot be found, or a sufficient portion thereof to satisfy the amount of said judgment and costs, that the amount remaining due thereon shall be satisfied out of the property of the garnishee not exempt from execution.

Such a form of judgment is not authorized, in express terms, by the statute, but there is a general provision of the Code that gives to courts and judicial officers the means to carry into effect the jurisdiction conferred upon them, and to adopt any suitable process or mode of proceeding, where none is specifically pointed out, which may appear most conformable to the spirit of the Code. Section 911, Civil Code. The court is compelled to construe the statute in question, and it should give it that construction which would render all its provisions effectual. The legislature evidently intended by the amendment that the property attached should be made applicable to the payment of the debt; otherwise it would not have required that the judgment in the action direct a sale of the property. This course would obviate the objection against the recovery of a general judgment against the garnishee for the value of the property in his hands after directing its sale in the judgment against the debtor to satisfy it, which, to my mind, has always seemed to be an incongruity.

Under this view, the former opinion of this court, before expressed, is modified, and the judgment appealed from will be modified in accordance with this opinion.

(14 Or. 35)

MOORE v. KNOTT and others.

(Supreme Court of Oregon. October 25, 1886.)

EVIDENCE—BOOKS OF ACCOUNT.

Where a transfer of accounts is the subject-matter of an alleged contract, and testimony has been given tending to show such contract, it is error to exclude the books of account.

H. T. Bingham, for appellants, Levi Knott and others. *H. Y. Thompson*, for respondent, Amasa Moore.

LORD, C. J. It will be sufficient for the purposes of this case to state that the defendants and appellants, Levi Knott and Levi Estes and Anthony Moore were partners, engaged in the business of manufacturing and selling lumber. Amasa Moore, Alexander Moore, and Albert Moore were employed to work for the firm. For value, Alexander and Albert assigned their claims for wages to the plaintiff and respondent, who brings this action for his own and the assigned sums due. The defendants answer "that on or about the thirteenth day of March, 1883, each of said parties, viz., this plaintiff, Alexander Moore, and Albert Moore, agreed and directed that any balance to be due each of them should be transferred to and credited to the account of their brother, Anthony Moore, one of the members of said partnership, and a co-defendant herein, and said Anthony Moore assented and agreed thereto, and that said credit and transfer was accordingly made, and that said Anthony Moore was duly credited upon the books and accounts of the said partnership with whatever amounts were due the said parties, and that this partnership is now obligated to pay the said Anthony whatever balances there were due the said Amasa, Alexander, and Albert Moore." This was denied in the reply.

On the trial, Levi Knott testified that, at the time of the sale of the mill by the defendants, he (witness) asked Amasa Moore, the plaintiff, and Alexander Moore, what amount the firm owed them on account of wages,—what was to be done about their wages,—and that they replied that was all right; their accounts were put into Anthony Moore's account. The defendants then followed up this evidence by offering the books of account of the partnership business, and the accounts of the plaintiff and his assignor's therein; but the court ruled that the books were inadmissible. The objection which was made to them is not stated in the bill of exceptions. We think, under the issue made by the pleadings, this ruling was error. The agreement, as alleged, re-

quired that the accounts of the plaintiff and his assignors in the partnership books should be transferred to the account of Anthony Moore therein. The contract directed this to be done. This made the books necessarily evidence of whether the defendants had kept their promise, and transferred the accounts of the plaintiff and his assignors according to their engagement. Now, after the defendants had introduced evidence tending to establish the agreement, the books were offered to show that the accounts of the plaintiff and his assignors had been transferred according to the direction of the agreement. The performance of this part of the contract could only be shown by the books. It made them a link in the chain of facts necessary to be established by the defendants by the terms of the agreement.

In *Ross v. Brusie*, 11 Pac. Rep. 760, it was held that a book of account is admissible in evidence to prove that defendant had performed his contract, and given plaintiff the credit promised him. The facts of that case show that on the trial the defendant was permitted, against the plaintiff's objection, to prove, by the introduction in evidence of certain books of account, that defendant had carried into the books a credit of \$250 to the account of plaintiff. The court say: "The evidence was that the defendant agreed to give the plaintiff credit on his account for the sum of \$250 in payment for said lot; and in order to prove that he had kept his contract, and given the plaintiff the credit in question, he was permitted to prove the fact by his own books. This was not the case of a party making evidence for himself, as claimed by plaintiff. The books were not offered for the purpose of establishing a claim against the plaintiff, but simply to show that the defendant had performed his contract and given plaintiff the credit he had promised him. Defendant promised to give plaintiff credit for \$250. That was his contract. To prove that he had done this, he was allowed to introduce in evidence the books where the credit was entered. We see no objection to this. It was like proving any other act defendant had promised to perform as a condition on which his right to maintain or defend the suit depended."

It is due, however, to the learned counsel for the plaintiff to say that he did not deny but that the books were proper and material evidence, but he sought to avoid the error complained of, on the ground that there was nothing in the bill of exceptions to show that the books offered in evidence had been identified as or were the firm books of the defendants; and, as the objection to the books is not stated in the bill of exceptions, that the court will not assume anything for the purpose of declaring error if there is any ground upon which it would appear from the record to be proper to exclude the books. But we think the bill of exceptions identifies the books offered in evidence as the firm books of the defendants beyond all controversy. It is written in them that they were such.

The judgment must be reversed, and a new trial ordered.

(14 Or. 37)

DANVERS *v.* DURKIN

(*Supreme Court of Oregon. October 25, 1886.*)

1. APPEAL—DEFECTIVE RECORD—ERROR NOT PRESUMED.

If the record is so defective that it fails to disclose whether the error assigned exists, error will not be presumed from inferences from the record, and the judgment of the lower court will be affirmed.

2. FORCIBLE ENTRY AND DETAINER—APPEAL—JUSTICE OF THE PEACE—UNDERTAKING.

The special undertaking for double the rental value of the premises, on an appeal from the judgment of a justice of the peace in an action for forcible entry and detainer, is a prerequisite to the right of appeal.

H. T. Bingham and Cornelius Taylor, for appellant, Richard Durkin. *Williams & Willis*, for respondent, Walter Danvers.

LORD, C. J. This is an action of forcible entry and detainer, in which the plaintiff and respondent, after trial in the justice's court, obtained judgment against the defendant and appellant for restitution of property. From this judgment the defendant appealed to the circuit court. In that court the plaintiff moved to dismiss the appeal, which was granted, and this appeal is from the order of dismissal entered therein. The order of dismissal in the court below was based on the grounds: (1) For want of sufficient undertaking for costs of appeal; and (2) for want of a sufficient undertaking for double the rental value of the land during the pendency of the appeal.

It appears by the record that when the motion of the plaintiff to dismiss came up, and after the argument, the defendant, to obviate the defects of the undertaking already filed, asked leave to file new undertakings, which the court refused to allow. Whether these last undertakings were sufficient, or such as would meet the requirements of the law, upon inspection, we are un-advised by this record, as they have not been incorporated in it. Assuming that the undertakings offered were sufficient, and in time, and that the court, in such case, ought to have granted the leave asked, it is not possible for us to say so unless the record discloses such a state of facts to exist. We do not presume error by inferences from the record, nor do we declare it, except when it is made to affirmatively appear. The object of the record is to disclose enough of the facts, or matter involved, as will show in what the alleged error consists; and, unless this be done, the court here cannot intelligibly apply or declare the law, much less review and determine whether there was error in the action of the court below in the premises. Besides, in actions of this character, the statute prescribes the observance of certain requirements without which no appeal can be upheld. It provides that "no appeal shall be taken by the defendant from such judgment until the defendant shall, in addition to the undertaking now required by law upon appeal, give an undertaking to the adverse party, with two sureties, who shall justify, in like manner as bail upon arrest, for payment to the plaintiff of twice the rental value of the property of which restitution shall be adjudged, from the rendition of such judgment until final judgment in said action, if such judgment shall be affirmed on appeal." Misc. Laws, § 10, p. 615. In our judgment, the giving of this undertaking is a prerequisite to the right of appeal. This undertaking is a special one, for rent, and must be given in addition to the undertaking now required by law upon appeal in ordinary cases. The language of the statute is in denial of the right of appeal, unless this undertaking is given. "No appeal shall be taken," it declares, "until the defendant shall in addition," etc., give this undertaking, or, in a word, perform this condition of the statute. To make this provision efficacious, and fulfill the requirements of the law, it must be enforced in cases or actions of this kind.

As the record before us does not disclose a compliance with its requirements, the law requires us to affirm the judgment, and it is so ordered.

(4 Utah, 506)

PEOPLE v. TIDWELL and others.

(Supreme Court of Utah. July 16, 1886.)

1. HOMICIDE—JUSTIFICATION—ATTEMPTED ARREST—EVIDENCE—REBUTTAL.

Defendants on trial on an indictment for murder endeavored to excuse the homicide by showing that they were undertaking to arrest the deceased for stealing cattle belonging to one of defendants. The prosecution introduced evidence showing that the cattle belonged to a third party. Held to be proper testimony in rebuttal.

2. CRIMINAL LAW—EVIDENCE—ORDER OF ADMISSION—DISCRETION OF COURT.

The admission of certain evidence in rebuttal which might properly have been given in chief held discretionary with the trial judge, and not error.

3. HOMICIDE—MALICE—PRESUMPTION FROM KILLING—EVIDENCE.

The act of killing being proved beyond a reasonable doubt without any evidence of intent, malice is presumed beyond a reasonable doubt; and, unless the other evidence preponderates against it, the presumption of malice will remain; and, if the other evidence only raises a reasonable doubt of malice, the weight of such evidence is in favor of malice, and the presumption from the weight of evidence is added to the presumption from the killing, and the presumption of malice is stronger than it would have been without the other testimony.

4. SAME—INSTRUCTION OF COURT—REASONABLE DOUBT.

An instruction embodying the above rule is not error when another part of the charge instructs the jury that malice, as well as the killing, must be proved beyond a reasonable doubt.

5. CRIMINAL LAW—TRIAL—PRACTICE—ATTORNEY ASSISTING PROSECUTING ATTORNEY.

In a trial on indictment for murder, permitting an attorney employed by friends or relatives of the deceased to assist the district attorney on the trial is discretionary with the court; and, if such permission is not shown to have done injustice to the defendant, it is not error.

Powers, J., dissents.

Appeal from First district court.

Dickson & Varian, for the People. *Arthur Brown, Sutherland & Son, Jacob Johnson, and D. Evans*, for the defendants.

ZANE, C. J. The defendants were tried in the First district court on an indictment charging them with the murder of one Augustus Sorenson, and the defendants Frank and Thomas Tidwell were found guilty of murder in the second degree, and the defendant Anderson guilty of voluntary manslaughter. They were all sentenced to terms of imprisonment in the penitentiary,—Frank for six years and six months, Thomas for five years and six months, and Anderson for one year and six months. From this judgment the defendants Thomas Tidwell and Joseph Anderson appealed to this court.

It appears from the evidence that the deceased had purchased a drove of cattle, which he was driving in Utah, assisted by one Toedt, to his home in Colorado, when the defendants overtook him, and charged him with stealing two heifers, which they alleged were Thomas Tidwell's. The evidence also tends to prove that they threatened to arrest deceased; that angry words followed, shots were exchanged, and Sorenson was killed. In justification of the killing, defendants, on the trial, offered evidence to prove that at the time of the killing they were endeavoring to arrest the deceased for the larceny of the two heifers claimed to be the property of the defendant Thomas Tidwell. They had no warrant authorizing his arrest, and neither of them was an officer. In order to make out the crime it was necessary for them to prove property, either general or special, in some one. They relied on evidence of general property in Thomas Tidwell. This the prosecution contested, as well as the good faith of that defense, and for that purpose offered in rebuttal proof that a third party was the owner of the animals in dispute, which the court permitted to go to the jury. The ruling of the court in so doing the defendants assign as error. In view of the nature of the defense, and the evidence relating thereto, we are of the opinion that the evidence objected to was properly received.

The defendants also allege as error the admission of certain evidence in rebuttal which might have been given in chief. Allowing it to go to the jury at that stage of the trial was discretionary with the court.

The following portion of the charge of the trial court is also alleged to be erroneous, and is brought to our attention for review:

"(13) If you believe from the evidence that the deceased, August Sorenson, had in fact stolen and driven away an animal belonging to the defendants, or either of them, and that he had in fact killed another animal of defendants, or either of them, and converted the carcass, or a portion thereof, to his own use; and if you further believe from the evidence that both facts, or that one of them, were known to the defendants, or that they had, prior to the homi-

cide, reasonable cause for believing that Sorenson had so killed and stolen animals of defendants, and that they had followed Sorenson with purpose of arresting him, or of recovering any of the property of them, or of either of them, from the possession of Sorenson; and if you further believe from the evidence that the defendants, on the seventh day of November, A. D. 1884, at Emery county, in this territory, came upon deceased and his herd of cattle, and discovered an animal belonging to one of the defendants, in said herd, and in the possession of the deceased; and if you further believe from the evidence that the defendants, or one of them, in the presence of the others, charged the deceased with having killed one animal not his own, and with having others in his herd, and that deceased then and there drew a loaded pistol, and leveled it on one of the defendants in a threatening manner, and afterwards, upon the request of said defendants, lowered his weapon, and indicated his intention to proceed no further towards combat; and that afterwards the defendants, or one of them, in the presence of the others, threatened to arrest deceased, and then and there shots were interchanged between two of the defendants and deceased, and the deceased was then and there shot to death by defendants, or either of them, with the consent and in the presence of the others,—I instruct you that the burden of proving the necessity or excuse or justification for the killing is upon the defendants, and they must establish the same by a preponderance of evidence, unless the evidence on the part of the prosecution tends to show such necessity, excuse, or justification.” (Given.)

The principle announced is this: If the killing is satisfactorily established without evidence on the part of the prosecution tending to prove justification, the defendants must prove any necessity, excuse, or justification for the act, by a preponderance of the evidence which he produces relating to such necessity, excuse, or justification. The prosecution having proven the act of killing beyond reasonable doubt, without any evidence of circumstances mitigating, excusing, or justifying that act, the burden of proving them is upon the defendant. Without any evidence with respect to them they will not be presumed; and, if defendant's proof is equally balanced with respect to them, they are not proved,—defendant's evidence is equally balanced and neutralized. In that case there is no excess of proof on his part to overcome the presumption from the killing.

The portion of the charge above quoted was evidently based upon the following section of the Criminal Code. “Upon a trial for murder, the commission of the homicide by defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.” Laws Utah 1878, § 268, p. 117. In this section the legislature adopted the common-law rule, thus stated by Russell: “Besides the presumption which a jury may make from circumstantial evidence, there are also presumptions of law. Thus, on every charge of murder, the fact of killing being first proved, the law presumes it to have been founded on malice till the contrary appears, and therefore all circumstances alleged by way of justification, excuse, or alleviation must be proved by the prisoner, unless they arise out of the evidence produced against him.” 2 Russ. Cr. 731. The principle is expressed in equivalent terms in Fost. Crown Law, 255: “In every charge of murder, the fact of killing being first proved, all the circumstances, of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him; for the law presmeth the fact to have been formed in malice until the contrary appeareth; and very right it is that the law should so presume.”

The substance of these quotations the court announced to the jury in its charge. The principle may be stated in this form: The acts of killing being

proved beyond a reasonable doubt, without any other evidence of intent, malice is presumed beyond a reasonable doubt; and, unless the other evidence preponderates against it, the presumption of malice will remain. The presumption of malice from the killing must be met with other evidence; and if, without the presumption from the *corpus delicti*, the evidence of malice is equal to the evidence against it,—balanced,—the presumption from the killing is not affected; and if the evidence, without the presumption from the fact of killing, merely raises a reasonable doubt of malice, the presumption from the weight of evidence is added to the presumption from the killing, and the presumption of malice is stronger than it would have been without defendant's evidence, for a reasonable doubt is supposed to exist against the mere weight of evidence. The law presumes there may be a reasonable doubt of the existence of a fact supported by the weight of the evidence. The rule stated in the portion of the charge quoted did not deprive the defendants of the benefit of a reasonable doubt of the existence of malice. It merely required the presumption of guilt from the fact of killing to be considered with all the other inferences and evidence bearing on the fact of malice. Regarding presumptions and inferences as part of the evidence, the rule stated required a reasonable doubt of malice in view of all the evidence bearing on that fact,—not alone in view of the other evidence, without the effect of the presumption from the killing. In other parts of the charge (which was quite long) the jury were plainly informed that malice, as well as the killing, must be proved beyond a reasonable doubt, and that if they had a reasonable doubt, in view of all the evidence before them, of any fact essential to guilt, they must acquit.

Counsel for the defense urge that the rule under discussion can only apply to a case of secret killing, and that it had no application to the one in hand; that the giving of it was calculated to mislead the jury. The jurors were the sole judges of the credibility of the witnesses and of the weight of the evidence. Unless there was proof on the part of the prosecution tending to show that the crime committed only amounted to manslaughter, or that the defendants were justified or excusable, the rule was certainly applicable. But, assuming it had no application to the evidence, in view of the entire charge we do not believe the jury were misled by it.

It appears from the record that one F. C. Goudy, an attorney at law, assisted the district attorney, on the trial, at the latter's request and by permission of the court, and against the objection of the counsel for defendants, and that he was employed by the relatives or friends of the deceased. This is also assigned as error. While the objection is supported by high authority, we are of the opinion that the weight is to the contrary, and that the rule generally followed is to leave such permission to the discretion of the court. It often happens that two or more counsel are engaged for the defense, and justice is best promoted by a full and fair presentation of the law and the evidence. The more learning and ability brought to bear on the case, the better. The court should so control the investigations as to prevent oppression and injustice.

A great number of other errors are assigned, none of which, in our judgment, are well founded. We find no error in the record, and therefore affirm the judgments rendered by the court below.

BOREMAN, J. I concur. In the charge the rule that the burden of proof never shifts is recognized. That being taken with the thirteenth instruction, I do not think the jury could have been misled.

POWERS, J. I dissent. I am of the opinion that a new trial should be granted. I think that the charge of the court was liable to mislead the jury, and that there are other errors in the record sufficient to reverse the case.

(2 Ariz. 214)

JOHNSON v. ZECKENDORF and others.¹

(Supreme Court of Arizona. November 5, 1886.)

1. PROMISSORY NOTE—INDORSEES.

Where the payee of a note writes his name on the back of the same in blank, he becomes an indorser, and not a joint maker.

2. SAME—NOTICE OF NON-PAYMENT.

An indorser of a promissory note must be notified of demand, and non-payment by maker, or he is not liable.

3. SAME—WAIVER OF NOTICE.

A waiver of such notice by a person in charge at the usual place of business of indorser, in the absence of indorser, completes his liability.

Appeal from Pima county.

Karl, Campbell & Stephens and *Chas. Silent*, for appellants, L. Zeckendorf & Co. and others. *R. D. Ferguson* and *Jeffords & Franklin*, for appellee, John S. Johnson.

BARNES, J. This was an action brought by Johnson against L. Zeckendorf & Co., upon a promissory note made by Tully, Ochoa & Co., and purporting to be indorsed by L. Zeckendorf & Co. The note reads as follows:

"\$2,800.

TUCSON, A. T., September 17, 1881.

"Three months after date we promise to pay, to the order of L. Zeckendorf & Co., twenty-eight hundred dollars, at two per cent. interest per month, value received.

[Signed]

"TULLY, OCHOA & Co.

Indorsed: "L. ZECKENDORF & Co."

After the indorsement of L. Zeckendorf & Co., and upon the back of the note, these words were written:

"We hereby waive protest.

"Tucson, A. T., December 17, 1881.

L. ZECKENDORF & Co.

"J. WITTELSHOEFER."

It appears from the evidence in this case that the defendants, Tully, Ochoa & Co. and L. Zeckendorf & Co., were separate mercantile houses, doing business at Tucson; that the former were indebted to the latter, who were pressing for a reduction of the balance due. The plaintiff had made known to a broker by the name of Fried that he had \$2,800 to loan. Zeckendorf & Co. went to the broker, and told him Tully, Ochoa & Co. were indebted to them, and that they were trying to get payment. Fried said he had a customer for whom he would loan \$2,800, with Zeckendorf & Co.'s indorsement. Tully, Ochoa & Co. also asked him if he could get them a loan. He said he could, with Zeckendorf & Co.'s indorsement. The note was handed to him, and plaintiff handed him the money, and he delivered the note to plaintiff. Zeckendorf & Co. paid him \$42, one-half of 1 per cent. for 90 days' brokerage, for negotiating this loan. The money went to Zeckendorf & Co., and on that day Tully, Ochoa & Co. were credited \$2,800 on the books of Zeckendorf & Co. The plaintiff left the note in the safe of Mr. Etchells for safe-keeping. When the note was due, viz., December 17th, Etchells took the note to Zeckendorf & Co.'s place of business, and handed it to the person in charge of the main office. The person to whom it was handed directed him to Mr. Wittleshofer, who was the book-keeper. The latter took the note, and wrote the indorsement of December 17th. At that time the members of the firm of Zeckendorf & Co. were absent, as well as Strauss, the general financial manager; and Wittleshofer was left in charge of the business.

The court below found the above facts, substantially, and, as a matter of law, concluded that Zeckendorf & Co. was a joint maker of the note, and so

¹Affirmed. See 8 Sup. Ct. Rep. 261.

v.12P.nos.3. 4—5.

liable, without notice of non-payment by Tully, Ochoa & Co. The court also found that Wittleshoefer was an agent authorized to waive protest, and bind the firm. The appellants seek to reverse this case for errors in concluding that Zeckendorf & Co. were joint makers, and not indorsers, and that Wittleshoefer was authorized to waive protest.

If Zeckendorf & Co. are joint makers, no notice and protest was necessary; but if they are indorsers, notice, demand, and protest were necessary, and it then becomes important to inquire whether notice, demand, and protest were waived. Upon its face, this is no other than a contract of indorsement. Tully, Ochoa & Co. are the makers; Zeckendorf & Co. are the payees. Zeckendorf & Co. wrote their name on the back of the note, and so are indorsers in blank. This was done on the date of the note. The evidence in this case confirms that. Plaintiff was willing to loan on Zeckendorf & Co.'s indorsement, and "at otherwise." Zeckendorf & Co. negotiated this loan,—that is, discounted the note,—and paid the brokerage therefor. The proceeds of the note went to them, and they, on the same day, gave Tully, Ochoa & Co. credit for the same. The transaction was no other than the ordinary discount by the payee of a note by indorsement. Tully, Ochoa & Co. owed Zeckendorf & Co., and gave their note to them, who indorsed it to plaintiff. It was not accommodation paper, nor an accommodation indorsement by a stranger to the note, and hence does not come within *Rey v. Simpson*, 22 How. 341; *Good v. Martin*, 95 U. S. 90, and that class of cases. These cases hold that a stranger to a note, who indorses the same before delivery, is a joint maker of the note. While this is sustained by the weight of authority, and, as we think, by the better reason, it has met strong opposition. See note to *Burton v. Hansford*, (10 W. Va. 470,) 27 Amer. Rep. 580; note to *Jones v. Goodwin*, (39 Cal. 493,) 2 Amer. Rep. 475; note to *Fitzhugh v. Love*, (6 Call. 5,) 3 Amer. Dec. 571; and note to *Moies v. Bird*, (11 Mass. 436,) 6 Amer. Dec. 182.

We conclude that the court below erred in holding that Zeckendorf & Co. were joint makers of the note with Tully, Ochoa & Co., and therefore liable as a principal.

As first indorsers, Zeckendorf & Co. were entitled to notice of demand upon and non-payment by the makers, Tully, Ochoa & Co., unless the evidence shows that this was waived. On the back of the note in evidence, on the date of the maturity of the note, was indorsed the words, "We hereby waive protest," signed by Zeckendorf & Co., "J. WITTLESHOEFER." It could not be contended that this would not be a waiver if signed by one of the firm of Zeckendorf & Co., but it is insisted that Wittleshoefer, who wrote "L. Zeckendorf & Co." on the note, had no authority to do so. This was one of the issues of fact on the trial, and the court found that he had authority to waive protest, and bind the firm. We cannot say that this finding is erroneous. There is evidence to sustain it. The evidence was better presented before the trial court than it can be here, and that court can better determine disputed questions of fact. Etchells, with whom the note was left for safe-keeping, testified that he told plaintiff when the note was due to remind him, and he would go and have them waive protest, or pay the money; that plaintiff did remind him, and on the day the note was due he took it to Tully, Ochoa & Co. first, and demanded payment, and they wrote their name on the back of it. He then took it to Zeckendorf & Co., and presented it to some one at the table in the front or main office, and he, whoever he was, directed him to Wittleshoefer, who was in the inner office. Wittleshoefer took the note, and wrote the waiver of protest on the back, and handed it back to him. Nothing was said. He did not say he had no authority to do it. Wittleshoefer testified that he was the book-keeper of Zeckendorf & Co., and had been for five years; that the waiver of protest was in his handwriting; it was done in the office of Zeckendorf & Co.; Steinfeld and Strauss were out of

town; in their absence, that he had drawn checks; that his signature was placed in the bank by Mr. Steinfeld; in the absence of Steinfeld and Strauss, that he drew checks for the interest of the business, and it was left to his judgment as to amount, and when needed, and he would have checked to pay an accepted bill, when due and presented. Asked what he would have done if a matured note had been presented, and what would have been his authority, he did not answer. There was much evidence and much contradiction directed to proof of other similar acts by Wittleshoefer, but we do not think it material to inquire further. We think Zeckendorf & Co. were clearly bound by the waiver of protest by Wittleshoefer. Had he, in the absence of the members of the firm, and of Strauss, the general manager, been found in the general office of Zeckendorf & Co. on the day the note was due, and then and there he had been served with notice of demand upon the makers, and non-payment of the note, such service would have been good. *Bank of Louisiana v. Mansker*, 15 La. 115; *Banking Ass'n v. Place*, 4 Duer, 212; *Jacobs v. Turner*, 2 La. Ann. 964; *Merz v. Kaiser*, 20 La. Ann. 377.

We quote from Daniels on Negotiable Instruments, § 1017: "Notice left with a clerk or person in charge at the party's place of business, in his absence, or at his place of business, without proof as to the person with whom it is left, is sufficient; and proof that such person was not the party's agent has been held irrelevant, notice being left at the right place. So, leaving it with his private secretary, at his public office, is sufficient."

Notice served upon Wittleshoefer would have been good service, but when the service was made he waived protest, and all further steps in the matter. If he were not specially authorized to do this, who should lose,—his employer, or the person who found him ostensibly in charge of the business, in the absence of the employer, and towards whom he demeans himself as general agent in charge, and assumes to act as such? We think the former. This disposes of all the questions in the case.

The judgment is affirmed.

PORTER, J., concurs.

(71 Cal. 254)

RIDDELL v. HARRELL. (No. 11,363.)

(Supreme Court of California. November 3, 1886.)

1. EXECUTION—SALE—SETTING ASIDE—COMPLAINT—"PROBATED"—"DURING HIS LIFE."

On a demurrer to complaint in a suit by a devisee to set aside an execution sale of his testator's land, an averment that the will was "probated by the superior court" means, in effect, that the will was admitted to probate by the superior court; and an averment that testator was, "during his life-time," the owner of real estates, is a statement that he was the owner continuously during his life-time,—and will sustain the complaint.

2. JUDGMENT—COSTS—VOID FOR WANT OF NOTICE OF MEMORANDUM.

Where plaintiff obtains a judgment "claiming his costs," and the clerk inserts the costs in the judgment, but no memorandum of the items of the costs as required by statute was served upon defendant, the judgment for costs is as void as it would be if the memorandum had not been filed.

3. EXECUTION—SETTING ASIDE SHERIFF'S SALE—RECEIPT OF BALANCE OF PROCEEDS.

In an action by a devisee to cancel a judgment for costs against his testator, and the sheriff's sale thereunder, the presumption that the sheriff, in the execution of his duty, paid or tendered the balance of the proceeds of the sale, above the amount of the judgment and costs, to the deceased testator, raises no presumption that the testator received it, and thereby ratified, the judgment, and will not estop his devisee from seeking relief in equity for cancellation of the judgment.

In bank. Appeal from superior court, Tulare county.

Action by a devisee to cancel a judgment for costs against his testator, and the sale of land, and sheriff's deed thereunder, and for a deed under order of court to plaintiff. Demurrer to complaint sustained. Judgment for defendant. Plaintiff appeals.

I. N. Thorne, for appellant. *Alfred Daggett*, for respondent.

McKINSTRY, J. The court below sustained the defendant's demurrer to the complaint, which is as follows:

"The plaintiff complains and alleges:

"First. That Speer Riddell, his brother, lately deceased, was, during his life-time, the owner in fee of certain real estate, situate, lying, and being in the county of Tulare and state of California, particularly described as follows: South half of section 20, township 17 south, range 24 east; north half of south half, and north half of south half of south half, of section 21, township 17 south, range 24 east; all section 29, township 17 south, range 24 east; south half of section 30, township 17 south, range 24 east,—Mount Diablo base and meridian.

"Second. And plaintiff further says that the said Speer Riddell departed this life on the twenty-third day of October, 1884, leaving no wife or descendants, and leaving a last will and testament, which has been duly probated by the superior court of the city and county of San Francisco, where said Speer Riddell resided and owned property at the time of his decease; wherein and whereby the said Speer Riddell devised to this plaintiff the whole of his estate, real and personal, subject only to the payment of certain small legacies, neither of them exceeding the sum of \$100, and not exceeding in the aggregate the sum of \$300; and by reason whereof this plaintiff became, was, and is the owner of and seized of all the real estate whereof the said Speer Riddell was the owner, as aforesaid, at the time of his decease.

"Third. And the plaintiff further says that the said Speer Riddell, prior to his decease, was interpledged with one Jasper Harrell, in a suit commenced by the said Jasper Harrell against the said Speer Riddell and others, his tenants, in the superior court of Tulare county, for the recovery of certain real estate situate in the said county of Tulare other and different from the land and premises hereinbefore described; and that such proceedings were had in such suit that judgment was rendered in favor of said Harrell, and against the said Speer Riddell and others, defendants, for the recovery of the premises sued for, to which judgment, as recorded in the judgment book, there was added, without authority by the clerk of said court, a further judgment, as for costs, of \$113.50, but that the copy of the judgment as recorded, attached to the judgment roll, did not contain the said sum added as for costs, but left a blank, a copy of which said judgment as recorded is hereto annexed, and marked 'Schedule A,' and which is made a part of this complaint.

"Fourth. And plaintiff further says that that part of the aforesaid judgment as for costs was added by the clerk of said court without authority of law, and in violation of the statute relating to costs, and the entry of judgment therefor; and he further says that said cause was tried in said court before the judge, sitting without a jury, and judgment rendered in favor of the plaintiff and against the defendants for the recovery of the land sued for, and costs; that since said trial and decision no bill of costs, or copy thereof, was served on the attorneys for the defendants, or either of them, or upon said defendants or either of them, nor was there any admission or pretended admission of the service of a bill of costs, or a copy thereof, nor any affidavit or service upon defendants, or either of them, or upon defendants' attorneys, or either of them, or any proof of service of any bill of costs upon them, or either of them, presented to, or filed with, or made before the clerk of said court, whereby the said clerk could have or acquire power or jurisdiction to add to, or include as a part of, said judgment the amount of any bill of costs, or any amount, for any such purpose.

"Fifth. And this plaintiff further says that afterwards, to-wit, on the thirteenth day of March, 1884, the said plaintiff, Jasper Harrell, caused an

execution to be issued in said case, out of and under the seal of said court, directed to the sheriff in Tulare county, commanding him to make \$113.50 (being the amount alleged as costs in said judgment) out of the property of the defendants; that thereafter said sheriff, under and by virtue of said execution, levied upon and advertised for sale four well-known and separate and distinct parcels or lots of land, and so described in said levy and notice of sale, belonging to the defendant Speer Riddell, and being the same property hereinbefore described; and on the nineteenth day of April, 1884, the said sheriff fraudulently, in violence of his duty, and contrary to law, sold the said four well-known, separate, and distinct parcels or lots of land *en masse* for \$400 to Jasper Harrell, plaintiff in said suit, as is shown by said execution and sheriff's return indorsed thereon, now on file in said cause, copy of which is hereto attached, marked 'Schedule B,' and which is made part thereof; and that on the day last named the said sheriff made, executed, and delivered to said Jasper Harrell his certificate of sale, showing that he had sold the said four well-known, separate, and distinct parcels or lots of land *en masse*, to said Harrell, for \$400, and each of said parcels or lots of land is herein separately described, as in said levy and notice of sale, and the same was filed for record in the county recorder's office of Tulare county on the thirtieth day of June, 1884, copy of which is hereto attached, marked 'Schedule C,' and which is made part hereof. And plaintiff further says that W. F. Martin, said sheriff of Tulare county, on the twenty-third day of October, 1884, made and executed on the thirteenth day of November, 1884, acknowledged and delivered to said Jasper Harrell, his deed purporting, in consideration of \$400, to convey to said Harrell all the right, title, and interest of the said defendants in and to four well-known, separate, and distinct parcels or lots of land, same as herein-before described; and on the day last named the same was filed for record in the county recorder's office of Tulare county, to which reference is hereby made, and which is hereby made part hereof.

"*Sixth.* And plaintiff further says that neither the attorneys of said defendants, nor either of them, nor the defendants, nor either of them, nor the plaintiff in this suit, had any knowledge, notice, information, or belief that any amount as for costs had ever been added to or included in the judgment made and entered in said cause, or that any cost-bill had ever been filed by said plaintiff or his attorney with the clerk of said court, or that any execution had been issued in said cause, or that any sheriff's sale under execution of any property of any of the defendants had been made, or that the sheriff of Tulare county had made any certificate of sale of any such property, or had made any sheriff's deed of any such property, to any person whatever, until the seventeenth day of November, this present month and year, when said facts first accidentally became known to this plaintiff."

"*Seventh.* And said plaintiff further alleges that the said four parcels or lots of land are now, and were at the time of said levy and sale, greatly in excess in value of the said supposed judgment for costs; and that each parcel or lot of said land now is, and was at the several times last aforesaid, largely in excess in value of the amount of said costs, and would have sold, at a fair and honest sale, for more than enough to pay said alleged judgment for costs; and that the aggregate value of said four parcels or lots of land was at several times last aforesaid, and is now, the just and full sum of \$25,000. Wherefore, plaintiff prays," etc.

We think the complaint is not one to be commended as a model pleading, but are compelled to hold it not fatally defective.

1. It is contended by respondent that the demurrer was properly sustained, because there is no sufficient allegation that plaintiff ever had any interest in or title to the lands described in the complaint. The complaint avers that Speer Riddell died, leaving a last will and testament, wherein and whereby he devised to the plaintiff the whole of his estate, real and personal. But, it

is said, there is no allegation that the will was proved or established by the decree of a court of competent jurisdiction. The complaint avers that the will "has been duly probated by the superior court of the city and county of San Francisco, where the said Speer Riddell resided and owned property at the time of his decease." If the judgment admitting the will to probate is pleaded at all, the Code of Civil Procedure only requires the prefix "duly." Section 456. The real question, then, is whether an averment that the will was "probated by the superior court" is, in effect, an averment that the will was admitted to probate by the judgment of the superior court. As a will can only be admitted to probate by a judgment, an averment that a will was admitted to probate by the superior court, having jurisdiction to make and enter the judgment, is an averment of the judgment. It would be difficult to distinguish between an allegation that the will was probated "by" the superior court and one that is admitted to probate by that court. The verbalizing of the word "probate" ought not to take from the intended meaning.

2. It is urged the complaint contains no averment that Speer Riddell had any interest in the lands described in the complaint at the time of his death. The averment is that Speer Riddell was, "during his life-time," the owner, etc. This is a statement that he was the owner continuously throughout his life-time.

3. The respondent insists the complaint shows that the judgment in *Harrall v. Riddell* was a valid judgment, and the execution sale valid.

Sections 510 and 511 of the former practice act provided:

"Sec. 510. The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court a memorandum of the items of the costs to which he is entitled. He may include in the costs * * *. The memorandum shall be accompanied by the affidavit of the party. * * * The memorandum and affidavit shall be delivered to the clerk within twenty-four hours after the rendition of the verdict, or the costs shall be deemed waived.

"Sec. 511. The clerk shall include in the judgment entered up by him the costs, the percentage allowed, and any interest on the verdict from the time it was rendered." St. 1851, pp. 131, 132.

In *Chapin v. Broder*, 16 Cal. 418, it was held that the insertion of a sum as costs in a judgment by the clerk was a mere ministerial act, depending entirely on the filing of a memorandum for its authority, and that the judgment, so far as the costs were concerned, was void unless based on a memorandum filed; that a party who failed to comply with the statute by filing his memorandum waived all claim for costs.

Sections 1033 and 1035 of the Code of Civil Procedure read:

"Sec. 1033. The party in whose favor judgment is rendered, and *who claims his costs*, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee,—or, if the entry of the judgment on the verdict or decision be staid, then before such entry is made,—a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating * * *. A party dissatisfied with the costs claimed, may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers."

"Sec. 1035. The clerk must include in the judgment entered up by him any interest on the verdict or decision of the court from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose."

If the insertion of costs in the judgment is merely the ministerial act of the clerk,—an act which can only be performed in the cases in which the statute allows it,—the judgment for costs is void, as well when the memorandum has not been served on the opposite party, as when no memorandum has been filed. The omission from section 1033 of the Code of Civil Procedure of the clause in section 510 of the practice act, which provided that a failure by the prevailing party to file his memorandum of costs within the time limited should be deemed a waiver of his costs, is not a material circumstance. The Code contemplates that such shall be the result, since the only costs which the clerk is authorized to insert are those *claimed*, and “taxed or ascertained,” in the manner provided.

4. It is said plaintiff, as successor in interest of Speer Riddell, is estopped from seeking relief in equity, because the latter ratified the sheriff's sale by receiving from the officer the excess of the proceeds of the sale beyond the amount of the judgment and the accruing costs. It does not appear from the complaint that Speer Riddell received, or that there was tendered to him any part of the proceeds of the sale. And even if it should be conceded that there would be any presumption that the sheriff paid or tendered such excess to Speer Riddell, the defendant in execution,—in other words, a presumption that the officer discharged his duty,—this would be met by the averment in the complaint that neither Speer Riddell nor plaintiff had any knowledge, notice, information, or belief that any amount as for costs had been inserted in the judgment, or that any cost-bill had ever been filed, or that any execution had ever been issued, or of any sale thereunder, or of any certificate or deed by the sheriff, until the seventeenth of November, 1875. Moreover, if defendant here could rely on a presumption that the sheriff did his duty, that officer fully discharged his duty by tendering the excess of the proceeds of the sale of any excess there was to Speer Riddell. There is no presumption that Speer Riddell received the money.

5. The mere fact that several separate tracts were sold together by the sheriff would not constitute a cause of action.

6. Respondent relies upon the omission to allege that the amount of costs inserted by the clerk was not justly due as costs. But if the service of the memorandum is a jurisdictional fact, and the claim of the plaintiff to any costs existed as an enforceable claim only after the statute was complied with, no sum was legally due for costs when the clerk inserted a sum in the judgment.

Judgment reversed, and cause remanded, with instructions to the court below to overrule the demurrer, with leave to the defendant to answer.

We concur: SHARPSTEIN, J.; MYRICK, J.; MCKEE, J.; MORRISON, C. J.; THORNTON, J.

(71 Cal. 263)

PEOPLE v. STOKES. (No. 20,221.)

(Supreme Court of California. November 4, 1886.)

1. ADULTERY—PROOF OF MARRIAGE—MARRIAGE CERTIFICATE—STATUTES—CONSTRUCTION. St. Cal. 1871-72, p. 380, providing for the punishment of adultery, and making a recorded certificate of marriage proof of marriage for the purpose of the act, does not exclude other proof of the marriage.

2. SAME—EVIDENCE—MARRIAGE CERTIFICATE—INDICTMENT—VARIANCE. Where, in a trial of John W. Stokes for adultery, the record of a marriage certificate introduced in evidence shows a marriage of John Stokes to *Rebecca Gibson*, the testimony of a witness that he was present when defendant was married to *Rachael Gibson*, in the year when, at the place where, and by the person by whom, the record shows the marriage was performed, is admissible as tending to identify the parties named in the certificate.

3. SAME—COHABITATION.

Evidence that defendant and Rachael Gibson lived as man and wife for many years, and that she bore him children, if not admissible as proof of marriage in a trial on a charge of adultery, is admissible as tending to identify the parties named in the certificate.

4. SAME—NAMES IN MARRIAGE CERTIFICATE.

Evidence of the real names of the parties, contradicting the names in a marriage certificate, does not contradict the certificate, the minister not being required to guaranty that the persons named were married in their true names.

5. HUSBAND AND WIFE—MARRIAGE—PRESUMPTION OF CONTINUANCE OF STATUS.

The *status* of marriage, having been proved, is presumed to continue, and the presumption can only be overcome by evidence of death or divorce.

In bank. Appeal from superior court, Tulare county.

Atwell & Bradley, for appellant. *E. C. Marshall*, Atty. Gen., for the People.

MCKINSTRY, J. The defendant was found guilty of the misdemeanor defined in the first section of "An act to punish adultery," which reads: "Every person who lives in a state of open and notorious cohabitation and adultery is guilty of a misdemeanor, and is punishable," etc. St. 1871-72, p. 380. The third section of the act provides: "A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this act."

At the trial the prosecution called the county recorder of Tulare, the custodian of the records, who read from his records as follows:

"John Stokes to Rebecca Gibson. This certifies that on the twenty-second day of May, in the year of our Lord 1859, John Stokes, of Tulare county, Cal., and Rebecca Gibson, of the same county and state, were by me united in marriage at the school-house, in the Persian district, in the said county, according to the laws of California and the customs of the church to which I belong." *E. B. LOCKLEY*, Methodist Preacher."

"Filed for record June 18, 1859, at 10 A. M., and recorded same day, at 2 o'clock P. M." *E. E. CALHOUN*, Recorder."

To the record the defendant objected that it was irrelevant, immaterial, and incompetent, because it did not appear that the John Stokes married was the defendant. When the objection was made the district attorney said: "We propose to follow this up with proof that the John Stokes mentioned in this record is the person mentioned in the indictment as John W. Stokes," and thereupon the objection was overruled.

The prosecution subsequently called a witness, who testified that, in the year 1859, he was present in the "Persian school-house," when a marriage was celebrated by a Methodist preacher, named Lockley, between the defendant and *Rachael Gibson*. This, of itself, was evidence of the defendant's marriage. The statute does not exclude all evidence of marriage other than the record of the certificate. If it be suggested that the jury may have disbelieved the witness, and relied on the record of the certificate as proof of the marriage, still the testimony of the witness was admissible as tending to identify the parties named in the certificate. There was also evidence that the defendant and Rachael lived together, avowedly as man and wife, for many years. Under our law, that would be evidence of a marriage in prosecution for bigamy. Pen. Code, 1106. Even if it should be conceded that in this action it would not be evidence of marriage, it was evidence tending to identify the defendant and Rachael Gibson as the persons mentioned in the certificate.

It is said the record of a marriage between *John Stokes* and *Rebecca Gibson* was contradicted by evidence tending to prove that *John W. Stokes* was married to *Rachael* or *Rachael M. Gibson*. Counsel argue that, in a criminal

case, the jury "could not infer" against the defendant, that Rachael M. Gibson was the person referred to in the certificate. But the jury were not left to infer the identity of the persons from the bald fact of identity in their surnames. There was evidence tending to prove that John W. Stokes and Rachael M. Gibson were the very persons married by the Methodist preacher, Mr. Lockley, in the Persian school-district, in the year 1859; and other evidence tending to prove that John W. and Rachael M. were the persons mentioned in the certificate of record by the names, John and Rebecca. The marriage was a valid marriage, even if the parties gave the wrong names to the preacher, or the latter mistook the names. Men and women are conjoined in matrimony, and a defendant charged with bigamy or adultery cannot, in this country, base a defense on the ground that he or his wife was married under an assumed name, not his or her real name. In such case, evidence of the real names does not contradict the certificate, since the minister or other person authorized to perform the marriage ceremony is not required to guarantee the fact that the persons married were married in their true names. Certainly the omission of a middle name or initial does not invalidate the marriage nor detract from the effect of the recorded certificate.

At common law, in cases of alleged bigamy, proof of an actual marriage, or at least an admission of former marriage, was ordinarily required. The presumption of a marriage, (in favor of morality), arising in civil causes, from open and avowed cohabitation as man and wife, was overcome, in cases where the person was charged with the crime of bigamy, by the counter-presumption of defendant's innocence. If the common-law rule obtain in prosecutions like the present, still evidence that the defendant and Rachael M. lived together for 20 years as man and wife, and that she bore children to him, tended to identify John W. and Rachael M. as the persons mentioned in the certificate by the names of John Stokes and Rebecca Gibson.

It is said that the prosecution, relying on the statutory evidence of the marriage, should have proved that the parties had not been divorced. But the statute does not declare that a recorded certificate of marriage proves marriage only when accompanied by evidence that the parties have not been divorced. It proves that marriage, and also the continuance of the marriage, "there being no decree of divorce." Aside from the inherent difficulty of proving the negative, a decree of divorce could not affect the evidence of the fact that marriage was contracted, since marriage must precede divorce. The status of marriage being proved, is presumed to continue until death or divorce. This presumption can be overcome only by proof of the dissolution of the marriage. It was incumbent on the prosecution to prove a subsisting marriage at the time of the offense charged, but the subsisting marriage was proved *prima facie* by proof that the marriage was contracted.

Appellant also claims that there is no proof the defendant's wife was living at the time of his alleged cohabitation with the woman named in the indictment. In the absence of affirmative evidence, the dissolution of the marriage is not to be presumed to have occurred, either by divorce or by the death of one of the parties to it. In the latter case, the presumption of death is created by evidence that a party to the marriage has not been heard from in seven years. Code Civil Proc. 1963. There is no presumption of law that life will not continue for any period, however long. But juries are justified in presuming as a fact that a person is dead who has not been heard of for seven years. Roscoe, Crim. Ev. 18. Under our Code, the jury is bound to presume that a person not heard from in seven years is dead. But this presumption is disputable, and may, in its turn, like the presumption of continued life, be overcome by other evidence. Code Crim. Proc. 1963. Moreover, there was affirmative evidence that the wife was still living at the time of the trial of this action. The witness Elizabeth Balaam testified: "She is in San Luis Obispo county." It would be to distort the ordinary meaning of language to

hold that the witness said, or intended to say, her sister was buried in San Luis Obispo.

The jury were justified in holding that the defendant was a married man. There was abundant evidence that while married he "lived in a state of open and notorious cohabitation and adultery."

Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.; MYRICK, J.

(72 Cal. 157)

DUFFY v. GREENEBAUM. (No. 11,206.)

(*Supreme Court of California.* November 6, 1886.)

APPEAL—APPEAL BONDS—SUFFICIENCY—SUPERSEDEAS BOND.

An undertaking stating that its purpose is to stay execution on appeal, and following Code Civil Proc. Cal. § 942, which provides for undertaking for that purpose, will not be construed to include the \$300 undertaking on appeal required by Code Civil Proc. Cal. §§ 940, 941.

Department 2. Appeal from superior court, city and county of San Francisco.

D. L. Smoot and Chas. Creighton, for appellant. *O'Brien & Morrison*, for respondent.

BY THE COURT. Motion to dismiss an appeal. There is no \$300 undertaking on appeal as required by sections 940 and 941, Code Civil Proc. The undertaking closely follows section 942, Code Civil Proc., which prescribes the requisites of the undertaking to stay execution. We are therefore of opinion that the undertaking must be construed to be given for the purpose stated in the undertaking; that is, to stay execution. We cannot construe it to include the \$300 undertaking on appeal. Motion granted.

(14 Or. 55)

O'KEEFE v. WEBER and others.

(*Supreme Court of Oregon.* April 26, 1886.)

GAMING—STATUTES—PENAL AND CIVIL—CONSTRUCTION—TITLE.

Section 3 of "An act to prevent and punish gambling," approved October 20, 1876, which gives the loser of money lost at gaming a cause of action against the winner for twice the amount lost, confers a strictly civil action. It is remedial, and such section is germane to the title, and the title of the act fairly attracts attention to the subject-matter of such section.

This action was brought under an "act to prevent and punish gambling," approved October 20, 1876, to recover money lost at gaming.

Section 1 of the act provides for the punishment, by fine, of "each and every person who shall deal, play, carry on, open, or cause to be opened, or who shall conduct, either as owner, proprietor, or employe, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenette, rondo, vingt-et-un, (or 'twenty-one'), poker, draw poker, brag, bluff, thaw, or any banking or other game played with cards, dice, or any other device, whether the same be played for money, checks, credit, or any other representative of value."

"Sec. 3. All persons losing money, or anything of value, at or on any of said games, shall have a cause of action to recover from the dealer or player winning the same, or proprietor for whose benefit such game was played or dealt, or such money or thing of value won, twice the amount of the money, or double the value of the thing so lost."

F. A. E. Starr, for appellants. Einil Weber and others. *A. H. Tanner*, for respondent, M. O'Keefe.

WALDO, C. J. A statute giving cumulative damages to the party aggrieved is a remedial, not a penal, statute. *Reed v. Northfield*, 18 Pick. 94, was an action on a statute to recover double damages for an injury to the plaintiff caused by a defect in a highway. It was argued that the action was penal; but the court said: "In the present case, we think the action is purely remedial, and has none of the characteristics of a penal prosecution. All damages for negligence or breach of duty operate, to a certain extent, as punishment; but the doctrine is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages, but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." And see *Goodridge v. Rogers*, 22 Pick. 495; *Burnett v. Ward*, 42 Vt. 80; *Quinly v. Carter*, 20 Me. 218. Where a sum is given to a stranger, as where it is given to him that shall prosecute, the action is penal. *Cole v. Groves*, 184 Mass. 471. "The action is remedial where the action is brought by the party injured; but penal, where brought by a common informer." *Bones v. Booth*, 2 W. Bl. 1227; *Woodgate v. Knatchbull*, 2 Term R. 148; *Wilkinson v. Colley*, 5 Burr. 2698. There is no difference, respecting this remedial character, between a statute giving single and one giving accumulative damages. Cases above, and see *Myddleton v. Wynn, Willes*, 597; *Atcheson v. Everitt*, Cowp. 391; *Lake v. Smith*, 1 Bos. & P. 179; *Hardw. Cas. Temp.* 412.

The action given by the third section of the act is therefore a strictly civil action. Is it without the subject expressed in the title? We had an impression at the argument that civil and criminal provisions could not be mingled under a common title, but the law is undoubtedly the other way.

The statute of 9 Anne, c. 14, referred to by COMSTOCK, J., in *Meech v. Stoner*, 19 N. Y. 26, was entitled "An act for the better preventing excessive and deceitful gaming," and was similar to the one before us, in containing civil and criminal provisions. The second section gave an action to recover the money lost. It is true, HOLT, C. J., had said a few years before that "the title of an act of parliament is no part of the law or enacting part, no more than the title of a book is part of the book; for the title is not the law, but the name or description given to it by the makers." *Mills v. Wilkins*, 6 Mod. 62. We think, however, that at this period we are entitled to rely on the statement of the chief justice that the title was the work of the makers of the act; and that we may, to some extent, infer that they supposed they were carrying out the object avowed in the title when, in the second section of the act, they gave the loser an action to recover the money lost,—an action which, as Mr. Justice COMSTOCK showed in *Meech v. Stoner*, above, he had not at common law. In a general sense, all law is preventive. An act to prevent gambling is the same, in legal effect, as an act to prevent and punish gambling. The legislator can hardly be supposed to interest himself in the fortunes of one who loses his money at gambling. His object must be simply to repress gambling. This is one of the means by which he tries to accomplish his object. That it will have that effect, so far as it has effect at all, is certain. Then, it cannot be said that he has not expressed the subject of the act in the title.

In *Simpson v. Bailey*, 3 Or. 517, change in the location of the county-seat was the subject of the enactment, and there was nothing in the act which did not relate strictly to this subject. See, also, *Stuart v. Kinsella*, 14 Minn. 524, (Gil. 395); *Brewster v. City of Syracuse*, 19 N. Y. 116; *Ex parte Upshaw*, 45 Ala. 234; *Thomasson v. State*, 15 Ind. 455, 456,—where both civil

and criminal provisions were included in one act; *Walker v. State*, 49 Ala. 332.

The authorities cited cover other points made by counsel; and all we conceive they require us particularly to consider. It follows that the judgment must be affirmed.

ON REHEARING.

(October 28, 1886.)

LORD, C. J. The opinion of the court, as delivered by the chief justice, in effect, holds and decides that a statute may include both civil and penal provisions, and that section 3 of the act in question is not penal, but remedial; nor do we understand that the correctness of the law, as applied, is impuned or denied. It is only claimed that one point suggested at the former hearing, and which seems to be regarded as of vital importance, has been overlooked; this is, that the title of the act does not indicate the subject-matter of the statute as contained in the third section. The act is entitled "An act to prevent and punish gambling," and section 3 of the act provides that the loser shall have cause of action against the dealer or proprietor, etc., for the recovery of twice the amount of money or double the value of the thing lost. The argument is that the enforcement of this section by civil action cannot have the effect to prevent gambling any more than the enforcement of any other civil action will have a preventive effect in respect to the matter or cause out of which it arose; as this result can only be accomplished through the agency of penal clauses with which this statute is provided, and consequently the subject-matter of the section is not within the title of the act. Evidently, the legislature thought otherwise, for their intention seems manifest. What could be the object of giving to a party injured a right of action against him by whom it was committed, where it did not before exist, and allowing him to recover twice the amount, or double the value in compensation for such injury, unless it be to mark with legislative condemnation the creation of such liabilities, and to warn and deter others from incurring them. Is not the object in such case more manifest than in actions for breach of promise of marriage, where the jury are authorized by law to give exemplary or punitive damages to warn and deter others from the violation of their promise? It seems to us there can be but one answer as to the object of such legislation: that it is designed to be preventive, and that it is such in effect. The section, therefore, is germane to the title, and the title of the act fairly attracts attention to the subject-matter of the statute, including the third section. A court will never resort to a forced construction to declare a statute void on the ground that the subject is not expressed in the title. There was no error.

(14 Or. 59)

SWIFT, Jr., v. MULKEY and another.

(Supreme Court of Oregon. October 29, 1886.)

1. PLEADING—LEAVE TO AMEND—COMPLAINT AND REPLY.

Where, in an action to recover real estate, when the cause comes on for trial, plaintiff obtains leave to strike out certain words in his complaint and in his reply, permission to do so may be rightly given; and defendant's exception on the ground that the complaint, before the words were struck out, stated no cause of action, is not well taken, the amendment working no injury to the defendants.

2. EJECTMENT—TITLE—BURDEN OF PROOF—ADVERSE POSSESSION.

Where, in an action to recover real estate, plaintiff has given evidence of a record title, it is for the defendant to prove title in himself, or an adverse possession for 10 years, and the burden of proving adverse possession does not rest upon the plaintiff.

3. STATUTE OF LIMITATIONS—COLOR OF TITLE—QUITCLAIM DEED.

A quitclaim deed, and any instrument purporting upon its face to convey title to the grantee, is sufficient to constitute color of title.¹

¹ See note at end of case.

4. TRIAL—TRIAL BY JURY—INSTRUCTION—SPECIAL FINDINGS—DISCRETION OF COURT.
A refusal of the circuit court to direct special findings as requested by a party is wholly discretionary, and the appellate court will not undertake to review any such ruling of a circuit court.

Appeal from circuit court, county of Multnomah.

Action in circuit court to recover real estate. Verdict for plaintiff. Defendants appeal.

Williams & Willis and *George H. Durham*, for appellants, Mulkey and another. *Strong & Strong*, for respondent, Swift, Jr.

THAYER, J. The respondent commenced an action in said circuit court to recover the possession of certain real property situated in said county. The complaint is in the ordinary form, excepting that the allegation of the appellant's possession and withholding the property is that they are in possession, "or claim the possession, of said above-described real property as the owners thereof," and wrongfully withhold the same from the respondent. The allegations of the complaint regarding the ownership of the property, the wrongful withholding the same, and the alleged damages for such withholding are controverted in the answer, and in which the appellants allege ownership in themselves, and plead the statute of limitations, which allegations last referred to are controverted in the reply, and in which it was in effect denied that the appellants had been in the possession of the premises at all, or that they had had possession of them, or any part or portion of them, at all. When the case came on for trial the respondent's counsel asked leave to amend the complaint and reply by striking out certain portions thereof, which was granted by the court, and thereupon the words "or claim the possession of said above-described real property as the owners thereof" were stricken out of the complaint; and the words "or for any other period, or at all," also the words "or that defendants, or either of them, have had possession of the real property in the complaint described, or any part or portion thereof," were stricken out of the reply. This is claimed by the appellants' counsel to have been erroneous; that the said words, left in the respective pleadings, rendered them defective; that the complaint stated no cause of action with the said words in it; and that the court could not allow it to be amended in that stage of the case.

It does not appear what the counsel claimed as to the effect the words stricken out of the reply would have had if left in it; but it is apparent that it would have made the reply contradict the complaint in a material particular. The appellants' counsel also claimed that, after the pleadings were amended as stated, they still did not contain a cause of action, and he objected to the admission of evidence under them, and subsequently moved to arrest the judgment upon that ground. The respondent's counsel, after the portions of his pleadings referred to were stricken out, introduced evidence of a record title to himself in the land, and then rested his case, whereupon the appellants' counsel moved for a judgment of nonsuit, claiming that the respondent's pleadings, taken together, did not, after the amendment, constitute a cause of action, and that the burden was upon the respondent to show that appellants' possession was not adverse. The court overruled the motion, and allowed the appellants' counsel an exception to the ruling, and which is claimed to be erroneous. The latter then attempted to prove his defense set up in the answer, and gave evidence tending to show that the appellants took possession of the premises in controversy more than 10 years prior to the commencement of the action under a *quitclaim* deed executed to them by one R. Hendrie; that their possession had been uninterrupted and continuous ever since, and then offered in evidence a certified copy of the record of deeds of Multnomah county of the said deed from Hendrie, for the purpose, as appellants' counsel claimed, of showing that they entered under color of title. The respondent's counsel objected to the introduction of the said deed,

upon the grounds that a quitclaim deed could not give rise to color of title. The court sustained the objection, and rejected the evidence, to which ruling an exception was allowed, and which is also claimed to have been erroneous. The appellants' counsel then offered in evidence a copy of a judgment of the said circuit court, rendered on the twelfth day of February, 1866, in favor of said R. Hendrie, and against Mrs. H. Swift, claimed to be one of the respondent's immediate grantors, the issuance of an execution thereon, sale of the said premises by the then sheriff of said county to said R. Hendrie, and an order confirming the sale, to the introduction of which the respondent's counsel objected, and the court sustained the objection, and allowed an exception. This ruling is also claimed to have been erroneous. After the evidence was closed the appellants' counsel requested the court to direct the jury to make certain special findings, which the court refused, and to which refusal an exception was allowed, and which is also relied on herein.

I think the court had power to allow the amendment of the complaint and reply at the time it did, and in the way permitted. Great liberality in amending pleadings under our system should be shown when the justice of the case requires it. The court should always be careful that the opposite party be not misled to his prejudice, and this can be avoided in almost every case by granting a continuance. When a party comes into court in good faith with his action or suit, he should not be turned out on account of a technicality or mistake which an amendment will obviate, when it will do no substantial injury to the opposite party. It is the province of the courts to adjust controversies between litigants, and it should be done with as little delay and annoyance to them and the public as the circumstances will permit. The parties in this case were before the court to try the case, and I think the court did right in not turning the respondent out, and compelling him to commence over again, where it could be done by a simple amendment of his pleadings. It worked no injury to the appellants. They were there to try the merits of the case, and could not have been injured a particle. The motion for a nonsuit was properly denied.

The respondent proved title to the premises in himself, and that entitled him to the possession, unless the appellants could show a title in themselves, or an adverse possession for the period of 10 years. The legal title draws after it the possession, and a right of entry is not barred unless there has been a disseizin, followed by an actual, open, notorious, and continuous adverse possession for the period of 10 years next prior to the commencement of the action. To be an adverse possession it must be an occupancy under a claim of ownership, though it need not be under color of title. It is sufficient if the party goes upon the land, and declares to the world, by his acts and conduct, that he is the owner of it, and maintains that attitude the requisite period. His occupancy, when he does not enter under color of title, must, however, extend to the entire tract of land claimed. He will gain no right to any part of it that he does not actually occupy. The rule is different if the entry is made under a paper title. Then his occupancy, if he actually occupy a part of it, will be extended, by construction, to the boundaries specified in the instrument under which he claims. But the circuit court was mistaken in holding that a quitclaim deed would not constitute color of title. Any instrument that purports upon its face to convey title to the grantee is sufficient to constitute color of title. A quitclaim deed, it is true, only conveys what the grantor can rightfully convey, but it is as effectual to convey that as any other form of deed, and it had been held that an entry under a conveyance from the sheriff, though not sufficient upon its face to convey the legal title, was an entry under color of title. *Jackson v. Newton*, 18 Johns. 355. A large number of cases are collected in Tyler on Ejectment and Adverse Enjoyment, at page 862 of that work, and they fully sustain the view here expressed.

The other exceptions in the case were not well taken.

The sale under the execution, as shown by the order of confirmation, was too indefinite in the description of the land sold. It was described therein as a "part of sec. 29, T. 1 N., R. 2 E., containing 160 acres, more or less, and being a portion of the donation land claim of Henry and Jane Swift, and being described on plat as notification No. 6,165, lying and being in Multnomah county, Oregon." It appears that a donation claim known as notification No. 6,165 was patented to H. Swift and Jane Swift, his wife, and that it included the premises in question. The claim included a larger portion than 160 acres, probably 320 acres, though that does not appear in the record. But it does appear that 160 acres was only a part of the donation claim. That must be inferred from the description set out in the order of confirmation. But it does not appear, nor can it be ascertained from the record, which portion of the donation claim was sold by the sheriff. He doubtless intended to sell some 160 acres thereof, but it would be impossible to ascertain which part of the claim it was intended to be. There is nothing in the description to identify it.

The refusal of the court to direct special findings, as requested by the appellant's counsel, was wholly discretionary. This court will not undertake to review any such ruling of a circuit court.

The respondent's counsel contended upon the hearing that the appellants' possession of the premises, as shown by the cross-examination of one of the appellants when on the stand as a witness, was not such an occupancy as would constitute an adverse possession within the meaning of the law, and that, therefore, the exclusion of the deed from Hendrie to appellants, when offered in evidence, if erroneous, did not injure appellants. If all the evidence in the case were shown to be contained in this bill of exceptions, we might properly pass upon that question; but as it stands we do not think we have the right to do so. The case was submitted to the jury to pass upon, and the statement in the bill of exceptions, showing the character of testimony given upon the part of the appellants, entitled them to have it so submitted. I do not think the testimony returned here shows any such adverse holding as would bar the action; but this court cannot determine that it was all the testimony in the case, and is compelled, therefore, to reverse the judgment, and remand the case for a new trial.

NOTE.

STATUTE OF LIMITATIONS—COLOR OF TITLE. Possession under color of title is possession under that which in appearance is title, but which in reality is not. *McIntyre v. Thompson*, 10 Fed. Rep. 531; *Miller v. Clark*, (Mich.) 23 N. W. Rep. 35. A sheriff's deed gives color of title. *McIntyre v. Thompson*, 10 Fed. Rep. 531. So does a quit-claim deed, *Wheeler v. Merriman*, (Minn.) 15 N. W. Rep. 665; the separate deed of a married woman, though void, *Wright v. Kleyla*, (Ind.) 4 N. E. Rep. 16; a parol gift, *Braden v. Campbell*, (Pa.) 1 Atl. Rep. 580; or a contract for the sale of land made by one who is in under color of title, *Hall v. Torrens*, (Minn.) 21 N. W. Rep. 717; a tax deed, though the proceedings were invalid, *Gatling v. Lane*, (Neb.) 22 N. W. Rep. 227; *Wheeler v. Merriman*, (Minn.) 15 N. W. Rep. 665; but not if the invalidity appear from the recitals of the deed, *Mulcahy v. Floer*, (Minn.) 8 N. W. Rep. 166; nor a tax certificate, *McKeighan v. Hopkins*, (Neb.) 15 N. W. Rep. 711; in Iowa, a contract to convey land, *Montgomery v. Severson*, 20 N. W. Rep. 458; S. C. 17 N. W. Rep. 197.

(14 Or. 39,

BURKHART v. HOWARD and others.

(Supreme Court of Oregon. October 26, 1886.)

1. VENDOR AND VENDEE—ACTUAL NOTICE—MORTGAGE.

Where an obligor of a bond for a deed of land, conditioned upon the payment of a promissory note executed to him by the purchaser, mortgages the land (with other land) for an amount greatly exceeding its value, and, the note having been dishonored, he, subsequently to the execution of the mortgage, but prior to its

being recorded, assigns said promissory note for value to another, he takes the note, and the rights incident thereto, subject to the mortgage, and the fact of the note being past due puts him on notice.¹

2. SAME—BOND FOR DEED—EQUITABLE EFFECT OF.

The effect of a bond for a deed of land is to transfer the title in equity to the land to the purchaser, and the obligor holds the title merely as a security for the payment of the purchase money, and the assignee of a promissory note given by the purchaser is entitled to the benefit of the security. He can hold, then, against an assignment by the obligor of the land for the benefit of his creditors, made subsequent to the transfer of the note to him, and against a judgment not docketed prior thereto.²

Appeal from a decree of the circuit court, county of Linn.

C. E. Wolverton, for appellant, Burkhardt. *L. Flinn*, for respondents, Howard and others.

THAYER, J. The record herein shows that the appellant, as administrator of the estate of Philip Baltimore, deceased, commenced a suit in said circuit court to foreclose a certain bond for a deed. He alleged in his complaint, after alleging the decease of said Baltimore, and of his appointment as administrator of the estate of the deceased, that on the nineteenth day of September, 1877, said Estelle M. Howard executed to Thomas Monteith her promissory note for \$500, with 10 per cent. interest per annum from date, payable as follows: The interest, on or before one year from the date thereof; \$100 of the principal, and all the interest due, on or before 18 months from the date thereof; and a like payment of \$100 of the principal, together with all interest due, to be made on or before the expiration of each six months thereafter, until the whole sum of \$500 and interest were paid; that at the same time the said Monteith executed to the said Estelle M. Howard a bond, with a penalty of \$1,000, conditioned that it should be void if said Monteith executed to her a deed to lots 5 and 6, in block No. 90, in the city of Albany, in Linn county, Oregon, on or before the first day of January, 1884, provided she should, on or before that date, pay to him the amount of the said note and interest; that by mutual mistake between said parties the premises to be conveyed were incorrectly described in the bond; that they should have been described therein as lots 5 and 6, in block No. 90, in the southern addition to the city of Albany, in Linn county, Oregon; that the said Estelle M. Howard went into the immediate possession of said lots, and ever since had been and then was in the actual and notorious possession of them; that on the fifth day of February, 1884, the said Thomas Monteith, for value, duly assigned and transferred said promissory note to appellant, who became the legal owner and holder thereof; that said Estelle M. Howard had paid \$50 thereon, and the interest to September 19, 1878, and no more; that the amount thereof, with the interest thereon at 10 per cent. per annum from said last date, was due and owing from said Estelle M. Howard to appellant; that on February, 1884, said Thomas Monteith duly assigned all his property, both real and personal, including the said lots, to the respondent R. S. Strahan, for the benefit of his creditors, but that said Strahan received the assignment with notice of the possession and rights of said Estelle M. Howard; that said assignee and said Thomas Monteith were ready and willing to make, execute, and deliver to the said Estelle M. Howard a good and sufficient deed to the premises, but that she would not accept it, and refused to pay the note; that the other respondents claimed some interest in the premises; but that it was subsequent and subject to the interest of the said Estelle M. Howard. The complaint concluded with a prayer for a decree against said Estelle M. How-

¹ See *Ranney v. Hardy*, (Ohio,) 1 N. E. Rep. 523

² See note at end of case.

ard for \$500, and the interest; for a reformation of the bond in reference to the description of the lots; for a sale of them, and the primary application of the proceeds to the payment of said debt and interest.

It further appears from said record that all the respondents, except said Estelle M. Howard, filed a demurrer to the complaint, which having been overruled, two of them—said Strahan and D. B. Monteith—filed separate answers. The former denied that he was ready or willing, or would at all, make, execute, or deliver to the said Estelle M. Howard a good or sufficient deed to the lots, or that he took or received the assignment from said Thomas Monteith subject to any lien or rights of appellant in or to the lots; alleged that the assignment was made on or about the last day of February, 1884; that said Thomas Monteith, long before he executed the bond, owed one Hanon the sum of \$4,000, with accruing interest from December, 1876, and still owed it to Hanon; that it had been reduced to a judgment, and presented for payment as a claim against the estate of said Thomas Monteith, and that more than six months had elapsed since the presentment, and no objections had been made to it; and claimed that thereby his interest as assignee in the premises was prior to any interest of the appellant therein. D. B. Monteith in his answer denied that his interest or claim in the premises was subsequent or subject to that of the appellant, or of the said Estelle M. Howard, or that it was acquired with any knowledge or notice of any interest of the appellant, except that he had knowledge of the giving of the bond set forth in the complaint, and that Estelle M. Howard refused to pay said note or any part thereof, except \$30; and he further alleged in his answer that, before the assignment of the note by Thomas Monteith to the appellant, he executed, with the said Thomas Monteith as surety only, for the sole use and benefit of said Thomas Monteith, four certain promissory notes,—one of them, January 1, 1883, for \$5,000, with interest at 10 per cent. from date, payable one day after date; two of them, October 1, 1882, for \$6,000 each, with interest at the same rate, and payable one day after date; and the other on the same day, for \$5,600, bearing the same rate of interest, and payable the same time; that to secure him against payment of said notes the said Thomas Monteith and wife, on the second day of February, 1884, before the assignment of the note to appellant, executed, under their hands and seals, a mortgage on certain premises therein described, which included said lots; that said mortgage was duly acknowledged, so as to entitle it to record, and the same was on the eleventh day of February, 1884, duly recorded in the office of the clerk of the said county of Linn; that, the conditions in said mortgage having been broken, he, said D. B. Monteith, commenced a suit in said circuit court against said Thomas Monteith to foreclose it; that he obtained a decree at the October term, 1884, of said circuit court foreclosing said mortgage, and directing the sale of the mortgaged premises, including the lots in question, to satisfy the sum of \$19,002.20, and interest thereon, the amount adjudged to be due the said respondent from the said Thomas Monteith, besides costs, which decree remained in full force.

The case was heard upon these pleadings, and the court decreed a dismissal of the complaint, which is the decree appealed from.

The appellant's counsel contends that the effect of the bond executed by Thomas Monteith to Estelle M. Howard transferred the title in equity to the lots from the former to the latter; that he held the legal title merely as a security for the payment of the note; and that when he transferred the note to the appellant, it entitled the latter to the benefit of the security; that the transaction between said Monteith and Estelle M. Howard was, in effect, a mortgage in favor of the former upon the premises in question, to secure the purchase money; and that when the note was transferred it was as effectual to transfer the security as the assignment of a note secured by a mortgage would be to transfer the mortgage.

It occurred to me upon the hearing that said counsel's position was entirely correct in principle, and I still am of that opinion; but, conceding this to be true, what security had Thomas Monteith, growing out of the transaction, to transfer, when he assigned the note to the appellant? He had at the time executed the mortgage to said D. B. Monteith for about \$19,000, which covered the premises in question. That mortgage certainly extended to the security he held against the lots, and, it seems to me, put it out of his power to enforce it to the extent claimed herein. He could not, on said fifth day of February, 1884, at the time he assigned the note to appellant, have gone into a court of equity, and charged Estelle M. Howard personally,—could not have claimed a decree against her for the debt,—for he had put it out of his power to comply with the conditions of his bond. He was not in a condition to execute to her a good and sufficient deed to the lots, and could not equitably require her to pay the debt. Again, he could not resort to the security, as he had pledged that to D. B. Monteith, except in subordination to the rights of D. B. Monteith under the mortgage he had executed to him. And if Thomas Monteith were not in a situation to foreclose the security arising under the bond and note as mentioned above, how can the appellant claim to be invested with the right? The note assigned to him was past due when he received it, and, of course, he must have taken it subject to all the equities existing against it. He could not claim any greater right in the premises than his assignor had, and the latter could not, certainly, have cut out the mortgage he had executed. If Thomas Monteith had, prior to the assignment of the note to the appellant, conveyed away the lots in question by deed of conveyance to an innocent purchaser, no one would contend that he could have them appropriated to the payment of the note, or enforce its payment in equity; and, had he attempted to enforce its payment at law, a court of equity would have restrained him under such circumstances. And it appears to me that he occupied no more favorable position in having placed a \$19,000 mortgage upon the lots than if he had sold them outright. He could not have made a deed to them that would have been worth a cent, and upon no principle of equity could he have compelled Estelle M. Howard to pay for them, unless he were in a condition to fulfill the obligation which his bond to her imposed upon him. Unless, therefore, the appellant has acquired a superior right to that of Thomas Monteith, he has no standing in a court of equity, and I fail to perceive how he can have secured any greater right than the former had to enforce the payment of the note as a personal claim. If the note had been transferred to him for value before its maturity, and the record did not disclose any conveyance of or incumbrance upon the lots at the time, he might have occupied a more favorable position than he does now; but receiving a dishonored note, under such circumstances, would not, as I can see, afford a party any advantage as against the maker that the payee did not enjoy. In that particular he would stand in the latter's shoes.

I have not considered the effect of the debt to Hanon, and its reduction to a judgment, as important, for it does not appear when the judgment was obtained, nor the assignment to Strahan for the benefit of creditors, as that was made after the assignment of the note to appellant; yet I am not prepared to say that they were not circumstances that would interfere with the appellant's right to the relief claimed, though they might not affect his right to subject the lots to the payment of the note. I think, beyond question, that the appellant took the note, and the rights incident thereto, subject to the mortgage to said D. B. Monteith. The mortgage, it is true, was not then recorded,—was not recorded until the eleventh day of February, 1884, nine days after it was executed, and six days after the assignment of the note; but the note being past due at the time it was assigned, was a sufficient circumstance to put the appellant upon inquiry when he took it. I think it, therefore, beyond question that the appellant's right under the assignment was

subordinate to that of D. B. Monteith under his said mortgage, though the mortgage was not recorded until after the assignment was made. But I cannot see any reason why the right under the assignment should not take precedence to that made to Strahan for the benefit of his creditors. It had then vested in the appellant, and it was not in the power of Thomas Monteith to divest himself of it. If Hanon's judgment had been docketed at the time, it would have been a lien upon the lots, and would have vested in him the right to have had them applied, subject to the rights of Estelle M. Howard, to the payment of it; but that fact does not appear, nor has there been any neglect shown upon the part of appellant forfeiting his right. There was no record notice of it, nor could there have been. It was not of such a character that it could have been recorded, and the recording act does not extend to such transactions. *Fash v. Ravesies*, 32 Ala. 451. This may be of no practical benefit to the appellant, as the D. B. Monteith mortgage may effectually extinguish it; but it was a lien upon the lots, and entitled the appellants to a decree enforcing it, as against them, subject to the lien of the said mortgage. The appellant was entitled to a decree of that character, but not to any personal decree, as against the said Estelle M. Howard. Such decree should be entered herein, and the decree appealed from be modified in accordance with this opinion.

LORD, C. J., concurs in the result. STRAHAN, J., did not sit in this case.

NOTE.

VENDOR AND PURCHASER—BOND FOR DEED. The purchaser, under an executory contract for the sale of land, is the equitable owner. *Alpers v. Knight*, (Cal.) 8 Pac. Rep. 446; *Taylor v. Holmes*, 14 Fed. Rep. 498; *Martin v. Carver*, (Ky.) 1 S. W. Rep. 199; *Bartle v. Curtis*, (Iowa.) 26 N. W. Rep. 73. Any accidental loss accruing between the time of his purchase and the conveyance of the legal title must be borne by him, and he is entitled to all benefits. *Martin v. Carver*, (Ky.) 1 S. W. Rep. 199. The vendor retains the legal title until the purchase money is paid, *Coolbough v. Roemer*, (Minn.) 15 N. W. Rep. 869; *Wells v. Baldwin*, (Minn.) 10 N. W. Rep. 427; and holds it as trustee for the vendee. *Taylor v. Central Pac. Ry. Co.*, (Cal.) 8 Pac. Rep. 438; *Taylor v. Holmes*, 14 Fed. Rep. 498.

(14 Or. 22)

POWELL and others v. WILLAMETTE R. Co. and others.

(*Supreme Court of Oregon*. October 20, 1886.)

1. **ESTOPPEL—APPELLATE COURTS—RE-EXAMINATION OF POINTS FORMERLY DECIDED.**
The legal propositions which have been decided in a former appeal, whether correctly decided or not, are the law of the case, and will not be re-examined on a subsequent appeal in that case.

2. **APPEAL—JURISDICTION—LEAVE TO ANSWER OVER.**

It is not properly within the appellate jurisdiction of the supreme court, if it sustains a demurrer, to give leave to answer over. In case, therefore, this court makes no final disposition of the case, but remands it to the court below, it will be open for that court to determine, in the first instance, whether the defendant shall be permitted to answer or not.

Appeal from Multnomah county.

STRAHAN, J. This cause was here on appeal at the last March term of this court, and the same was remanded for further proceedings. The questions presented on this appeal were then argued and considered by the court, and the general principles of law applicable to the pleading demurred to were stated. *Powell v. Willamette Val. R. Co.*, 13 Or. —; S. C. 11 Pac. Rep. 222. At that time this court sustained the demurrer to the complaint for the particular objections that were pointed out, and the only question open for consideration on this appeal is whether or not the amended complaint has obviated their objections, and we are of the opinion that it has. Upon all the other questions presented—and they are numerous—the former opinion of

this court is the *law of the case*. In *Page v. Fowler*, 37 Cal. 100, the rule of law that precludes the re-examination of legal propositions, once settled by the appellate court in the same case, is thus stated: "The legal propositions which arose and were decided on the former appeal, whether they were correctly decided or not, have become the law of the case, so far as they are applicable to the facts developed on the second trial. There would be no end to the litigation, if the same question in the case, once decided by the appellate court, were open to examination on every succeeding appeal." To the same effect is *Lucas v. City of San Francisco*, 28 Cal. 591; *Polak v. McGrath*, 38 Cal. 666; *Pico v. Cuyas*, 48 Cal. 639. From these views, it results that the decision of the court below in overruling the demurrer to the amended complaint was right.

The appellants' counsel suggested at the hearing that, in case the decision overruling the demurrer should be sustained by this court, the appellants should be given leave by this court to answer over. The practice in such cases has never been settled. This court in some cases has granted such leave, but we have concluded that it would be more consistent with the authority and jurisdiction of this court, as established by the constitution and laws of the state, that such application should be made in the court below, leaving this court to exercise only an appellate jurisdiction, in case the lower court should abuse the discretion confided to it. We therefore announce it as a rule of practice in such cases that, whenever the court does not make a final disposition of the cause, but remands the same to the court below, it will be open for that court to determine, in the first instance, whether the defendant shall be permitted to answer or not. This discretion, of course, is a judicial discretion,—not arbitrary,—and is always to be exercised in furtherance of justice. This cause will therefore be remanded to the court below for such further proceedings as may be proper. *McDonald v. Cruzen*, 2 Or. 259.

(All concur.)

(14 Or. 66)

WELLS and others v. NEFF and others.

(*Supreme Court of Oregon. June 29, 1886.*)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER—EQUITIES—NOTICE.

The *bona fide* purchaser of real estate for a valuable consideration buys it free from equities of which he had no notice.

2. SAME—HOLDER OF EQUITIES ESTOPPED BY PERMITTING PURCHASE.

Such a purchaser cannot be charged with the equities of one who stands by and sees him purchase, without giving him notice of his equities.

3. SETTLEMENT—MISTAKE—WHAT MISTAKES WILL NOT AFFECT.

A voluntary settlement will not be disturbed for any ordinary mistake, either of law or fact, in the absence of conduct otherwise inequitable, since its very object is to settle all such possible errors without controversy.¹

Sidney Dell and Chas. Gardner, for appellants. *B. Killin*, for respondent Wells. *T. V. Holman*, for respondent Budd. *J. W. Whally*, for other respondents.

LORD, J. This is a suit in equity for the partition of certain lands known as the Marcus Neff donation land claim, in which the plaintiffs and defendants were interested as tenants in common. Without advertizing to much preliminary matter now unnecessary for the consideration of the case, it is sufficient to say that the object of the answer of the Neffs, and the evidence they produce to support it after issue joined, was to establish their equitable ownership to the respective portions of the land claimed by each and all the

¹See *Zimmer v. Becker*, (Wis.) 29 N. W. Rep. 228; *Wells v. Neff*, *post*, 88.

other parties to the suit, and to have the deeds held by them, respectively, to the same, set aside and canceled, and declared to be null and void. The cause was referred to a referee to take the testimony, and report the finding of facts and conclusions of law, which resulted adversely to the Neffs. Subsequently, upon the report of the referee coming up before the court below on motions of the respondents to confirm, and the exceptions thereto of the appellants, the court, after argument and advisement, confirmed the report of the referee, and rendered the decree herein, from which this appeal is taken. In the course of the argument of the appellant, the court being satisfied that no case was made against Whalley, Fechheimer, and Page, the suit was dismissed as to them; but, not being so satisfied as to the other respondents, ordered the argument to proceed as to them.

The case is almost purely one of fact. The record is quite voluminous, involving many and various transactions, covering a period of more than 10 years last past. It would not be possible, without very much embarrassing the length of this opinion, to point out all the particular matter in detail upon which our conclusions rest, nor shall we attempt it. All that we propose to do is to state the result, which the very able argument of counsel, together with our examination of the evidence, has enabled us to reach.

And first, as to the respondent George F. Wells. His interest in the property comprised the interest in the Neff claim of George Neff and Mary A. Lousignont, (Neff,) children of Marcus and Margaret J. Neff, and the life-interest of Margaret J. Neff. As to these interests, it is not disputed but that the respondent Wells paid a valuable consideration to each of the parties of whom he made the purchase; nor are any of the parties of whom he made the purchase, except the appellant Margaret J. Neff, parties to the suit, or making any charges of unfairness or want of good faith in the several transactions; and the only inquiry in respect to the respondent Wells is whether he was a *bona fide* purchaser.

The evidence shows that, while Wells was negotiating with Mrs. Neff for her life-lease, she knew that he was at the same time negotiating with George and Mary for the purpose of purchasing their respective interests in the land which they held by deeds from the appellants, and that his object in purchasing her interest was, in the event he concluded the bargain with George and Mary, to have the property free from that incumbrance, so as to make it available for the purposes of speculation and sale, and to enable him to give a clear title to purchasers. During all the time this negotiation was proceeding, and while thus understanding that Wells did not wish to purchase any of the different interests held by them, unless he could have a clear title, Mrs. Neff neither represented nor made any claim to the respective interests held by George and Mary, but, we think, by her acts and conduct, led him to believe that she had no such claim, and that the interests in the land of George and Mary were valid and *bona fide*; nor do we find any other circumstances calculated to put him on inquiry, or which impugn the good faith of his purchase. The consideration which he paid for the different interests amounted to nearly \$10,000; and, taking the testimony altogether, we are of the opinion he made the purchase in good faith, and without notice of any outstanding equities. The result is that the decree must be affirmed as to him.

We now come to the contention between the appellants and the respondent Budd. His interest in the land was derived from the appellants by deed duly executed by them, the alleged consideration for which was services rendered as an attorney, and money advanced. This deed is claimed to be without consideration, and fraudulent. It appears that while the appellant resided in Stockton, California, where the respondent Budd then and now resides, the father of Margaret J. Neff died, leaving certain property to her children; and that, upon her application, the respondent Budd was appointed their

guardian. The names of these children were Nancy, George, and Mary. In May, 1875, Nancy became of age; and the respondent Budd, after having paid over and delivered to her all the property he had received as the guardian of her estate, filed his account, and was, by a decree of the probate court, discharged from his duties and obligations as such guardian. Subsequently the appellants executed to their daughter, Nancy Neff, a deed to one-sixth of their interest in the donation land claim in Oregon. On the fourteenth day of February, 1877, Nancy Neff made a will, whereby she bequeathed and devised all of her property to the respondent Budd; and on the fifteenth day of February, 1877, she died, leaving property in the city and county of San Francisco. And thereafter, in March, 1877, the said last will was duly admitted to probate under the laws of California, and by the probate court of said county; but no steps were ever taken to record such last will in Oregon, or other proceeding had to make it available against the property here. On March 18, 1878, the appellants executed a deed, for certain considerations alleged, to Mary Neff, George Neff, and the respondent Budd, to certain undivided interests in said donation claim, in which a life-lease was reserved for the benefit of Margaret J. Neff in the interests held by Mary Neff and the respondent Budd. This sufficiently states the interest which the respondent Budd held in the land.

Thus matters stood until this suit was instituted for the partition of the respective interests of the parties, when the claim made by the appellants was set up in the answer to set aside the deeds held by the adverse parties to the suit. A great deal of testimony was taken in respect to the will of Nancy Neff, and to the matter of the alleged professional services and money advanced which constitute the consideration for the deed to the respondent Budd. But the chief defense relied upon is a settlement in which all matters between the parties were fully adjusted and liquidated. The number of acres to which the respondent Budd would have been entitled by the partition was about 67. But this was subject to the life-estate of Margaret J. Neff, appellant. By the settlement the respondent Budd transferred, by deed, to the appellants, all his interest in said claim in excess of 50 acres thereof, which was to be and remain his property, free and released from the life-lease of Mrs. Neff; and at the same time, as part of this transaction, the appellants by deed released and forever quitclaimed to Budd all their right, title, and interest, including the said life-lease to said 50 acres in said donation claim. And the referee found, which was confirmed by the court, that these deeds were executed freely and voluntarily by each of the parties therein named, and that the deed from the appellants to the respondent Budd was not obtained by fraud or misrepresentation.

The evidence shows that the will in favor of the respondent Budd, whatever the rights to which he may have been entitled under it, and all other matters of difference between the parties, were included in this settlement. In a word, that it was intended to be a full and complete settlement of all differences and questions of property rights between them. It is claimed, however, that the appellants were led into this settlement by misrepresentation in respect to the will. There is no doubt but that compromises of doubtful rights, or voluntary settlements between parties, which are characterized by good faith and a full disclosure of all the facts, are favored by the courts.

Mr. Pomeroy says: "Voluntary settlements are to be favored; that if a doubt or dispute exists between the parties with respect to their rights, and all have the same knowledge, or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by them in their agreement may not be that which the court

would have decreed had the controversy been brought before it for decision. Of course, there must not only be no misrepresentation, imposition, or concealment; there must also be a full disclosure of all material facts within the knowledge of the parties, whether demanded or not by the others. In the words of a distinguished judge: 'There must not only be good faith and honest intention, but full disclosure; and without full disclosure honest intention is not sufficient.' If these requisites of good faith exist, it is not necessary that the dispute should be concerning a question really doubtful, if the parties *bona fide* consider it so. It is enough that there is a question between them to be settled by their compromise." Pom. Eq. Jur. § 850.

The evidence shows that, after the answer for the appellants was drawn, the leading counsel, Mr. Dell, sought and procured an interview with the respondent Budd, and made known the contents to him, for the purpose, it would seem, of affording Budd an opportunity, if he desired it, to effect a settlement without litigation. The result of this interview was an agreement that the parties should meet at Dell's office at 4 o'clock, when all matters of difference could be submitted and discussed with a view to an amicable and satisfactory settlement. At or about the time appointed, the appellants were present with their attorney, Mr. Dell, and the respondent, who is also a lawyer, with his attorney, Judge Woodward, when, after considerable discussion, a satisfactory arrangement was effected, which resulted in the interchange of deeds, as above stated. The testimony in respect to these interviews, what was said, and what took place as heard and seen, is fully set forth in the record, as testified to by those who were present. In some respects there is a conflict in the testimony, probably more particularly as to what occurred, and what was the understanding at the first interview. But this was more of a preliminary character, and not irreconcilable with the after result. As Mr. Dell had prepared the answer of the appellants, we must suppose that he was conversant with the facts by which it was expected to be sustained; and, as to the will, that he knew the law as to its validity as well as Budd, and was therefore well equipped to advise and protect his clients, and not liable to accede or accept any settlement that did not secure a just and proper recognition of their rights and interests.

The evidence shows, too, that Budd had never attempted to perfect his rights under the will, so far as the property in this jurisdiction was concerned; and he seems to have referred to the matter more to show that he had a further and another distinct claim to a portion of the property, quite liable, it is true, to be contested whenever he should attempt to establish such rights, but which he was willing to throw in and abandon in order to facilitate and bring about a full and complete adjustment and settlement of all matters in dispute, and to prevent further litigation. And where parties meet, as here, for the purposes of a settlement, and to avoid litigation, courts of equity are strongly inclined to favor and uphold such compromises or settlements when effected. And it is said that they will not be disturbed for any ordinary mistake, either of law or fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without judicial controversy. Looking at much matter which has come into this record, in the absence of the settlement, it probably would wear a different aspect, and compel us to regard it in a different light than we do now, in adjusting the rights and equities of the parties; but it seems to us that one of the principal objects which induced the respondent Budd to compromise and settle, and put an end to all controversy, was the exclusion of this very matter, which otherwise would necessarily be involved in the case. In view of all the facts, we are inclined to think that the settlement must be upheld, and that the decree of the court below must be affirmed in all matters and things, except that the respondent Budd shall not be entitled to recover costs and disbursements in either court.

WALDO, C. J., was of opinion that the will of Nancy Neff, of February 16, 1877, was void by reason of the nonage of the testatrix; and that, the extent to which this fact might affect the decree as to the defendant Budd not having been considered by the counsel or the court, further argument should be had upon the point.

(14 Or. 66)

WELLS and others v. NEFF and others.

(*Supreme Court of Oregon. November 2, 1886.*)

1. **CONFLICT OF LAWS—WILL—COLLATERAL ATTACK—JUDGMENT OF SISTER STATE.**
A will duly proved, and adjudged to be the last will of the deceased, in a sister state, cannot be collaterally attacked in Oregon.¹
2. **SETTLEMENT—REPUDIATION—CONDITION PRECEDENT.**
A party seeking to repudiate a settlement must tender all the advantages it may have given him.²

For opinion on former hearing, see *ante*, 84.

PER CURIAM. The opinion heretofore filed in this cause disposed of every question presented, but, in a petition filed for a rehearing by counsel for the appellants, it was insisted that the court had not given full effect to the evidence in their favor touching the alleged settlement with Budd referred to in their answer. For the purpose of hearing further argument on this point, a rehearing was ordered, and, the cause having been again argued as to whether Budd was guilty of fraud in procuring that settlement, we will now briefly state our conclusions thereon.

The settlement occurred in the office of Mr. Dell, attorney for the appellants, on May 26, 1883, and at the time the same was concluded, and the deeds exchanged, there were present the defendant and J. H. Budd, Judge Woodward, Marcus Neff, Margaret J. Neff, and Sidney Dell. By the terms of that settlement, Budd was to have 50 acres of the Neff claim, under the deed of March 18, 1878, the same to be discharged from a life-estate of Margaret J. Neff therein, and to be set apart to him in the then pending partition suit, and he was to release and convey to Margaret J. Neff all of his interest, if any, in the residue of the Neff claim, and the necessary deeds were executed and delivered at the time to carry the same into effect. By the deed of March 18, 1878, referred to, Marcus Neff and Margaret J. Neff had conveyed to the respondent Budd and to Mary A. Neff and George Neff all their interest in the Neff donation land claim. For the purpose of setting this settlement aside, it is attacked by the answer of Marcus Neff and Margaret J. Neff for fraud in its procurement. The fraud consisted in the claim of Budd to an interest in the Neff donation land claim of a one-sixth part thereof under and by virtue of a will of Nancy Neff, deceased, made in favor of Budd. It is also claimed that the will was invalid; that Budd knew it at the time of the settlement, and that the respondents did not know it; and that Budd omitted to tell the facts showing its invalidity at the time of the settlement. The will of Nancy Neff was filed for probate in the superior court of the city and county of San Francisco on the thirteenth day of March, 1877, and such proceedings appear to have been thereafter regularly taken in the matter, until on the twenty-seventh day of March, 1877, it was duly proven in said court, and adjudged to be the last will of Nancy Neff, deceased. These facts fully appear from a certified copy of the proceedings had in said matter, now before us. It does not appear that this will has been probated in this state, but, with this record and judgment before us, we cannot say that it is not the will of Nancy Neff, deceased. It is the judicial record of a sister

¹ As to the conclusiveness of a judgment of a court of another state, see *Lewis v. Adams*, (Cal.) 11 Pac. Rep. 838, and note.

² See *Zimmer v. Becker*, (Wis.) 29 N. W. Rep. 228, and note; *Wells v. Neff*, *ante*, 84.

state, and it is entitled to full faith and credit, under the constitution and laws of the United States. The validity of a will executed in another state cannot be tried in this collateral manner. It has become a judicial record in the state where it was proven and filed, and it must receive full credit here.

But it is charged that this will was forged, and that the respondent Budd was a party to the forgery. This was stated in the argument by counsel for the Neffs, but we have sought diligently for evidence to support it; it is not in the record. Presumptively, all of the transactions of these parties were fair and honest, and the settlement in question was fairly made. Whoever alleges otherwise must support that allegation by a preponderance of evidence. Fraud is never presumed. Taking all that is testified to by Dell and Budd at the 12 o'clock meeting in Dell's office, when Dell and Budd only were present, and all that occurred at the 4 o'clock meeting at the same place, when Judge Woodward, Marcus Neff, and Margaret J. Neff were also present, and when the settlement in question was finally consummated, and we fail to find in it any evidence whatever of fraud on the part of Budd. Dell has given his version of it, but we would hardly be justified in accepting his statements without any qualification, and rejecting the others. The Neffs must produce evidence which is stronger,—in other words, make a better case than Budd; and if they have not done this, under well-settled principles of law, they must fail. And this, in our judgment, they have failed to do.

There is one other question that appears upon the face of the answer of the Neffs, and that is, they have not tendered back to Budd a deed for any interest they may have derived from him in the Neff claim by the terms of the settlement. They could not repudiate the settlement, and at the same time hold on to any advantages it may have given them. "He who seeks equity must do equity." Having determined that the settlement is unimpeached, we decide this case solely upon that ground, though the objection last stated would be alike fatal to the respondents' case. A party prevailing in this court in a suit is entitled to his costs, unless, for special equitable reasons presented by the case, we should order otherwise, and this, we think, we ought not to do here, no such reasons appearing.

The decree of the court below will be affirmed, with costs; and it is so ordered.

(14 Or. 47)

BALFOUR and others v. DAVIS and others.

(*Supreme Court of Oregon. October 28, 1886.*)

1. USURY—USURY AS A DEFENSE—PLEADING—EVASION OF LOCAL LAWS.

An allegation that the note was made payable in S. F., in another state, for the purpose of fraudulently evading the local usury laws, is bad, as not alleging any agreement between the parties to make it payable where it was made payable for any fraudulent purpose.

2. SAME—FOREIGN STATUTE.

To sustain an allegation of usury under the laws of a foreign state, the foreign statute must be pleaded as a fact, and such facts must be alleged as bring the case within the law.

3. SAME—WHAT CONSTITUTES.

Four things are essential to a usurious contract: (1) A loan, express or implied; (2) an understanding between the parties that the money lent shall be or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned.

4. MORTGAGE—FORECLOSURE—COSTS AND FEES—STIPULATION FOR ATTORNEY'S FEE—VOID AS UNCONSCIONABLE.

The court will not enforce an unconscionable allowance for attorney's fees in a mortgage, and, being unauthorized to make a new contract for the parties, will make no allowance therefor.

W. T. Burney and J. V. Beach, for appellants, Davis and others. *E. C. Bronough*, for respondents, Balfour and others.

STRAHAN, J. This is a suit commenced to foreclose a mortgage on certain real property in Multnomah county. The mortgage was made to secure a promissory note dated November 29, 1882, which note was due two years after date, and was made payable at the city of San Francisco, California, and provided for the payment of interest half yearly, on the first days of June and December of each year, and, if the interest was not paid when due, to be compounded by being added to the principal, and becoming a part thereof. The rate of interest specified in the note was 9 per cent. The mortgage provided, in substance, that said G. H. Davis should pay, as soon as due, all taxes, assessments, and incumbrances whatsoever, which may be and appear to be a lien upon the mortgaged property, or any part thereof; and will keep the buildings erected thereon insured against fire to the amount required by the plaintiffs, or their assignee, in gold coin, in such insurance companies as shall be specified by the plaintiffs; and that if such taxes, assessments, or incumbrances be not so paid, or such buildings so insured, and the policies so assigned, then the plaintiffs may pay such taxes, assessments, or incumbrances, and be the sole judge of the legality thereof, or may obtain such insurance in their own name, as mortgagees, and all taxes paid therefor shall be secured by said mortgage, and shall be repaid by said G. H. Davis on demand, and shall bear interest from the date of the payment at the rate of 10 per cent. per annum, and be compounded monthly until paid; and that any default in repayment of such sums when demanded should, at the option of plaintiffs, render said whole mortgage immediately due and payable. The mortgage further provides, in substance, that, in case any action should be brought to foreclose said mortgage, counsel fees at the rate of 20 per cent. upon the amount due should be allowed and paid, whether judgment be recovered or not, as also such sum as may have been paid for searching the title of the mortgaged property since the date of the record of said mortgage.

The main questions presented for our consideration arise upon the answers of the defendants W. T. Burney and others, and the separate answer of the defendant G. H. Davis.

The answer of Burney and others is substantially as follows: That defendant G. H. Davis executed and delivered to Burney his two certain promissory notes on the first day of November, 1883, for the payment of \$500 each, within one year, with interest at 10 per cent. per annum from date, and reasonable attorney's fee, if collected by suit or action, and also his certain second mortgage on the same land as respondents' mortgage, to secure the payment of said notes; that appellant Burney's notes and mortgage were assigned to said bank on the first of March, 1885, as collateral security for the loan of \$800, and interest at 10 per cent. per annum on note indorsed by defendants A. J. Knott and H. Clay Meyers, which had not been paid. "These defendants, further answering herein, deny that they have any knowledge or information sufficient to form a belief whether said sum has been paid to plaintiffs or not, or as to whether plaintiffs have paid the sum of \$12.48, or any sum, on the twenty-ninth day of March, 1884, or at any time, or the sum of \$14.08, or any sum, on the twenty-third day of May, 1885, or at any time, or any sum, as road tax, on the seventeenth day of July, 1885, or whether plaintiffs have paid any sum, at any time, as taxes, or otherwise."

The separate answer of the defendant Davis is as follows: Admits the execution and delivery of the note and mortgage alleged in complaint, but denied that said note was to be paid in the state of California, or elsewhere than in the state of Oregon; and alleges that, as to that fact, said note was made payable upon the face thereof in said state for the purpose of fraudulently evading the usury laws of the state of Oregon, where this defendant

resides, and where plaintiff's business is carried on; and this defendant further alleges that said note was executed and delivered to the plaintiffs upon the following usurious agreement, to-wit: "That plaintiff would loan to the defendant the sum of \$1,200 on the twenty-ninth day of November, 1882, to be paid in two years, with interest thereon at the rate of nine per cent. per annum, payable half yearly, on the first day of June and December, and, in default thereof, the same to become compounded, by adding the amount of said interest, and the whole thereafter drawing interest as principal, and the further sum of all taxes assessable in Oregon upon the mortgage securing said note, and upon the debt thereby secured, which taxes aggregate the sum of two per cent. per annum, said taxes to be paid to plaintiffs on or before the first day of March of each year; that said amounts were to be paid, and the further sum of \$25.75 was retained by plaintiffs, of said sum of \$1,200, *as interest* upon said loan, and not otherwise; and that the aggregate of all said sums amount to a higher and greater rate of interest than ten per cent. per annum upon the said loan, that being the highest rate of interest by the laws of Oregon allowed to be contracted for; and all said sums were contracted to be paid for the use of said sum so to be loaned plaintiffs by defendant, pursuant to the agreement upon which said note was executed." Defendant, further answering herein alleges that said mortgage referred to in the second amended complaint herein was made, executed, and delivered upon the following usurious contract, to-wit: "That the same was made, executed, and delivered for the purpose of securing the payment of said note pursuant to its terms, and the said sums therein provided for, to the plaintiff, and thereby plaintiffs contracted to receive, and this defendant to pay, as interest, and for the use of said sum of \$1,200, the following sum, viz., nine per cent. per annum upon \$1,200, payable half yearly upon the first day of June and December, and, in default of the payment when due, then said interest to be compounded, by being added to the principal, and thereafter drawing the same rate of interest as principal; also the sum of all taxes assessable in Oregon upon the said mortgage, and upon the debt thereby secured, and all taxes, assessments, and incumbrances whatsoever which may be, or appear to be, liens on the property described in said mortgage, or any part thereof; and if said taxes, assessments, or incumbrances be not so paid then the plaintiff should pay the same, and be the sole judge of the legality thereof, and all sums paid therefor should be secured by said mortgage, and paid by this defendant on demand, and, if not so paid, bear interest from date of payment by plaintiffs at the rate of ten per cent. per annum, and to be compounded monthly until repaid; also the further sum of \$25.75 retained by the plaintiffs; that the sums so contracted to be paid for taxes as aforesaid amounted to more than two per cent. per annum, and that all of said sums, payable as aforesaid as interest, and for the use and in consideration of said loan of said sum, is and was a usurious agreement upon the part of this defendant to pay, and the plaintiffs to receive, a higher rate of interest for said money than ten per cent. per annum, that being the greatest sum then allowed by the laws of Oregon." The defendant denied the said conveyance was executed for, or intended to be, or was, a mortgage or lien upon said premises for any purpose other than to secure the payment of said sum of \$1,200, pursuant to the terms and conditions of said note. This defendant, further answering herein, alleges that said promise to pay by him to the plaintiffs said sum as provided in said mortgage as attorney's fees is and was without any consideration other than the loan of said sum, and that the amount is greatly in excess of the reasonable value of the services specified and required, and was inserted therein as a penalty, and is unconscionable and void, and does not constitute a lien upon said premises.

To this answer of Davis setting up new matter the plaintiffs demurred, for the reason that it did not contain facts sufficient to constitute a defense,

which demurrer was sustained by the court, and a final decree entered foreclosing said mortgage.

The first question presented for our consideration is the propriety of the ruling of the court below in sustaining the demurrer to the new matter in the separate answer of defendant Davis. The allegation in the answer as to the purpose of making the note payable at San Francisco is subject to two objections: (1) The answer does not allege an agreement or understanding between the parties at the time to make said note payable at San Francisco for any fraudulent or wrongful purposes, and the naked statement that it was so made is a conclusion not warranted by any issuable fact alleged. (2) If it was the design of the pleader to rely upon the usury laws of the state of California, he should have pleaded the statute of that state, and then alleged such facts as brought the case within the law. In such case we do not presume the laws of another state are like our own. Tyler, Usury, 459, and authorities there cited.

But, assuming the contract in question was to be executed in Oregon, is there enough alleged to present the question of usury? Tyler on Usury states the requisites of a usurious contract thus: "Thus it appears that, in order to constitute usury, there must be (1) a loan, expressed or implied; (2) an understanding between the parties that the money lent shall or may be returned; (3) that for such loan a greater rate of interest than is allowed by law shall be paid, or agreed to be paid, as the case may be; and (4) a corrupt intent to take more than the legal rate for the use of the sum loaned. Unless these four things concur in every transaction, it is safe to affirm that no case of usury can be declared, and this may be regarded as a rule universally recognized in all of the states." Tyler, Usury, 110. Applying these rules to the pleadings in question, its insufficiency is manifest, and the court did not err in sustaining said demurrer.

Objection is made by the appellants to the allowing of \$200 as attorney's fees in this suit for foreclosing the mortgage. That allowance was based on a provision in the mortgage providing for counsel fees of 20 per cent. on the amount due, in case of a suit, whether judgment should be recovered or not. In *Peyser v. Cole*, 11 Or. 39, S. C. 4 Pac. Rep. 520, this court considered the question of attorney's fees arising on contracts providing for reasonable attorney's fees, and sustained their legality; but we do not feel disposed to extend the doctrine there announced beyond the precise question then before the court. But the question there considered does not exclude the one at bar. We are therefore at liberty to consider it uninfluenced by anything that was said in that case.

The supreme court of Michigan has stated the law applicable to this class of cases thus: "So, parties contracting are not permitted to stipulate and fix the measure of damages that shall be recovered in case of a breach of the contract grossly in excess of what the damages should actually appear to be. Just compensation for the injury sustained is the principle at which the law aims, and the parties will not be permitted, by express stipulation, to set this principle aside. *Jaquith v. Hudson*, 5 Mich. 123. * * * To permit the parties to agree upon any attorney's fee they should think proper to insert in a mortgage, payable in full, whether much or little should be done towards the foreclosure thereof, would be in violation of the rule of just compensation, and contrary to well-settled principles of public policy. Parties may make and carry out any agreement they please which does not affect the public, or the rights of third persons; but, in case of dispute, they must not expect the courts to enforce any unconscionable bargain they may have thought proper to make. If the creditor can insert such a provision in a mortgage, and enforce performance thereof, why not insert a clause that, if the debt is not paid at maturity, for every letter he shall write to his debtor demanding the payment, and for every time he shall call on his debtor to demand pay-

ment, he shall receive a definite, fixed sum." *Myer v. Hart*, 40 Mich. 517.

Counsel for the respondents suggested, upon the argument, that if the court deemed the amount specified in the mortgage as attorney's fees to be unjust or unreasonable, that the same might be reduced to such sum as we might think, under all the circumstances, would be proper. This, in effect, is asking the court to make a contract for the parties that they have not made for themselves, and which we do not consider we are authorized to do. We must either enforce this contract as it appears, as to this item, or decline to enforce it. No allowance will therefore be made in favor of the plaintiffs for attorney's fees in this suit.

Appellants' counsel object to the items of \$12.48 and \$14.08 alleged by the plaintiffs to have been paid by them as taxes; but the payments are denied in the answer of appellants, and, no proof having been offered on the subject, these items cannot be allowed.

We have carefully considered *Burns v. Scoggin*, 9 Sawy. 73, S. C. 16 Fed. Rep. 734, and *Daly v. Mattland*, 88 Pa. St. 384, referred to by respondents' counsel, but we cannot assent to the doctrine therein announced touching a contract like the one now before the court. Of course, we are aware that the authorities on the subject are irreconcilable, and we might find authority for almost any view we might think proper to adopt. *Peyser v. Cole, supra*, has gone as far on the subject of allowing attorney's fees as is consistent with our views of the best-considered cases.

The decree of the court below will therefore be modified here, so as to disallow those two items claimed for taxes; also the \$200 claimed by plaintiffs as attorney's fees. The mortgages mentioned in the pleadings will be severally foreclosed, and the usual decree entered for that purpose; the plaintiffs to recover \$1,200 and interest, as claimed, and the First National Bank of East Portland and W. T. Burney the amounts claimed in the separate answer, to be paid from the proceeds of the sale after the payment of the amount due plaintiffs, and that the appellants recover costs.

(All concur.)

(35 Kan. 740)

ATCHISON, T. & S. F. R. CO. v. ROACH.

(Supreme Court of Kansas. November 5, 1886.)

1. CARRIERS—OF PASSENGERS—CONNECTING RAILROADS.

While a railroad company cannot be compelled to transport beyond its *termini*, it is well settled that it may lawfully contract to carry passengers and property, over its own and other lines, to a destination beyond its route, and when such a contract is made it assumes all the obligations of a carrier over the connecting lines as well as its own.

2. SAME—THROUGH TICKET—LIABILITY OF FIRST ROAD.

The sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful performance, and for all loss on connecting lines, the same as on its own.

3. SAME—LIABILITY OF EACH ROAD—NEGLIGENCE.

Each carrier is liable for the result of its own negligence, and, although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting lines, to whose negligence the loss or injury can be traced, will also be liable to the owner.

4. SAME—EVIDENCE OF THROUGH CONTRACT—RELATION OF ROADS.

The sale of a through ticket over the route formed by the connecting lines of several railroad companies, and the checking of baggage to the end of the route, without other evidence of the relations between the companies, or the basis upon which through business was done by them, fails to show such a community of interest as would make them partners *inter se*, or as to third persons; nor will such action alone make the last carrier liable for the negligence of the contracting carrier, or of any other carrier in the combination.

Error from Reno county.

Geo. R. Peck, A. A. Hurd, and W. C. Campbell, for plaintiff in error. *R. A. Campbell and H. Whiteside*, for defendant in error.

JOHNSTON, J. This action was brought by Michael Roach against the Atchison, Topeka & Santa Fe Railroad Company, to recover for baggage alleged to have been lost and injured while in transit from New York city to Hutchinson, Kansas. A verdict was given in favor of Roach for \$227.32, and judgment rendered accordingly. The railroad company brings the case here, and complains of the charge of the court, and of the insufficiency of the evidence.

The essential facts of the case may be briefly stated. On February 28, 1881, Roach purchased eight coupon tickets for the passage of himself and family from the city of New York to Hutchinson, Kansas, over the New York, Lake Erie & Western Railroad, Grand Trunk Railway, Michigan Central Railroad, Chicago, Burlington & Quincy Railroad, Hannibal & St. Joe Railroad, and Atchison, Topeka & Santa Fe Railroad. The tickets were purchased from one Henry Opperman, who had an office in New York, and who at the same time caused several pieces of baggage to be checked through to Hutchinson, using checks on which the names of the roads mentioned were stamped. As there was more baggage than could be carried on the tickets purchased, Roach was required to and did pay \$62.15 for extra baggage, and Opperman gave him duplicates of the checks, which he retained. The defendant in error and his family made the journey over the roads mentioned, and the tickets were honored and accepted for their passage, and the servants of the several companies detached the coupons or portions of the ticket that represented the passage money over the different roads. When the passengers reached Hutchinson, application was made for the baggage, and it was found that some of it had been lost, and portions of it badly injured. The testimony tended to show that the baggage was delivered to the first carrier in good condition, but on what road or roads the loss or injury occurred was not shown.

The plaintiff below sought to recover upon two theories: One, that Opperman, who sold the tickets, was the agent of the Atchison, Topeka & Santa Fe Railroad Company, and that that company undertook to carry the passengers and baggage over the entire route, and that, being the contracting carrier, it was liable for the loss and injury, regardless of where and upon what road it occurred. The other theory is that the several roads constitute a connected and united line, and that the combination and running arrangements existing among the owners of the roads were such as amounted, in effect, to a partnership; and therefore the injury and loss was a common liability, and each and all of the companies are liable, no matter upon what part of the line the loss occurred.

No recovery can be had upon the first theory, for the reason that the testimony wholly fails to establish that Opperman was the agent of the defendant company. Some of the witnesses for Roach spoke of Opperman as the agent of that company, while others stated that he was the agent of the New York, Lake Erie & Western Railroad Company. It was, however, developed, upon cross-examination, that they had no knowledge of his authority or agency, beyond his action in the sale of the tickets, and the checking of the baggage. Opperman testified that he was the authorized agent of the New York, Lake Erie & Western Railroad Company, and sold the tickets for, and as the agent of, that company; and that he did not represent, and was not the agent of, the defendant company. There was other testimony to the same effect; and also that when Roach purchased his tickets the defendant company had no tickets on sale in or about the city of New York.

The theory that the defendant company was the original contracting carrier finds no support in the testimony, and no liability arises against the

company on that ground. Where, then, is the liability? It is contended by the railroad company that the New York, Lake Erie & Western Railroad Company, being the first carrier, is alone liable. While a railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines, to a destination beyond its own route; and, when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own. In such cases the connecting carriers engaged in completing the carriage are deemed to be agents of the first carrier, for whose negligence and default the contracting carrier becomes liable. *Berg v. Atchison, T. & S. F. R. Co.*, 30 Kan. 561; S. C. 2 Pac. Rep. 639; *Lawson, Carr.* § 235; *Hutch. Carr.* § 145; *Thomp. Carr.* 431; 2 Rorer, R. R. 1234.

Of course, a railroad company, or other common carrier, may limit its liability to the loss or injury occurring on its own line, and the understanding or contract between the parties is to be determined from the facts of each case. Some of the courts have held that the mere acceptance of the property marked for transportation to a place beyond the terminus of the road of the accepting carrier amounts to an undertaking to carry to the ultimate destination, wherever that may be, and, in the absence of any conditions or limitations to the contrary, will make it liable for loss occurring upon the connecting lines as well as its own; while others hold that in such a case the carrier is only bound to safely carry to the end of its own route, and there to deliver to the connecting carrier for the completion of the carriage. *Lawson, Carr.* §§ 238-240. But where a railroad company sells a through ticket, for a single fare, over its own and other roads, and checks the baggage of the passenger over the entire route, more is implied, it seems to us, than in the mere acceptance of the property marked for a destination beyond the terminus of its own line. The sale of a through ticket, and the checking of the baggage for the whole distance, is some evidence of an undertaking to carry the passenger and baggage to the end of the journey. The contract need not be an express one, but may arise by implication, and may be established by circumstances, the same as other contracts. In Wisconsin a passenger purchased a through ticket from the Chicago & Milwaukee Railway Company from Milwaukee to New York city, and at the same time delivered her trunk to that company, and received therefor a through check to New York city. Upon arrival at New York, the trunk was found to have been opened, and some of the articles taken therefrom. The supreme court, in ruling upon the effect of the railway company issuing the through ticket and check, stated that "the ticket and check given by the Chicago & Milwaukee Railway Company implied a special undertaking by that company to safely transport and carry, or cause to be safely transported and carried, the plaintiff and her baggage over the roads mentioned in the complaint, from Milwaukee to the city of New York. This, we think, must, in legal contemplation, be the nature and extent of the contract entered into and assumed by that company when it sold the plaintiff the through ticket, and gave a through check for the trunk, and received the fare for the entire route." *Candee v. Pennsylvania R. Co.*, 21 Wis. 589; *Illinois Cent. R. Co. v. Copeland*, 24 Ill. 332; *Carter v. Peck*, 4 Sneed, 203; *Railroad Co. v. Weaver*, 9 Lea, 38; *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647; S. C. 3 Amer. & Eng. R. Cas. 246; 2 Rorer, R. R. 1001.

From the authorities, we conclude that the sale of a through ticket, for a single fare, by a railroad company, to a point on a connecting line, together with the checking of the baggage through to the destination, is evidence tending to show an undertaking to carry the passenger and baggage the whole distance, and which, in the absence of other conditions or limitations, and of all other circumstances, will make such carrier liable for faithful per-

formance, and for all loss on connecting lines, the same as on its own. The liability of the first carrier does not necessarily relieve the defendant company from responsibility. Each carrier is liable for the result of its own negligence; and although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting carriers to whose default it can be traced will be liable to the owner for the loss of his baggage. *Hutch. Carr.* § 715; *Aigen v. Boston & M. R. Co.*, 132 Mass. 423; *Railroad Co. v. Weaver*, 9 Lea, 39.

The defendant company cannot, however, be held liable upon that ground, because there is no evidence that the baggage was injured or lost while in the custody of that company, nor was it in fact shown upon what part of the route the injury or loss occurred.

The other theory upon which a recovery is sought is that the several connecting lines over which the baggage was to be carried should be treated as a continuous and united line, and that the arrangements made by the several lines for through traffic was such as to constitute them a partnership. There is a singular lack of testimony in the case, not only respecting the terms of the contract with the passenger, but also in regard to the relations existing among the several carriers. Not a word of testimony was introduced as to the running arrangements between the companies, nor the basis upon which through business was done. The practice or custom of the companies in the past was not shown, neither was there any proof that they had ever co-operated, or had done any through business, beyond the transaction in question. It was not even shown what the form of the tickets was, nor what were the stipulations, if any, printed on them. There was, in fact, no evidence upon which to predicate a theory of partnership, or that each of the companies was the agent of all the others, except the single transaction of selling the tickets and checking the baggage. It is doubtless true that arrangements are frequently made among railroad companies, whose lines connect for through traffic, which constitute them partners. Such an arrangement is greatly to the advantage of the companies. The convenience which it affords the public invites business, and swells the traffic of the companies engaged in the joint enterprise. These arrangements, among associated lines, render it difficult for the passenger or shipper, in case of loss or injury of his property, to ascertain where the loss occurred. But no such difficulty lies in the way of the railroad companies. They have the facilities and can easily trace the property to the company which caused the injury or loss. In interpreting the agreements and conduct of associated lines, engaged in a through traffic, public policy, and the inconvenience mentioned, should be considered, and they should be fairly and liberally interpreted towards the patrons of the lines, holding the companies, where it is admissible, under the rules of law, to a common liability as partners. But such arrangements for through traffic cannot be held to be a partnership unless there is a community of interest among the companies, and under which each shares the profits and losses of the enterprise. The mere sale of a through coupon ticket over the connecting lines of several companies, and the checking of the baggage to the end of the route, does not show such a community of interest as would make them partners *inter se*, or as to third persons. This question has been directly adjudged.

A through ticket was purchased for passage from New York to Washington over three lines of railroad which constituted a through line for the transportation of passengers and freight, and the passenger purchasing the ticket received a through check for her baggage. It appeared that the fare received for through tickets was accounted for by the company selling the tickets to the other lines according to certain established rates, but there was no division of losses; and it was held, in an action against the last carrier to recover for lost baggage, that the first carrier was liable for losses occurring

on its own line, as well as any other connecting line throughout the whole distance, but that the arrangement of the three companies for the sale of through tickets, and the issuance of through checks, while it resembled a partnership, did not constitute one, nor make any of the connecting carriers liable for a loss not occurring on its own line. *Croft v. Baltimore & O. R. Co.*, 1 McArthur, 492.

In *Hartan v. Eastern R. Co.*, 114 Mass. 44, it was ruled that arrangements between connecting roads forming a continuous line, for the sale of through coupon tickets, which enabled passengers to pass over all the roads without change of cars, did not imply joint interest, or joint liability.

In another case, where several carriers whose lines connected made an agreement among themselves to appoint a common agent at each end of a continuous line to sell through tickets and receive fare, it was held that this arrangement did not constitute them partners as to passengers who purchased through tickets, so as to render each of the companies liable for losses occurring on any portion of the line. *Ellsworth v. Tarr*, 26 Ala. 733.

A somewhat similar case was decided in New York. There a passenger purchased a through ticket from New York to Montreal, over several connecting lines of railroad, owned by several companies. The ticket was a strip of paper divided into coupons, whereof one was to be detached and surrendered to the conductor of each line on the route. The passenger, instead of giving his valise into the charge of the agent of the company, and receiving a check therefor, kept it in his own charge to the terminus of the line of the first carrier, where he delivered it to the agent of the connecting line, who checked it through to another point on the road. It appeared that an arrangement had been entered into between the various lines from New York to Montreal to connect regularly. Tickets were sold in New York for the entire route, or intermediate places, under the direction of a general agent, who was paid by the several companies. The rate of fare was different on the different roads, and each company received its own proportion of the whole fare or passage money at the close or at the beginning of every month, according to the established rates of fare. It was held that there was nothing in an arrangement like this to constitute the different companies partners for the transportation of passengers or baggage, so as to make one of them liable in common with the others for the loss of the valise. It was decided that "the arrangement may be beneficial to them as well as to the public, inasmuch as, by facilitating travel, it may tend to increase it; but that would not create that joint interest—that community in profit and loss—which is essential to the existence of a partnership." *Straiton v. New York & N. H. R. Co.*, 2 E. D. Smith, 184; *Hot Springs R. Co. v. Tripp*, 42 Ark. 465; S. C. 18 Amer. & Eng. R. Cas. 562; *Atgen v. Boston & M. R. Co.*, 132 Mass. 423; S. C. 6 Amer. & Eng. R. Cas. 426; *Darling v. Boston & W. R. Co.*, 11 Allen, 295; *Kessler v. Railroad Co.*, 61 N. Y. 538; *Irwin v. Railroad Co.*, 92 Ill. 103; *Insurance Co. v. Railroad Co.*, 104 U. S. 146; S. C. 3 Amer. & Eng. R. Cas. 260.

Among the cases relied on by the defendant in error is *Hart v. Railroad Co.*, 8 N. Y. 37. In that case the defendant, which was one of three railroad companies owning distinct portions of a continuous road, was held liable for the loss of the baggage of a passenger received at one terminus to be carried over the whole road. The liability was not, however, based alone upon the selling of the ticket and the checking of the baggage. In addition to through tickets, it appeared that, under the agreement made, each of the railroad companies ran its cars over the whole route, and employed the same agents to sell passage tickets. Besides these facts, it appeared that the lost baggage had been placed directly in charge of the servants of the defendant company, and that its loss was due in part to the negligence of that company.

Texas & P. R. Co. v. Fort, a decision by the commission of appeals of the
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state of Texas, reported in 9 Amer. & Eng. R. Cas. 392, is also relied on. There it is held that the delivery of through checks, upon which were stamped letters indicating the different railways over which the baggage would go, constituted a contract under which the several companies were liable, regardless of the line upon which the loss occurred,—a proposition to which we cannot accede. The decision in this case is based upon the ruling in *Hart v. Railway Co., supra*, which, as we have seen, was determined upon other considerations.

The same may also be said respecting *Texas & P. Ry. Co. v. Ferguson*, another decision of the commission of appeals of Texas, 9 Amer. & Eng. R. Cas. 395; as well as *Harp v. The Grand Era*, 1 Woods, 184.

The only other case relied on is *Wolff v. Central R. Co.*, 68 Ga. 653. It was there held that where a passenger, with a through ticket over a connecting line, checks his baggage at the starting point through to his destination, and, upon arrival there, found that it had been injured, he might sue the railroad company which issued the check, or the one delivering the baggage in bad order. Upon the facts in that case the court determined that the company selling the tickets was to be regarded as the agent of the other companies composing the line; and intimated that, where a passenger travels over a continuous line on a through ticket, and the baggage is sent on a through check, that any one of the companies may be held liable for spoliation of the baggage, irrespective of the point at which it actually occurred, and the query is also raised as to whether they are jointly liable as partners. The writer of the opinion held that by the sale of the tickets, and the division of the receipts at periodical settlements, they acted as principals, and not as agents, and that by such action they stood substantially in the position of partners in the through business, and were jointly and severally liable as such. The concurrence of the other justices was, however, placed upon the ground that as the last carrier, and the one which was sued, received the baggage in apparent good condition, it was presumably liable; and the chief justice stated that this was the exact point decided. It is difficult in many cases to determine whether the arrangements and agreements of connecting carriers are such as to constitute each of them principals, or to place them in the relation of partners; but neither upon reason nor authority can we hold that the sale of through tickets, and the checking of baggage over the connected lines of several companies, without other proof of their relations, or the basis upon which the business was done, is sufficient to make them jointly and severally liable as partners.

The instructions of the court not being in accord with the views herein expressed, and the evidence being insufficient to support the verdict, the judgment of the district court must therefore be reversed, and the cause remanded for another trial.

(All the justices concurring.)

(35 Kan. 700)

UNION PAC. RY. CO. v. FRAY.

(*Supreme Court of Kansas. November 5, 1886.*)

1. JURY—QUESTION OF FACT—DUTY OF EMPLOYEE.

Where a duty is imposed by a railroad company upon one of its employees, and afterwards another duty is assigned to him by his employer, without expressly relieving him from the performance of the first duty, the question whether the assignment of this second duty relieves him from the performance of the first duty is a question of fact, to be submitted to the jury upon the evidence, and is not a question of law.

2. EVIDENCE—CONVERSATION OF EMPLOYEES AS TO PAST TRANSACTION.

A conversation between two employees of a railroad company concerning a past transaction is incompetent evidence, as against the railroad company, to prove such transaction.

3. JURY—QUESTION OF FACT—DUTY OF EMPLOYEE.

In an action brought by an employe against a railroad company for injuries resulting from alleged negligence, evidence was introduced tending to show that a duty was imposed by the railroad company upon such employe, and afterwards another duty was assigned to him by his employer, without expressly relieving him from the performance of the first duty, and he could not act in the performance of both duties at the same time; and evidence was also introduced tending to show that he might have performed both duties by attending to one, and then to the other, alternately; and that he failed in the performance of one of such duties; and that, by reason of such failure, the injury for which he sued the railroad company resulted. *Held*, that an instruction by the court to the jury, in substance, that if, at the time of the injury, the plaintiff was in the discharge of the duty which he in fact performed, he might recover, notwithstanding the fact that he failed to perform the other duty, is misleading and erroneous.

4. TRIAL—SPECIAL VERDICT—INSTRUCTIONS.

Where special questions of fact are submitted to the jury for their answers, it is erroneous for the court to instruct the jury that, "in case no evidence can be found bearing upon the question required to be answered, the jury will say, 'Don't know'; or, 'Cannot answer from the evidence.'"

5. SAME—ANSWER OF JURY.

In such a case, where the jury answer eight of such questions by simply saying, "Don't know," and the questions are material, and there was some evidence introduced on the trial applicable to all of them, and the court refused to require the jury to answer these questions in a proper manner, *held* error.

Error from Wyandotte county.

J. P. Usher and *Charles Monroe*, for plaintiff in error. *R. P. Clark* and *N. Cree*, for defendant in error.

VALENTINE, J. This case has once before been in this court. *Union Pac. Ry. Co. v. Fray*, 31 Kan. 739; S. C. 3 Pac. Rep. 550, and 15 Amer. & Eng. R. Cas. 158. After the former decision, the case was returned to the district court, where it was again tried, before the court and a jury, and the jury found a general verdict in favor of Fray, who was the plaintiff below, and against the railroad company, which was the defendant below, and assessed the damages at \$4,000, and also made several special findings of fact; and upon this general verdict, and these special findings of fact, the district court rendered judgment in favor of Fray, and against the railroad company, for the amount of the general verdict, and costs; and the railroad company, as plaintiff in error, again brings the case to this court, and again seeks a reversal of the judgment of the court below.

The evidence introduced on the second trial is very similar to that introduced on the former trial. There are some differences, however, which we may mention as we proceed with this opinion.

The foundation of the plaintiff's action is the alleged negligence of the defendant railroad company in failing to provide and maintain a safe and sufficient derrick, with sufficient ropes and other appliances, for the safe handling of stone in building a culvert for the defendant on its line of railroad in Wyandotte county, Kansas, at a point known as "Deep-hollow Bridge," near a station on the line of the company's railroad called "Tiblow." Samuel Mallison was the railroad company's general superintendent in building the culvert. William Ulrich was the overseer or foreman of the work, under Mallison, and John Nelson and the plaintiff, Fray, were laborers, handling the derrick, and performing such other duties as might be assigned to them by either Mallison or Ulrich. This derrick was used in removing stone from a platform near the derrick to a place about 40 feet below, where the stone was used in constructing the culvert. In operating this derrick, a rope, usually called a brake-rope, was used, a portion of which was wound around a pinion shaft. This pinion shaft, from friction produced in some manner not shown by the record, would become heated whenever it was used, unless water at such times was constantly poured upon it, and, when allowed to become heated, it would burn or char the brake-rope, so as to render it frail, weak,

and unsafe. If, however, water was poured upon the brake-rope and pinion shaft while the derrick was being operated, and if occasionally, when the brake-rope became worn, a new one was put in its place, there was no danger in operating the derrick. In the present case there seems to have been negligence in not keeping the brake-rope and pinion shaft wet, and in allowing the brake-rope to become burnt or charred, and partially worn, before removal, so as to render it unsafe, whereby it broke, and caused portions of the derrick to break, and thereby caused the injuries of which the plaintiff complains, and for which he seeks damages in this action.

It seems to be admitted by both parties that there was negligence in this respect. But the parties differ as to who was guilty of the negligence. The plaintiff claims that it was principally, if not entirely, the negligence of Ulrich, while the defendant claims that it was wholly the negligence of Fray and Nelson, and principally the negligence of Fray himself. In all probability, Ulrich, Fray, and Nelson were about equally guilty of the negligence that caused the injuries complained of. The plaintiff claims that the defendant is liable for the negligence of Nelson as well as of Ulrich, as Nelson was one of the defendant's servants; but the defendant claims that the plaintiff is liable for the negligence of Nelson for the following reasons: The railroad company claims that the duty of keeping the brake-rope and pinion shaft wet, and of seeing that the brake-rope was at all times safe, and in proper condition, was imposed particularly upon the plaintiff and Nelson, jointly and severally; that they worked together at and near the derrick; and that it was their duty jointly, as well as severally, to watch the derrick, the brake-rope, and the pinion shaft, and to see that at all times the brake-rope was safe and in good condition.

On the second trial an effort was made by the plaintiff to show that the brake-rope became unsafe from wear alone, and that it did not burn or char; but we think the effort was a failure. There was also an effort made on the part of the plaintiff to show that although the duty of keeping the brake-rope and pinion shaft wet was at one time imposed upon the plaintiff, or the plaintiff and Nelson, by Mallison or Ulrich, or both, yet that the plaintiff was afterwards relieved from such duty, and assigned to another by Ulrich. Whether this was so or not is probably one of the principal questions, if not the main question, in the case; and this question, under the evidence, is one of fact, and not one of law. On the part of the defendant, an attempt was made to show that the duty of keeping the brake-rope and pinion shaft wet was imposed upon Fray and Nelson by Mallison, and that Ulrich not only did not attempt to relieve them from such duty, but that he had no power to do so if he had so attempted. As Ulrich, however, was the foreman of the work, and as Fray and Nelson worked under him, we would think that the attempt to show that Fray and Nelson had the right to work independently of him, or to violate his orders, was a failure.

As between Fray and the railroad company, we would think, from the evidence, that Ulrich had the power to assign Fray and Nelson to other and different duties, and to relieve them from the duty of keeping the brake-rope and pinion shaft wet. The only question, then, in this regard, is whether he did in fact relieve Fray from the duty of keeping the brake-rope and pinion shaft wet. He did not expressly so relieve him, but whether he did so impliedly is the question to be considered. This, as before stated, we think is the main question involved in the case; and, under the evidence, is purely a question of fact, and not one of law, and therefore we do not think that we can decide it as a question of law. Really, the only question which we can determine is whether this question, and the other questions of fact involved in the case, were fairly submitted to the jury, and fairly tried by them. The defendant claims that they were not. It claims that improper evidence was admitted, that improper instructions were given, that proper instructions

were refused, that the jury refused to answer proper questions of fact which had previously been submitted to them, and that the court below refused to require the jury to answer such questions. Whether the foregoing errors were in fact committed or not we shall now proceed to consider.

The first claim of error is that the district court erred in permitting testimony of a conversation had on the next day after the accident, between John Nelson and Samuel Mallison, to be introduced in evidence. This conversation was concerning matters which transpired on the day of the accident, and which tended to prove negligence on the part of Ulrich. It was concerning past events, and although it occurred between persons in the employment of the defendant, still it was pure and simple hearsay testimony, and not admissible under any rule of law. The authorities cited by the defendant in error are not applicable. It is possible, however, under the other facts and circumstances of the case, that this error is immaterial; but whether it is or not we need not now determine.

It is next claimed that the court below erred in refusing to give certain instructions, and in giving certain other instructions. We think the court below did so err. We shall now assume that Ulrich and Nelson were guilty of negligence for which the railway company is responsible, and that their negligence was so clearly and conclusively shown by the evidence that any errors of the court with respect thereto are wholly immaterial. But still, the principal question presented to the court below was whether the plaintiff was guilty of contributory negligence or not, which question was one of fact for the jury; and the principal question now to be determined by this court is whether that question was fairly submitted to the jury or not for their determination. We hardly think it was. From the evidence introduced, the duty of keeping the brake-rope wet was, at one time, imposed upon the plaintiff, among others; and also, from the evidence, it is probable that if the brake-rope had been kept wet it would not have broken as it did, and the accident would not have occurred. It is also in evidence that the further duty of giving and receiving signals was also imposed upon the plaintiff; and, in giving and receiving such signals, it was necessary for the plaintiff to stand on the edge of the platform, a few feet from the derrick, but so far away from the derrick that he could not, while there, pour water on the brake-rope; neither could he give nor receive signals while pouring water on the brake-rope. In other words, he could not perform both duties at the same time. This, we think, has at all times been conceded by the parties, and at no time has any question with reference thereto been raised by either party. This accident occurred while the plaintiff was on the edge of the platform for the purpose of giving and receiving signals. But although the defendant concedes that both duties could not have been performed precisely at the same time, yet it claims that the plaintiff could have easily performed both duties by first attending to one, and then to the other, alternately; that is, he could have first wet the brake-rope, and then attended to the other duty, and then wet the brake-rope again, and so on, without any difficulty. The defendant claims that, even after the employes had commenced to remove a stone for the purpose of letting it down to the place where it was to be put in the culvert, the plaintiff could have stepped to the derrick and poured water on the brake-rope, and then have stepped back to the edge of the platform to receive and give signals; that the performance of one of these duties would not at all have interfered with the performance of the other; and considerable evidence to this effect was introduced on the trial, but it does not appear that the court below charged the jury sufficiently with respect to this aspect of the case. The court refused all the instructions asked for by the defendant upon this subject, and, indeed, upon every other subject, and gave only its own instructions. Among these instructions given are the following:

"(20) * * * But if the jury further find and believe from the evidence that after said order [to keep the brake-rope wet] was given by said Mallison to said plaintiff, that one Ulrich became foreman, with authority to superintend and direct work for defendant, and that said Ulrich had assigned other duties to the plaintiff, and at the time of the alleged injury occasioned by the breaking of the said brake-rope, and prior to and at the time of said alleged injury, the plaintiff, in obedience to orders of Ulrich, was in the discharge of other duties than wetting said rope, he was bound to discharge such other duties, (if the jury find he was assigned to other duties;) and if it appears the plaintiff received the alleged injuries in the discharge of such other duties, under the direction of the foreman,—then the defendant would properly be charged with negligence."

"(24) If the jury believe from the evidence that Samuel Mallison was superintendent of the work, and William Ulrich was overseer or foreman of the work, and that John Nelson and the plaintiff were laborers handling the derrick, when the accident occurred; and if the jury further find and believe that William Ulrich, overseer, prior to time of said accident, assigned and directed plaintiff the work and duty of giving signals to other workmen while lowering rock from the derrick platform into the pit below; and if the jury further find that at the time the accident occurred the plaintiff, in obedience to previous directions given by the overseer, was at his proper place, ready and waiting to give the required signals, or in the act of giving such signals, —then plaintiff was in the line of his duty, under the orders of the overseer of the work, at the time of the accident."

"(28) If the jury find and believe from the evidence that plaintiff was charged by both Mallison and Ulrich with keeping the brake-rope wet while lowering rocks, and also charged by Ulrich to give signals to the workmen in lowering the rocks, and if the jury further find and believe that neither of these orders was revoked when the accident happened, then the jury will consider whether the plaintiff at the time of the accident was occupied in giving signals, or pouring water on the rope; and they will further find and consider whether he could perform both duties at the same time; and if the jury find that both duties could not be performed at one and the same time, and if they believe that both could not be performed at the same time, then the jury will find from the evidence to which of these duties he was assigned at and immediately prior to the accident that caused the injury; and if the jury find and believe that at that time he was assigned to and directed to pour water on the rope, and the rope broke, and he was injured on account of his failure to keep the rope wet, then, and in that case, the plaintiff is not entitled to recover. *But if the jury find and believe that at the time of the accident the plaintiff was engaged in giving signals or other duties pertaining to the giving of such signals, and in the line of his duty pertaining to such orders, then he could not be charged with negligence in failing to pour water on the brake-rope in lowering the rock.*"

Now, these instructions are in substance that if the plaintiff had two duties to perform,—one in pouring water on the brake-rope at the derrick, and the other in giving signals at the edge of the platform; and if he could not perform both of these duties at the same time,—and he certainly could not; and if at the time of the accident he was properly at the edge of the platform for the purpose of giving signals,—and probably he was properly at that place at that time: then that he performed his whole duty, and he could not be charged with negligence, although he may have had ample time to have poured water on the brake-rope immediately before he took his position on the edge of the platform. In other words, that if he was performing his duty at the edge of the platform at the very time of the accident,—and perhaps the defendant will admit that he was,—then that his prior negligence immediately preceding the accident, in not pouring water on the

brake-rope, if he was guilty of such negligence, could not affect his right to recover. This cannot be the law. If the rope broke because of his negligence in not pouring water on it a few moments before the accident occurred, it could not make any difference that he was properly performing another duty at the precise time of the accident. If it was the duty of the plaintiff to pour water on the brake-rope prior to his taking position on the edge of the platform, and if the rope broke because he failed to perform this duty, then he cannot recover. The foregoing instructions probably misled the jury.

It is also claimed that the court below erred in giving the following instruction to the jury with regard to the special questions of fact submitted to them for their answers, to-wit: "In case no evidence can be found bearing upon the question required to be answered, the jury will say; 'Don't know,' or, 'Cannot answer from evidence.'" We think the court below erred, as is claimed. *Kansas Pac. Ry. Co. v. Peavey*, 34 Kan. 474, 486; S. C. 8 Pac. Rep. 781, 789.

It is also claimed that the court below erred in refusing to require the jury to answer in an intelligent manner the following special questions, submitted to them at the request of the defendant. The following are the questions, with the answers of the jury: "Question 2. Was the plaintiff instructed by Mallison, acting for the defendant, that there was danger of the brake-rope burning in letting the rock down into place, if the rope was not kept wet? Answer. Don't know." "Q. 5. If the brake-rope had been kept wet where it wound around the shaft, and the friction occurred, would it have burned? A. Don't know. Q. 6. Did the plaintiff observe and obey the directions of Samuel Mallison in respect to keeping the rope wet? A. Don't know. Q. 7. Was not the plaintiff repeatedly warned by Samuel Mallison and William Ulrich, the foreman upon the work, to be careful to attend and see that the brake-rope was kept wet while rock was being lowered by the derrick to the work below? A. Don't know." "Q. 9. Would the brake-rope have burned if it had been kept wet as directed by Mallison? A. Don't know. Q. 10. Did any one for the defendant direct the plaintiff not to observe the directions given him by Mallison in respect to keeping the rope wet? If so, name the person, and state what was said. A. Don't know. Q. 11. Was not the plaintiff provided with a bucket for the water, which he was to use in wetting the brake-rope, and a proper vessel for applying water to the rope? And was not water flowing near by which the plaintiff could get to wet the rope? A. Don't know, as to the first paragraph. Yes, as to the second. Q. 12. Was not the brake-rope put on new the day of the accident, or the day before, and was it not of size and strength sufficient for the purpose of controlling the lowering of the rock by the derrick, and was not the only thing needed, to make it safe, to keep it wet, as directed by Mallison? A. Don't know."

We think the court below erred in refusing to require the jury to answer these questions in a proper manner. The questions are material, and there was some evidence introduced applicable to every one of them.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(35 Kan. 722)

DARCY v. McCARTHY.

(Supreme Court of Kansas. November 5, 1886.)

1. EVIDENCE—CERTIFIED COPY OF LETTER RECEIVED BY LAND-OFFICERS.

The copy of an official letter received by the register or receiver of any land-office of the United States from any department of the government of the United States, that has been duly certified by the register or receiver having the custody of such letter, is admissible in evidence the same as the original; and, where the official character of the letter is apparent upon its face, it is unnecessary for the certifying officer to state in his certificate that it is the copy of an official letter.

2. PUBLIC LANDS—COMMISSIONER OF GENERAL LAND-OFFICE—JURISDICTION.

The commissioner of the general land-office has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions; and, where an erroneous entry made by the register and receiver was canceled by the commissioner, it will be presumed, in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence.

Error from Ottawa county.

L. J. Crans and Thompson & Richards, for plaintiff in error. *D. C. Chipman*, for defendant in error.

JOHNSTON, J. This was an action in ejectment, brought by Michael Darcy, to recover from William F. McCarthy the possession of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 9, in township 10 S., of range 5 W. The judgment rendered at the first trial was vacated upon a demand made under section 599 of the Code, and the second trial was had before the court without a jury.

To maintain his action, the plaintiff offered in evidence the duplicate receipt of the receiver of the United States land-office at Concordia, Kansas, which is as follows:

"RECEIVER'S OFFICE, CONCORDIA, KANSAS."

"No. 2,495. Pre-emption Act of 1841. See Commissioner's Letter G, of September 10, 1883.

"SEPTEMBER 14, 1884.

"Received from Michael Darcy, of Ottawa county, Kansas, the sum of two hundred dollars and —— cents; being in full for the north-east quarter of section No. 9, in township No. 10 south, range No. 5 west, containing one hundred and sixty and —— hundredths acres, at \$1.25 per acre, \$200.

"E. J. JENKINS, Receiver."

There was also offered in evidence by the plaintiff a certified copy of a letter of the commissioner of the general land-office, which is as follows:

"WASHINGTON, D. C., September 10, 1883.

"Register and Receiver, Concordia, Kansas—GENTLEMEN: I am in receipt of your letter of the thirty-first ult., transmitting pre-emption proof of Michael Darcy for my consideration. Darcy filed D. S. 10,186 for N. E. $\frac{1}{4}$ 9, 10 S., 5 W., December 11, 1882; alleged settlement, November 6, 1882. W. F. McCarthy made H. E. 16,880, November 11, 1882. There is no reason why, upon proof being made to your satisfaction, you should not allow Darcy to make his cash entry, he having complied with the requirements of the law in the matter of giving notice of such intention. I return the papers transmitted with your letter.

"Respectfully,
N. C. MCFARLAND, Commissioner."

This, with testimony showing the value of the possession to be \$100, was all the proof offered by the plaintiff, and the defendant then offered in evidence a copy of another communication from the commissioner of the general land-office, which, with the certificate of the register of the local office, is as follows:

"DEPARTMENT OF THE INTERIOR, GENERAL LAND-OFFICE.

"WASHINGTON, D. C., October 4, 1883.

Register and Receiver, Concordia, Kansas—GENTLEMEN: By my letter G, of September 10, 1883, you were instructed to allow Michael Darcy to make entry, upon proofs admitted, of N. E. 1/4 9, 10 S., 5 W., recorded by his D. S. 10,186. It appears from a letter of Messrs. Olney & Co., who write in behalf of Wm. F. McCarthy, who made H. E. 16,880 on said tract November 11, 1882, and the records of this office corroborative of their statements, that McCarthy had instituted a contest against H. E. 15,678 by Darcy on this same land, which he prosecuted to a final decision, canceling said H. E. 15,678, October 30, 1882. This action gave McCarthy a preference right for thirty days, under act of May 14, 1880. As McCarthy made his H. E., October 11, 1882, he was strictly within the law, and any action allowing Darcy's entry was erroneous. I have therefore now to rescind said letter of September 10, 1883, of which action you will advise Darcy.

"Respectfully.

N. C. MFARLAND, Commissioner."

"U. S. LAND-OFFICE, CONCORDIA, KANSAS.

"NOVEMBER 26, 1883.

"I hereby certify that the above and foregoing is a true copy of the U. S. land commissioner's letter of, now on file among the records of this office.

"S. H. DODGE, Register."

The plaintiff objected to the admission of this testimony, but the court received it, and gave final judgment in favor of the defendant; and the only ground of reversal urged here is the admission of the commissioner's letter.

One objection is that the letter was not properly certified. We deem the certificate to be sufficient. Copies of any official letter or communication, received by the register or receiver of any land-office of the United States from any department of the government, that has been duly certified by the register or receiver having the custody of such official letter or communication, is admissible in evidence the same as the original. Code, § 384.

The certificate is claimed to be defective because it fails to show that the letter to which it is attached is the copy of an official letter. It appears to be a letter addressed by the commissioner of the general land-office to his subordinates, upon a matter which clearly comes within the scope of the official duty of those officers. The official character of the letter is clearly disclosed upon its face, and no statement in the certificate could change or make its character more apparent.

It is also claimed that the action of the register and receiver in allowing the cash entry of the plaintiff is conclusive on the land department, and that the commissioner had no authority to do that which his letter attempted to do. Although proof of the right to enter land must be made to the satisfaction of the register and receiver, they are not the final arbiters of such right. They make returns of entries of land to the general land-office, which is under the charge of the commissioner. That officer has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions. The entry relied on by the plaintiff was allowed by mistake, and without authority of law, and it was clearly competent for the commissioner to cancel and set it aside. *Bellows v. Todd*, 34 Iowa, 31. It seems that before the entry was made the plaintiff and defendant had both settled upon, and were seeking to acquire title to, this land. The plaintiff then claimed it under a homestead entry, but the defendant instituted a contest which resulted in the decision made October 30, 1882, canceling the entry. Under an act of congress, this gave McCarthy, the successful contestant, 30 days in which to enter the same land. 21 U. S. St. at Large, c. 89, § 2. Dur-

ing this time a preference was given to the defendant, which was availed of and exercised by him on November 11, 1882, when he made a homestead entry. This homestead entry gave the defendant the superior right, and barred the plaintiff from acquiring any right to the land until the entry was contested and canceled. Notwithstanding this, the officers of the land department, through a mistake, permitted a filing to be made on the land by the plaintiff on December 12, 1882, in which he claims settlement on November 6, 1882. As the land had already been taken, and was not subject to entry by the plaintiff, this mistaken action of the officers gave him no right.

It is argued for the plaintiff that under section 383 of the Code his duplicate receipt is proof of title against all but the holder of the actual patent, which is not in the hands of the defendant. This is a rule of evidence prescribed by the Code, and is applicable in a controversy between citizens, where the duplicate receipt is held with the concurrence of the United States authorities. The title to the public lands belongs to the United States, and congress is given full authority to dispose of the lands, and to make all needful rules and regulations respecting the same. Section 3, art. 4, Const. U. S. A land department has been created by congress, and rules prescribed for the disposal of the public lands, and to the officers of that department the duty of selling and disposing of the lands is committed. They can only sell or dispose of these lands in the manner prescribed by congress. In disposing of them there are doubtless many mistakes made, but the matter is within the control of the land department until the patent issues, and the mistakes may be corrected by the officers of that department. The entry of the plaintiff, having been made without authority, was rightfully canceled and set aside by the commissioner, and the effect of the duplicate receipt, as evidence of title, was destroyed. It being within the scope of the duties of the commissioner to make the correction, and to cancel the erroneous entry, it will be presumed, in the absence of evidence to the contrary, that it was done in accordance with the rules governing such action, and upon sufficient evidence. His action left the whole matter before the land department of the government for adjustment, where the rights of the parties could be further contested, and an appeal from the decision of the commissioner could be taken to the secretary of the interior. Whatever may be the *status* of the controversy between the parties there, it is plain, from the evidence in the record here, that the plaintiff was not entitled to recover.

The judgment of the district court will be affirmed.
(All the justices concurring.)

(35 Kan. 731)

STATE v. WHITAKER.

(*Supreme Court of Kansas. November 5, 1886.*)

1. CRIMINAL LAW—TRIAL—INSTRUCTION—APPLICABILITY TO FACTS.
An instruction ought not to be given, although it is a correct statement of the law in the abstract, which is not applicable to the facts that are in proof.
2. HOMICIDE—MURDER—INSTRUCTION—EVIDENCE.
Where the defendant is charged with the crime of murder in the first degree, an instruction which contains inferences and suggestions to the jury not warranted by the facts in proof is erroneous, and, unless it clearly appears that the defendant did not sustain any injury by such misdirection, the verdict in such a case must be set aside.

Appeal from Osborne county.

On June 1, 1885, the following information, omitting court, title, and verification, was filed in the district court of Osborne county:

"I, the undersigned, county attorney of said county, in the name, by the authority, and on behalf of the state of Kansas, give information that on the nineteenth day of May, A. D. 1885, in said county of Osborne and state of

Kansas, one John R. Miller, John Cranshaw, and Albert Whitaker did then and there unlawfully, feloniously, purposely, and of their deliberate and pre-meditated malice, make an assault in and upon one Delbert J. Tunison, then and there being; and that the said John R. Miller a certain double-barreled shotgun then and there loaded and charged with gunpowder and shot, which said shotgun he, the said John R. Miller, then and there in both of his hands had and held to, against, and upon him, the said Delbert Tunison, then and there purposely, and of his deliberate and premeditated malice, did discharge and shoot off; and that the said John R. Miller, with the shot aforesaid, then and there, by force of the gunpowder aforesaid, shot, discharged, and sent forth as aforesaid, out of the said shotgun by him, the said John R. Miller, then and there so as aforesaid discharged and shot off, him, the said Delbert J. Tunison, in and upon the left side of the neck of him, the said Delbert J. Tunison, did strike, penetrate, and wound, giving unto him, the said Delbert J. Tunison, by the means and in the manner aforesaid, one mortal wound, of the length of two and one-half inches, and of the depth of six inches, of which said mortal wound he, the said Delbert J. Tunison, shortly died, to-wit, in about three hours after said wound was inflicted. The said defendants John Cranshaw and Albert Whitaker then and there, by the means and in the manner aforesaid, aided, abetted, and assisted the said John R. Miller to do as above set forth. The said John R. Miller, John Cranshaw, and Albert Whitaker, in manner and by the means aforesaid, purposely, and of their deliberate and premeditated malice, him, the said Delbert J. Tunison, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas.

"A. SAXEY, County Attorney."

Trial commenced October 12, 1885, before the court with a jury. On October 16th the jury returned a verdict against the defendant Albert Whitaker, finding him guilty of murder in the first degree. On the same day the defendant filed his motion in arrest of judgment, and also his motion for a new trial. On October 17th both the motions were overruled. The defendant was sentenced in accordance with the verdict, and from the sentence and judgment he appeals to this court.

S. B. Bradford, Atty. Gen., and A. Saxy, for the State. Walron, Mitchell & Huron and Hays & Pitts, for appellant.

HORTON, C. J. The information filed in this case charges John R. Miller with the murder of Delbert J. Tunison, and also charges John Cranshaw and Albert Whitaker with having aided, abetted, and assisted in the commission of the crime. John R. Miller was convicted of murder in the second degree, from which he appealed to this court. The opinion of this court was handed down affirming that conviction. *State v. Miller*, 35 Kan. —; S. C. 10 Pac. Rep. 865. Whitaker was convicted of murder in the first degree at the October term of the district court of Osborne county for 1885, from which conviction he appeals.

It is claimed that the information upon which he was tried charges only an assault upon D. J. Tunison, and, if it charges anything more than an assault, that it does not charge murder in the first degree. While the language of the information is subject to some criticism, we think it is sufficient within the authority of *Smith v. State*, 1 Kan. 365, and *State v. Brown*, 21 Kan. 38, as an information for murder in the first degree. It alleges, among other things, that on May 19, 1885, in the county of Osborne and state of Kansas, John R. Miller, John Cranshaw, and Albert Whitaker did then and there unlawfully, feloniously, purposely, and of their deliberate and premeditated malice, make an assault upon D. J. Tunison; that John R. Miller did purposely, and of his deliberate and premeditated malice, shoot off and discharge

against the said Tunison a double-barreled shotgun, loaded with gunpowder and shot, then and there held in his hands, giving him a mortal wound, of which he died in a few hours thereafter; that John Cranshaw and Albert Whitaker then and there, by the means and in the manner aforesaid, aided, abetted, and assisted John R. Miller to do the acts set forth; and that said John R. Miller, John Cranshaw, and Albert Whitaker, in the manner and by the means stated, purposely, and of their deliberate and premeditated malice, did kill and murder said Tunison. The information, taken together, alleges that the killing of Tunison was willful, deliberate, and premeditated.

The evidence on the part of the state conducted to show that on Saturday, May 16, 1885, a difficulty occurred between Tunison and his wife. Her father, Jeremiah Miller, who lived a few miles away, learned of the trouble on Sunday evening, and went at once to the residence of the defendant Whitaker, who was a near neighbor of the Tunisons, and remained until Monday forenoon. In the forenoon of that day, while Tunison was absent from home, Jeremiah Miller, accompanied by Albert Whitaker, went to Tunison's house, hitched up a pair of horses found there to a wagon, and took Mrs. Tunison and her children to his home, carrying with him some goods and a cow, which property, together with the horses, Mrs. Tunison claimed as her own; that on Sunday preceding the killing of Tunison, as James Dwyer and wife were driving up to the house of Richard Dey, Whitaker came out from the stable, up to the wagon, and handed Dey a chain, saying, "Here's your chain,—I will let you take it home;" that Dey then reached down in Whitaker's shirt-pocket, and pulled out a pistol; that Dey asked Whitaker what use he had for it; that he answered, "He might have use for it before tomorrow morning;" that Dey asked him who he was about to get into trouble with, and that Whitaker said, "The man in the stone house," pointing to where Tunison lived; that he said he had been looking in his trunk for cartridges, but had not found any; that he was going up to where Dey was to see if he could get some; that on the same Sunday night Whitaker said to George Piatt he "wanted to see Dick Dey to get some cartridges of him;" that he had laid out a couple of men in his time, and expected to have another laid out before sundown,—a person about six feet and a half tall;" that upon being asked "Who he was in trouble with," he said, "His cousin, Dell Tunison;" that Whitaker brought word to the Millers on Monday, the 18th, that Tunison was to come up that night and take the horses away; that John R. Miller and Charles Miller are sons of Jeremiah Miller, and brothers to Mrs. Tunison; that John Cranshaw is a son-in-law of Jeremiah Miller, and Albert Whitaker, the defendant, a cousin of Tunison, and that all of these persons were at Miller's the night of the murder; that about 11 o'clock P. M. of said May 18th, John Miller and Charles Miller went down to the stable in anticipation of Tunison coming to retake the horses; that about 12 or 1 o'clock that night John Miller, without any excuse or justification, shot and killed Tunison at the stable; that on Tuesday morning, May 19th, Whitaker told John Loe, "Dell Tunison was dead; that he came up to the Millers' for the property the night before, and John Miller shot him;" that upon being asked whether Tunison tried to get away, he said, "No, we surrounded the stable;" that Mrs. Loe asked who was there, and he answered, "John Cranshaw, Charley and John Miller, and himself; that John and Charley Miller were in the stable when Tunison came for the horses, and Cranshaw and himself were on the outside of the stable."

Upon the evidence introduced by the state there was sufficient before the jury to justify the verdict rendered, because if the killing of Tunison by Miller was wholly without justification, and Cranshaw and Whitaker were outside of the barn while John and Charles Miller were in the inside, the evidence is amply sufficient to show that Cranshaw and Whitaker were aiding and abetting the commission of the crime. Therefore, if no question was be-

fore us other than the one urged so strenuously,—that the evidence does not support the verdict,—we would necessarily decide the appeal adversely.

A serious question, however, is presented upon the following instruction of the trial court: "If you believe from the evidence that John R. Miller was justified in killing Tunison, then you will find the defendant not guilty, unless you shall find that defendant falsely reported, directly to John R. Miller, or through others to John R. Miller, certain threats, which he claimed deceased had made to him with reference to the persons and property of the Millers, and thereby produced in the mind of John R. Miller such a reasonable and honest conviction that he (John R. Miller) was in danger of his life from Tunison at the time of the shooting as would justify John R. Miller in killing Tunison, when, as a matter of fact, the deceased, Delbert J. Tunison, did not utter to the defendant the threats which he so reported, directly or indirectly, to John R. Miller. Under these circumstances, if you shall find that defendant falsely reported such threats, directly or indirectly, or through others, to John R. Miller, with intent to cause John R. Miller to kill deceased, and you shall find that John R. Miller did kill the deceased by reason of the honest and reasonable fear induced by said threats so communicated, and that it was not actually necessary for John R. Miller to kill deceased to preserve his own life, then you may find the defendant guilty, although you may believe John R. Miller was justified in killing the deceased, or you may find the defendant guilty of a higher degree of crime, if any, than you believe John R. Miller guilty of."

On the part of the defense, evidence was offered showing that, on May 18th, D. J. Tunison said to Richard Dey, "He would go up to the Millers', steal the horses, murder the outfit, set the things on fire, and skip the country." William Price also testified that he saw Tunison with Whitaker on May 18th, and that Tunison said to Whitaker, at the time, "He was going over to get his brother Bill, and a couple of six-shooters, and go and get his property at the Millers'."

Mrs. Tunison testified that on Monday, the 18th, between 5 and 6 o'clock, after she had reached her father's house, Whitaker came to the house, and told them, "Dell said he would go over and get his brother Will, and two six-shooters, and come up and take the property, set the ranch on fire, and, if any of us interfered, he would kill us;" that "there were present at this conversation, besides herself, her father and mother, Mrs. Cranshaw, and her three younger sisters; that John Miller and John Cranshaw came to the house that night at about 9 o'clock, and she communicated to them the threats Whitaker said Dell had made." Mrs. Jeremiah Miller also testified that these threats, reported by Whitaker as coming from Dell Tunison, were communicated by her to John Miller on the evening of May 18th.

What occurred at the stable when Tunison was killed on the night of May 18th, according to the defense, is as follows: "Charles Miller took a gun, from his father's house, down to the stable that night, a little after eight o'clock, and set it down just on the inside, and then went back to the house, and watched to see if any one came to the stable; that, about a quarter of eleven, he heard a noise at the stable, and John went with him down there; that both of them went into the stable, and sat down; after being there about an hour, Dell Tunison came into the stable at an opening, went up to a horse which belonged to Cranshaw. He untied it, and took it out. He tied this horse to a post near by, and returned to the stable. At this time John had the gun which Charles had taken to the stable. When Tunison came in, John said to him, 'Halt!' Tunison said, 'Go to hell, you damned son of a bitch; I've got the drop on you, and I shall kill you for luck,' drawing a revolver from his coat. As these words were uttered, John Miller shot Tunison in the neck. He fell backwards, and died in a few hours afterwards."

In regard to the instruction complained of, the argument of the state is as

follows: "A homicide is committed. A. deliberately and premeditatedly procures B. to do it. Knowing that the deceased will be at a certain place at a certain time, he reports to B. false threats of an intent on the part of the deceased to do great bodily harm to B. At the time and place B. meets the deceased, and, his mind being poisoned by the communications of A., he believes that he is in danger of his life, or great bodily harm; and, to prevent it, the homicide is committed by him. So far as B. is concerned, the homicide is justifiable. But A., deliberately and premeditatedly intending to accomplish the killing of the deceased, adopted such means as would effect that end, and the killing results by reason of the means A. deliberately adopted for that purpose. A. would be guilty of murder in the first degree, although B.'s act, so far as he alone was concerned, was justifiable. B. was but the blind, irresponsible instrument of another mind."

The proposition, thus stated, is a sound one, but we do not think the evidence in the case warrants the instruction. It is probably true that John and Charles Miller were at the stable on the night of the killing of Tunison on account of the threat reported by Whitaker: that Tunison said he was coming after the horses which had been taken away from his house. But there is sufficient evidence in the record to show that Tunison intended to come that night to retake the horses, and it is undoubtedly true he gave out that he was coming so to do. This is corroborated by the fact that he did come that very night for that purpose.

The court in its instruction suggested that this threat, as well as the others, was falsely reported by Whitaker. The suggestion of its falsity, in absence of any proof, ought not to have been made by the court, and it was not consistent with the evidence for the court to intimate that this threat was not uttered by Tunison. There is no affirmative evidence in the record that the other threats reported by Whitaker to have been made by Tunison were not so made, but the other threats are so extravagant, and so unlikely to have been made by any person about to commit such acts, that we suppose the jury might have inferred the threats "to burn the house, and kill the Millers," were never uttered by Tunison.

We cannot perceive that the extravagant threats about the killing and burning, reported by Whitaker to have been made by Tunison, induced in John Miller such an honest and reasonable fear as caused him to believe it was actually necessary to kill Tunison to preserve his own life. Upon the facts disclosed in the record, we do not think that the court ought to have intimated to the jury that the threats so communicated were likely to have that effect upon Miller. If the killing of Tunison was justifiable, it was upon the testimony of the defense that, when he entered the opening of the stable at the time he was shot, he drew a revolver as if to shoot Miller, at the same time stating, "I've got the drop on you, and I shall kill you for luck." The defense attempted to show that Tunison was not only trying to get possession of the horses which his wife had taken away, but was also attempting to steal the horse owned by Cranshaw; and when Miller called him to halt, as he was entering the stable, he attempted to take his life. Upon the evidence offered by the state, the threats communicated to John Miller were no justification to Miller for the killing of Tunison. Upon the theory of the defense, the threats communicated were not the direct cause of the killing of Tunison.

Again, the threats reported by Whitaker were communicated to John and Charles Miller several hours before the killing of Tunison. There was ample time after the report of these threats for the parties to have had Tunison arrested, if these threats in any way created fear in their minds that their lives were in danger, or great bodily harm likely to occur. No such steps were taken. *State v. Rose*, 30 Kan. 501; S. C. 1 Pac. Rep. 817. Upon no view of the evidence embraced in the record can we assume that John Miller was an

"innocent agent" in the killing of Tunison; nor does the evidence show in any way that he was the blind and irresponsible instrument of Whitaker. No fair inferences, from the facts in proof upon the trial, warrant the theory that John Miller was the "innocent agent." Miller was either guilty of murder in killing Tunison, or else the homicide was justifiable on account of the words and acts of Tunison at the time that Miller shot him. Only upon the theory that John Miller was the "innocent agent" of Whitaker could the court have given the instruction complained of. It is impossible for us to say that this instruction was not the controlling one with the jury. In our opinion, it was wholly erroneous.

Because of the instruction given herein referred to, the judgment is reversed, and the prisoner will be remanded for a new trial.

(All the justices concurring.)

(35 Kan. 714)

STATE ex rel. DOOLITTLE, Co. Atty., etc., v. BRAYMAN.

(Supreme Court of Kansas. November 5, 1886.)

1. WRIT AND PROCESS—ISSUE OF SUMMONS BY JUSTICE OF THE PEACE.

The jurisdiction of a justice of the peace is limited, in civil actions, to the county in which he resides, and for which he has been elected; and where an action is brought before him, and service obtained upon one defendant, he has no authority to issue a summons in such action to an officer of another county, there to be served upon another defendant.

2. SAME—CIVIL CODE KAN.

The provisions of the Civil Code authorizing the issuance of a summons to a county other than the one in which the action is brought are not applicable to proceedings before a justice of the peace.

Error from Wabaunsee county.

A. H. Case, for plaintiff in error. Geo. G. Cornell, for defendant in error.

JOHNSTON, J. This was a proceeding in *mandamus*, brought by the state upon the relation of the county attorney of Wabaunsee county, to compel D. R. BRAYMAN, a justice of the peace of that county, to issue a summons in an action instituted before him to a defendant who resided in Shawnee county. The summons was asked for in an action in which J. F. Limerick & Co. were plaintiffs, and A. W. Miles and Tom E. Guest were defendants, to recover upon a promissory note which A. W. Miles had made and delivered to the Burlington Insurance Company, and which had been indorsed by that company to Tom E. Guest, who had in turn transferred the same to J. F. Limerick & Co. Tom E. Guest was a resident of Wabaunsee county, but A. W. Miles was a *bona fide* resident of Shawnee county. The defendant refused to issue the summons to the sheriff of Shawnee county, claiming that he had no jurisdiction, as a justice of the peace of Wabaunsee county, over a defendant residing outside of such county, and had no authority to issue the summons to any officer of Shawnee county. The district court held that the justice of the peace could not be compelled to issue the summons, and refused a peremptory writ, and the plaintiff seeks here a reversal of that ruling.

The only question presented by the record is, where a right of action exists against two persons living in different counties, and an action is brought before a justice of the peace where one of them resides, and service obtained upon him, whether the justice of the peace could issue a summons to an officer of another county, and obtain jurisdiction of the defendant residing outside of the county where his court is held. It is not claimed that authority for such a practice is expressly given by the Code regulating procedure before justices of the peace. The claim is that the provisions of section 60 of the Code of Civil Procedure, with respect to summoning a co-defendant living outside of the county where the action is brought, is made applicable by the following provision of the Justices' Code: "The provisions of the act entitled

'An act to establish a Code of Civil Procedure' which are in their nature applicable to the jurisdiction and proceeding before justices, and in respect to which no special provision is made by statute, are applicable to proceedings before justices of the peace." Section 185, c. 81, Comp. Laws 1879. This action cannot have the effect claimed, because provisions respecting the commencement of an action and the issuance of summons have been made in the Justices' Code, and these do not harmonize with the provisions in the Civil Code sought to be applied. In article 2 of the justices' act full provisions are made for the issuance of summons, and its form, to whom it shall be directed, when it shall be made returnable, and how and by whom it shall be served. Provision is also made for the service of summons upon foreign and domestic corporations, also the manner of service when the defendant is a minor. These provisions are so full as to indicate that the legislature intended to cover the whole ground upon the question of summons.

Again, by section 12 of the Justices' Code, the summons must be returnable not more than 12 days from its date, and may be made returnable in three days after its issuance; while, by the Civil Code, a summons issued to another county than the one in which the action is brought must be made returnable in not less than 10 days nor more than 60 days from the date thereof. Civil Code, § 61. In the justices' court the action is triable upon the return-day of the summons, but by the Civil Code no appearance of the defendant, by answer or demurrer, is required until 20 days after the return-day of the summons, and the action is not triable before the next succeeding term of court, and not then unless the issues in the case have been made up 10 days before such term. It is apparent that these provisions are inconsistent with each other, and that those in section 60 of the Civil Code are not in their nature applicable to an action before a justice of the peace. Besides, the jurisdiction of justices of the peace is limited, and therefore cannot be extended beyond the prescribed limit, nor can it be exercised in any other manner, nor upon any other terms. There are restrictions not only upon the class and subject-matter of civil actions that may be brought before justices of the peace, but also upon the territorial extent of his jurisdiction. It is provided that "the jurisdiction of justices of the peace in civil actions shall be co-extensive with the county wherein they may have been elected, and wherein they shall reside." Justices' Code, § 1. Being thus limited to his own county, he cannot send a summons to another county, and thus acquire jurisdiction of persons who are beyond the limits of the county where his court is held.

We think the ruling of the district court in disallowing the peremptory writ of *mandamus* was correct, and its judgment must therefore be affirmed.
(All the justices concurring.)

(19 Nev. 368)

STATE v. CRUTCHLEY. (No. 1,244.)

(Supreme Court of Nevada. November 12, 1886.)

1. **HOMICIDE—NEW TRIAL—MISCONDUCT OF JURY—IMPEACHMENT OF VERDICT.**
The affidavit of a trial juror in a trial for murder, purporting to give a statement made by another juror after the jury has retired to consider their verdict, is not evidence of misconduct which the court can consider in support of a motion for a new trial.
2. **SAME—EXCEPTIONS—ALLOWING STATE CHALLENGE—REVIEW—CRIMINAL PRACTICE ACT NEVADA.**

Where, on a trial for murder, the court refuses to settle a bill of exceptions to its action in allowing the state's challenge of a juror for implied bias, who entertained such conscientious opinions as would preclude his finding defendant guilty on circumstantial evidence, the refusal, if erroneous, is harmless, as the question as to the disqualifying nature of the answer is not subject to review, under the criminal practice act of Nevada.

Appeal from a judgment of the Sixth district court, White Pine county, upon a verdict convicting the defendant of murder. Defendant appeals.

W. C. Love, for appellant. *The Attorney General*, for the State.

LEONARD, J. Appellant was convicted of murder in the first degree. He appeals from an order denying his motion for a new trial, and from the judgment. The grounds of motion for new trial were misconduct of the jury, and error in law occurring at the trial, excepted to by defendant.

1. The court did not err in denying a new trial on the ground of misconduct of the jury, because there was no evidence of misconduct presented which the court had the right to consider. The only evidence offered was the affidavit of a trial juror, purporting to give a statement made by another juror, in the jury-room, after the jury had retired to consider their verdict. It is the general rule that such affidavits are not admissible to impeach the verdict. If there are exceptions to the rule stated, this is not one of them. *Bishop v. State*, 9 Ga. 124; *O'Barr v. Alexander*, 37 Ga. 203; *State v. Tindall*, 10 Rich. 218; *Smith v. Culbertson*, 9 Rich. 110; *Allison v. People*, 45 Ill. 37; *Leighton v. Sargent*, 31 N. H. 119; *Boyce v. California Stage Co.*, 25 Cal. 465; *Polhemus v. Heiman*, 50 Cal. 488; *People v. Gray*, 61 Cal. 164; *Wright v. Illinois & Mississippi Tel. Co.*, 20 Iowa, 210; *Woodward v. Leavitt*, 107 Mass. 453; *Cook v. Castner*, 9 Cush. 278; *Folsom v. Manchester*, 11 Cush. 337; *Dana v. Tucker*, 4 Johns. 488; *State v. Freeman*, 5 Conn. 348; *Meade v. Smith*, 16 Conn. 356.

2. It is claimed that, in law, the court erred in allowing the state's challenge of a juror, August Steen, for implied bias. The ground of the challenge was that, in this case, where the evidence was purely circumstantial, the jury entertained such conscientious opinions as would preclude his finding the defendant guilty.

In *State v. Larkin*, 11 Nev. 325, it was decided that the action of the district court in allowing challenges for implied bias is not made the subject of an exception; and that, under the criminal practice act, the question whether the answers given by a juror challenged by the state for implied bias were of such a nature as to actually disqualify him from serving as juror, is not subject to review; and see *People v. Murphy*, 45 Cal. 143. It follows that the result of this appeal would have been the same if the court below had settled a bill of exceptions according to the facts, and this court had been of the opinion that the juror was not, in fact, disqualified. Such being the case, the refusal of the court to settle a bill of exceptions, if erroneous, as claimed by defendant, was harmless.

The judgment and order appealed from are affirmed, and the district court is directed to fix a day for carrying its sentence into execution.

(70 Cal. 163)

McCALLION and others v. HIBERNIA SAV. & LOAN SOC. (No. 9,232.)*(Supreme Court of California. July 19, 1886.)***1. CORPORATIONS—DISFRANCHISEMENT—AUTHORITY TO EXPEL—OFFICERS—VACANCIES—
SUCCESSIONS.**

Neither opposition to the authority under which officers of an association act in the performance of their functions, nor irregularity in the performance of their functions, will authorize members of the association to secede, for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves their successors in office.

2. SAME—PROOF OF ORGANIZATION—MEMBERS—CERTIFICATE—STATUTORY REQUIREMENTS.

Where a certificate of members of an association is legally defective for want of conformity to the statutory requirements under which it purports to have been made, it cannot be used as proof of a corporation *in esse*.

8. COMPROMISE—LITIGATION—WAIVER—LEGAL RIGHTS.

Where a compromise has been proposed between parties in litigation, they will not be held by its failure, from any cause whatever, to have waived any of their legal rights.

Department 1. Appeal from superior court, city and county of San Francisco.

Action to recover a fund composed of moneys deposited with defendant, from time to time, by "Division No. 1," Ancient Order of Hibernians. Judgment for plaintiffs, and motion by defendants for a new trial. Motion overruled, and defendants appeal. The facts are sufficiently stated in the opinion.

M. C. Hassett, J. D. Sullivan, and D. T. Sullivan, for appellants. D. L. Smoot, for respondents.

MCKEE, J. This is an appeal from an order denying a motion for a new trial. The order appealed from was made upon a statement of the case. The case shows that plaintiffs and substituted defendants, respectively, claim to be the officers and directors of an association or society in the city and county of San Francisco known as the "Ancient Order of Hibernians, Division No. 1," and entitled to a fund composed of moneys paid into court by the Hibernia Savings & Loan Society, which were deposited with it from time to time by said division No. 1.

Upon the trial of the issues raised by the pleadings between these rival claimants of the fund, the court found as facts: "*First.* That the \$3,349.15 paid into court by the Hibernia Savings & Loan Society, and now in the treasury of the city and county of San Francisco, is the property of Division No. 1 of the Ancient Order of Hibernians, of the city and county of San Francisco. *Second.* That the plaintiffs constitute and represent the said division, and the substituted defendants do not. *Third.* That the said division is not a corporation, but a voluntary association of persons for benevolent purposes, and that the substituted defendants, designated as the 'Ancient Order of Hibernians' General Benevolent Society of California,' is not an existing corporation, with title to said money. *Fourth.* That the said division annually selects certain of its members to take charge of the division's property, and styles them trustees; that these trustees at present are John Collins, John Breslin, P. M. Cleary, Michael Sullivan, and Daniel O'Leary."

Upon these facts the court awarded possession and control of the fund to the plaintiffs, in trust for the use and benefit of division No. 1.

The principal grounds assigned by defendants upon their motion for a new trial were that the findings, conclusions of law, and judgment are wholly unsupported by the evidence, and that the findings are not responsive to the issues made by the pleadings. It is upon these grounds that the case has been argued and submitted.

As to the first finding, both parties concede that the fund in controversy belonged to division No. 1 of the Ancient Order of Hibernians, of the city and county of San Francisco.

As to the second finding, the evidence contained in the record clearly shows that the "division" was organized by authority, in January, 1869, as a voluntary Catholic association or society for benevolent purposes; that it has since continued to exist, maintaining fraternal relations between all its members, and with other divisions of the order, until the year 1878; that in that year the division had on its roll-call the names of 500 members, and on deposit in bank several thousands of dollars; that it held annual elections of officers in June of each year; and that in June, 1878, the plaintiffs were regularly elected and qualified as its officers and directors. The election of these officers was never contested, and for several months they exercised their functions without dissension or disorder. But in September, 1878, the county judicature of the order in San Francisco discovered that the president and other officers of the division, in initiating new members into the order, worked under a formula which it considered illegal, because it was not in conformity with the rules and regulations upon the subject promulgated by a national convention of the order held in Boston in May, 1878, and it directed the president to change the mode of initiation, so as to conform to the law of the order as established by the Boston convention. In the same year, however, a national convention of the order which was held in New York denounced the Boston convention as an illegal body, wholly without authority to give law to the order in the United States; and division No. 1, in San Francisco, following New York, refused to obey the "county delegate," and continued to work under the formula of initiation which, it claimed, was prescribed by the "head of the order" in Ireland. This created dissension in the order, and, upon a question as to the proper form of initiation, not only division No. 1, but the order itself, "split" in two.

Admittedly, however, certain of the defendants, in connection with such others of the members of division No. 1 as recognized the authority of the Boston convention, refused to attend the division meetings; and on the eighth of November, 1878, they held a special meeting outside the division room, presided over by the county delegate of the order, at which a resolution was passed declaring that the offices of president and treasurer of the division were vacant, and two of the defendants were selected to fill the vacancies, and others of them were chosen to act as trustees. But such action was without color of authority. Neither opposition to the authority under which officers of an association act in the performance of their functions, nor irregularity in the performance of their functions, will authorize members of the association to secede for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves as their successors in office. For any offense committed by a division officer the laws of the order provided a remedy *within*, and not *without*, the division itself. An outside movement would be wholly ineffectual to disturb him in his office; so that, when the plaintiffs commenced their action in January, 1879, they were legally in possession of the organization, as the legally elected officers and trustees of the division, and the finding of the court that they represented the division, and were entitled to the possession and control of its funds, is fully sustained by the evidence.

As to the third finding, there appears to have been no conflict in the evidence upon which it is founded. The only evidence upon the question is that in July, 1869, when the division numbered 50 or 60 members, 2 of them,—Bernard Conlan and William Dolan,—on the fourteenth of July, 1869, prepared a certificate to the effect "that on the twelfth of July, 1869, a meeting of the members of a society or association, not yet incorporated, known as 'The Ancient Order of Hibernians' General Benevolent Society of California,' * * * was held for the purpose of incorporating themselves according to law; that at the meeting it was resolved that the said society should be incorporated and assume corporate powers under the laws of the state, and ex-

ercise such powers under the said corporate name, having its principal place of business in the city of San Francisco; and that there was then chosen, by ballot, seven persons to act as a board of directors of said corporation for one year." This certificate Conlan and Dolan signed, acknowledged, and caused a copy to be filed in the office of the secretary of state. But as articles of incorporation, the certificate was legally defective for want of conformity to the statutory requirements under which it purported to have been made; and, aside from the defects which rendered it inapt, Conlan and Dolan, and those acting with them in the movement, did not attempt to exercise corporate functions under it, in connection with or as "Division No. 1 of the Ancient Order of Hibernians." Therefore the certificate was not proof of a corporation *in esse*. *Wood*, Dig. 119, § 2; *Hill v. Woodbury*, 14 Cal. 425; *Harris v. McGregor*, 29 Cal. 127; *People v. Selfridge*, 52 Cal. 331.

Besides, it was not claimed by the defendants that there existed at the commencement of the action a society or association by the name of "The Ancient Order of Hibernians' General Benevolent Society of California," as a chartered corporation, or that they were, under that corporate name, entitled to the funds of the division; and the finding that the division was not a corporation, and that the defendant's were not a corporation with title to the division's funds, was fully sustained by the evidence.

But it is insisted that the order appealed from should be reversed, because the court did not find upon an issue of compromise presented by certain supplemental pleadings in the case. There was evidence given, without objection, which proved that a state convention of the order had met at San Jose, after the commencement of the action, and proposed a compromise of the dis-sensions in the division, and that the plaintiffs and the defendants afterwards held a meeting for the purpose of harmonizing and settling their disputes; but the meeting was discordant and resulted in failure. Whether that was in consequence of the conduct of one or the other of the contesting parties is of no moment. The proposed compromise did not affect the title of the plaintiffs to their offices; and by the failure to compromise, from whatever cause, they did not waive any of their legal rights. So far as the question of their rights was concerned, the issue of a compromise was immaterial, and it was not necessary for the court to make any finding about it. Order affirmed.

We concur: Ross, J.; McKinstry, J.

(2 Cal. Unrep. 697)

JUDKINS v. ELLIOTT. (No. 9,975.)

(Supreme Court of California. August 30, 1886.)

WATERS AND WATER-COURSES—RIPARIAN RIGHTS—PRIOR APPROPRIATORS—PUBLIC LANDS
An appropriator of water on United States public lands is entitled to the use of the same, as against one who subsequently acquires title to the land from the government.¹

In bank. Appeal from superior court, county of Sierra.

Action for damages for diversion of water to the use of which the plaintiff claimed to be entitled, and for an injunction against further use of the water by defendant. It appears that plaintiff had appropriated water upon the public lands of the United States before any private claim to the land had been made. Defendant subsequently acquired title to the land upon which the water rose, and through which it flowed to plaintiff's lands, and diverted the same, to plaintiff's injury.

¹See *Kaylor v. Campbell*, (Or.) 11 Pac. Rep. 301; *Lehi Irr. Co. v. Moyl*, (Utah,) 9 Pac. Rep. 867; *Larimer Co. Res. Co. v. People*, (Colo.) 9 Pac. Rep. 794; *Lux v. Haggins*, (Cal.) 4 Pac. Rep. 919, 938; S. C. 10 Pac. Rep. 674.

M. Farley and R. H. Lindsay, for appellant. *Van Cleave & Wehe*, for respondent.

BY THE COURT. The case shows that the water in controversy, while situate upon public land of the United States, was appropriated by the plaintiff prior to acquisition by defendant of any right or title from the government to the land upon which the water is situate.

Judgment and order affirmed.

(70 Cal. 638)

Ex parte JAYNES. (No. 20,235.)

(*Supreme Court of California*. September 15, 1886.)

TRIAL—SUBPOENA DUCES TECUM—IDENTIFICATION OF TELEGRAMS—CONTEMPT.

A witness served with a *subpoena duces tecum*, requiring him to search for and produce all telegraphic messages from a number of persons to many other persons, between certain specified dates, with no further identification of the messages, is not bound to respond.

In bank. *Habeas corpus*.

The petitioner was an employe of the Western Union Telegraph Company. On the trial of a cause involving the ownership of property in another state, some of the parties believing that frauds were being perpetrated concerning such property, in pursuance of telegraphic directions by one claiming the ownership of the property, applied for a *subpoena duces tecum*, to compel petitioner, who had charge of all the messages sent through the Western Union Telegraph Company, to produce all messages sent by the company between certain dates, from such claimant of the property to a number of designated persons in the place where the property was situated, and who were supposed to have control of the property. This petitioner refused to do, unless the particular messages sought were identified. Petitioner was then adjudged guilty of contempt, and committed to jail, whereupon he applied for a writ of *habeas corpus*.

P. G. Galpin, for petitioner.

BY THE COURT. The petitioner was served with *subpoena duces tecum*, requiring him to produce telegraphic messages, but there was nothing to point his attention to any particular message or messages.

He was required to search for and produce all messages from a number of persons, to many other persons, between certain specified dates. The service of the subpoena was an evident search after testimony. The petitioner was not bound to respond, and committed no contempt in failing to examine the papers under his control to ascertain if any such messages had been sent or received.

The petitioner is discharged.

JAYNES v. SUPERIOR COURT OF SAN FRANCISCO. (No. 11,584.)

(*Supreme Court of California*. September 15, 1886.)

TRIAL—SUBPOENA DUCES TECUM—TELEGRAMS—CONTEMPT.

In bank. *Certiorari*.

Doyle, Galpin & Scripture, for petitioners.

BY THE COURT. For the reasons given in the opinion in *Ex parte Jaynes*, *supra*, (No. 20,235,) the order of the superior court of March 9, 1886, committing Frank Jaynes for contempt, is annulled.

(2 Cal. Unrep. 207)

PORTEOUS v. REED. (No. 9,967.)

(*Supreme Court of California*. September 16, 1886.)

STATUTE OF LIMITATIONS—FINDINGS—REVERSAL.

Failure to find upon the issue of the statute of limitations is ground for reversal of the judgment.

Department 1. Appeal from superior court, county of Calaveras.
Ira H. Reed and D. M. Seaton, for appellant. *Reddick & Solinsky*, for respondent.

PER CURIAM. Ejectment. The defendants pleaded the statute of limitations. The findings fail to respond to this issue. The judgment is reversed, and cause remanded.

(71 Cal. 269)

Ex parte CASEY. (No. 20,159.)

(*Supreme Court of California.* November 16, 1886.)

COURTS—STATE—PROBATE—ORDER TO PAY IN—TITLE INVOLVED—CONTEMPT.

The probate court has no authority to make an order for the payment into a bank, subject to its further orders, of money of the decedent claimed by the party holding it as her money in virtue of the gift of the decedent, or to commit such party for contempt in disobeying such order, as no power to make such order is conferred by Code Civil Proc. Cal. §§ 1459-1461, nor by § 572.

Commissioners' decision. In bank.

Comittal by probate court for contempt. Application for writ of *habeas corpus*.

G. W. Langan and H. C. Newhall, for petitioner. *M. Cooney, contra.*

Foote, C. Mrs. Ellen Casey, the petitioner, is in possession of a sum of money which the executor of a certain Mrs. Zephyr claimed as belonging to the estate of his decedent. After an examination under the statute, (sections 1459-1461, Code Civil Proc.,) Mrs. Casey was cited to show cause why she should not be punished for a contempt of the probate court in not obeying its order commanding her to deposit the money in a bank, subject to that tribunal's order. She appeared, claimed that the money had been given to her by Mrs. Zephyr before the latter's death, and introduced evidence tending to establish her own title to it. The court heard testimony in favor of and controverting her right to the money, and then made its order committing her for contempt in refusing to deposit it in a bank. The petitioner has sued out a writ of *habeas corpus* for the purpose of regaining her liberty.

According to the evidence adduced in this proceeding, the petitioner was either the owner by gift from Mrs. Zephyr of the money in controversy, or she had embezzled it after the latter had intrusted it to her to be deposited in bank. The dispute between Mrs. Casey and the executor necessarily involved the title to that money, and the question for determination is whether or not the probate court had the right, upon such a summary proceeding as that taken here, to order Mrs. Casey to be committed for contempt in failing to obey its order, which involved the transfer of the property which she claimed and asserted title to into the custody of a bank of the court's choosing. If the evidence had shown that Mrs. Casey claimed no title to the money in dispute, but admitted it to be the decedent's property at her death, the question presented would be different. But here the claim is made, and supported by some evidence, at least, although there is a sharp and decided conflict about it, that the money which the executor claims as assets of the decedent's estate was given to Mrs. Casey, and was in her possession as her property, before the decedent's death. It necessarily follows, then, that, in order to commit Mrs. Casey for contempt in not obeying the order of the probate court, that tribunal must have decided that the title to this property was not in her. Can such an issue, vital to the exercise of the court's power, be legally determined in such a proceeding?

The question, it seems to us, is very clearly answered by this court as follows: "The title upon which his adverse claim was founded may be invalid. It may have been obtained by fraudulent and corrupt practices. It is a principle which underlies all institutions and forms of government that no man

can be deprived of his property, except in proceedings according to law, unless it be confiscated for the necessities or good of the public. If his title is claimed to be invalid or fraudulent and void, he is entitled to be heard according to the forms of law. Proceedings to punish him for contempt, for not delivering it up without a trial according to law, to another who claims it, are not the appropriate proceedings for the trial of an issue of title. The issue as to such title should be tried in an appropriate action, in which the verdict of a jury or the findings of the court may be had upon issues properly framed for the purpose of definitely determining the question of title." *Ex parte Hollis*, 59 Cal. 406-413. "Proceedings to punish a party for contempt are not the appropriate proceedings for the trial of the issue of title." *Larrabee v. Selby*, 52 Cal. 506-508.

It is true that in the present case the order of the court did not command the petitioner to pay over the money to the executor; but it did command her to deposit what she claimed was her money in a bank subject to the further order of that tribunal. To give the right to the court to make such an order, it must first have determined that she had no title to it; for if otherwise, and her right was not determined or considered, she being in possession of the money, claiming it as her own, then that tribunal had no legal authority to make any such order, and therefore the question of title must necessarily have been passed upon.

Sections 1459 to 1461 of the Code of Civil Procedure—portions of the statute appertaining to probate proceedings—provide, it is true, for the citation and examination of parties alleged to have in their possession property belonging to an estate; but they do not declare that the court may, after such an examination, when the title to the property is in dispute, order such effects to be delivered up to the executor or administrator, or deposited where the court may order; and if such had been the legislative intention it was easy to have asserted it in apt language.

Section 572, Code Civil Proc., refers to property which is, without question, in the hands of a trustee as trust property, or which belongs to or is due to another. It does not refer to that where the party alleged to hold as a trustee claims title to it in his own right.

We fail to find anywhere in our constitution or statutes any language which gives to a superior court, in a summary proceeding of the kind invoked here, the right to adjudicate the title to property.

For these reasons the petitioner should be discharged from custody.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion the petitioner is discharged.

THORNTON, J. I concur in the order directed in this case. I can see no power in any court in this state to appoint a receiver without an action brought to which the person to be affected by the order is a party. This appears from section 564, Code Civil Proc. In this case no action has been brought, and, conceding that power to make the order which was made in this case is included in the power to appoint a receiver, the circumstance that no action has been instituted is conclusive to show that the court had no power to make the order. No power to make such order is conferred by sections 1459 to 1461, Code of Civil Procedure, nor by section 572 of same Code. In this last section, by the words "shown by the examination of a party," reference is had to a party to an action. That is plainly evidenced by the preceding words, "when it is admitted by the pleading." The pleading spoken of can only be the pleading in an action, and the examination of a party can have reference only to a party to the action. The meaning of the

section is the same as if it commenced with the words, "In an action, when it is admitted by the pleading," etc.

It may be said here that, granting that the case before us is such as is specified in section 572, the order authorized by that section has not been made. The order made directs the petitioner here to deposit the sum of money about which the controversy has arisen in a bank; the order allowed by section 572 is that the party pay the money into court, or to the party to whom it is admitted by the pleading, or shown by the examination of the party, to belong or be due. The order made in this case, directing the petitioner to deposit the money in a bank, was made without authority.

For the above reasons I think that the applicant for the writ should be discharged, and concur in the order discharging her from custody.

(70 Cal. 121)

PAGE and others v. SUMMERS and others. (No. 9,382.)

(*Supreme Court of California. July 12, 1886.*)

PARTNERSHIP—DISSOLUTION—MINING—PROSPECTING PARTNERSHIP.

Where a prospecting partnership has been dissolved by mutual consent of the partners, there is no implied duty upon any of the partners to go on, and complete defective locations, and, having done so, they are not chargeable as trustees of the others.

Department 1. Appeal from superior court, Mono county.

April 15, 1881, plaintiffs and defendant Young entered into an agreement to form a prospecting company to discover and acquire mining claims in Mono county, California. All were to be equally interested, and share alike, in all mining claims located by the company in name or names of any of its members. April 27, 1881, defendant Young and plaintiff Frost made a discovery of a claim, erected a monument, with notice of claim thereon, and called it "Kentuck." May 5, 1881, they located in the same way the "May Bell." These are the claims in controversy. May 12, 1881, the partnership was mutually dissolved. May 19, 1881, the defendants and plaintiff Frost located these claims and set up proper boundary monuments. Frost afterwards conveyed all his interest to the defendants. Plaintiffs seek to compel defendants to convey to them title of their share of the claims, and account for the proceeds of the mining.

Stewart & Herrin, for appellants, Page and others. *Bennett & Reddy*, for respondents, Summers and others.

MCKINSTRY, J. The court below found "that on the twelfth day of May, 1881, the said J. H. Page withdrew from the said prospecting company, and the said prospecting company was dissolved, and the said prospecting agreement was terminated between all the parties thereto."

It is insisted by counsel for appellants that the parties to the prospecting contract were *partners*, or at least occupied a fiduciary relation towards each other, like that existing between partners; that it was the duty of Frost and Young to complete the defective locations commenced before the dissolution, and that the subsequent locations made by Frost and Young should be treated precisely as if they were the completion of their prior attempted locations; that neither Frost nor Young could get rid of his obligation to complete the original locations by removing the original notices, and posting others, and marking the boundaries of the claims asserted in the notices last posted. Further, that G. M. and J. N. Summers, who took with notice of the prospecting agreement, should be held as trustees.

Where a partnership has contracted engagements which cannot be fulfilled during the time limited for its existence, the partnership continues for the purpose of performing such outstanding engagements, and of taking and settling all accounts, and converting the property, means, and assets of the

partnership existing at the time of its dissolution, and for these purposes the authority of each member of the firm remains the same after as before the dissolution. *Robbins v. Fuller*, 24 N. Y. 570; *Murray v. Mumford*, 6 Cow. 441; *Western Co. v. Walker*, 2 Iowa, 504.

The interest of the parties herein, in the completion of the defective locations, ought not to be estimated by reference to events which happened after the termination of the agreement, even if it appeared that the rights acquired by the subsequent locations were valuable. The agreement was made in Mono county, the mines located were within that county, and, for aught that appears, all the parties to the agreement resided there. There is no finding of the concealment of any fact from the plaintiffs. It must be presumed that, with full knowledge of the existing conditions, all parties to the agreement terminated it, and dissolved the contractual relations arising from it. Page, Fulmore, and Blake may have concluded that the ground was valueless, or that it would be fruitless to complete the locations, or to expend money in developing them. Whatever motive may have influenced them, they saw fit to dissolve the company, and end the agreement and enterprise. It may be conceded that the parties to the prospecting contract might, had they deemed it for their interest to do so, have completed the locations previously commenced within a reasonable time, and that they would have been protected, during such reasonable time, from the interference of third persons. But it was for them to determine whether it was advisable to complete the locations or abandon them.

None of them had contracted an obligation with the government, or with any third person, to be performed after May 12, 1881. No duty remained with any of them to acquire property not contracted for prior to the dissolution. They had acquired no inchoate interest in property which they were under obligation to complete, notwithstanding the dissolution. The plaintiffs (other than Frost) could not have been compelled to take a conveyance of aliquot portions of the ground subsequently located, nor were they liable to the actual locators for part of the cost of making the subsequent locations, nor subject to pay any part of the expense for work done under such locations. It may be added, the court below found that Frost and Young removed and destroyed the original notices. It does not appear but this was done *after* the dissolution of the agreement, nor does it appear but it was done with the knowledge and consent of the other plaintiffs.

There are reasons, not necessary to mention, why (independent of the termination of the prospecting contract) none of the plaintiffs could demand a decree for a conveyance of any portion of the "Georgie Howell," located by Frost; why Frost is not entitled to any relief; why neither Frost nor Blake could enforce the agreement as against any of the mines located. Reasons, also, why, in any event, the defendants G. M. & J. N. Summers would hold two-thirds of the "May Bell" and one-half of the "Kentuck" free from any trust.

Judgment and order affirmed.

We concur: MYRICK, J.; Ross, J.

(70 Cal. 153)

STATE v. SMITH, Jr., and others. (No. 11,199.)

(Supreme Court of California. July 14, 1886.)

1. ALIENS AND NATURALIZATION—SUCCESSION BY NON-RESIDENT FOREIGNERS—ARTICLE 1,

§ 17, CONST. CAL.

Article 1, § 17, Const. Cal., prohibiting the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens, with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property, does not deprive it of the right to confer the same privileges on non-resident foreigners.

2. **SAME—CODE CIVIL PROC. CAL. § 671—LAW HAVING EXTRATERRITORIAL OPERATION.**
Code Civil Proc. Cal. § 671, providing for succession by non-resident foreigners, confers a right to be enjoyed within the state, and is not beyond the legislative power as a law having an extraterritorial operation.
3. **SAME—TAKING BY SUCCESSION—“APPEARANCE AND CLAIM”—CIVIL CODE CAL. § 672.**
Under section 672, Civil Code Cal., requiring a non-resident alien, in order to take by succession, to “appear and claim the property,” etc., appearance in person or by attorney, and claim by taking possession, or conveying or contracting with respect to the property, or any acts in the state indicating that the alien asserts a right to it, are sufficient.
4. **SAME—ESCHEAT—ACTION PREMATURE—OFFICE FOUND—CIVIL CODE CAL. § 672.**
Under Civil Code Cal. § 672, providing that the non-resident alien must appear and claim the property “within five years from the time of succession,” or be barred, a proceeding brought by the attorney general to secure to the school fund, under Const. Cal., art. 9, § 4, the estate of an intestate who left no resident heirs as an escheat, is premature if instituted within five years after the death of the intestate.

Department 1. Appeal from superior court, Sacramento county.

John Smith, a native of England, a resident of California, and a naturalized citizen of the United States, died intestate in Sacramento, California, November 3, 1883, leaving an estate of real and personal property. He left no heirs resident in the United States, but did leave one nephew and three nieces in England, his only next of kin. The nephew, the defendant, John Smith, Jr., came to California, obtained letters of administration after having declared his intention to become a citizen of the United States, and, for himself and the other next of kin, “appeared and claimed the estate.” Under this claim the estate was distributed equally to the next of kin, from whom the other defendants derive their title. In January, 1885, this action was brought by the state to declare said estate escheated to the state. The superior court rendered judgment for defendant, and the plaintiff appeals.

E. C. Marshall, Atty. Gen., and S. P. Scaniker, for plaintiff.

Section 17, art. 1, of the constitution is a limitation, and it has been held that the *bona fide* resident foreigner succeeds, to the exclusion of all others. *Siemssen v. Bofer*, 6 Cal. 250; *Farrell v. Enright*, 12 Cal. 450; *People v. Rogers*, 13 Cal. 160; *Norris v. Hoyt*, 18 Cal. 217. John Smith having died leaving no heirs in the state at the time of his death, his estate, at the instant (*eo instante*) of his death, vested in the state. 4 Kent, Comin. 424; *Fairfax v. Hunter*, 7 Cranch, 603; *Jackson v. Adams*, 7 Wend. 367; *Wilbur v. Tobey*, 16 Pick. 177; *Com. v. Hite*, 6 Leigh, 588; *Taylor v. Benham*, 5 How. 233; *Montgomery v. Hunt*, 5 Cal. 373; *Puckett v. State*, 1 Snead, 355; *Bradstreet v. Supervisors*, 18 Wend. 546; *Farrell v. Enright*, 12 Cal. 450; *Ettenheimer v. Hefernan*, 66 Barb. 374. Subsequent declaration of intention to become a citizen of the United States cannot have a retroactive effect so as to enable John Smith, Jr., to succeed as heir to the estate. *Heenev v. Trustees of Brooklyn Benev. Soc.*, 33 Barb. 360. Natives of foreign lands cannot take lands by descent in the state, because they have no inheritable blood in them. The nephew and nieces had never been in the state previous to John Smith, Sr.’s, death, and they had no inheritable blood in them at the time of their uncle’s death. *Wacker v. Wacker*, 26 Mo. 426. The fee could not be in abeyance; it must vest in some one, and it did vest in the state of California. *People v. Conklin*, 2 Hill, 67. The constitution and laws of this state have no force or effect beyond its limits. They cannot fix the *status* of persons who are natives and residents of foreign lands. They cannot make them heirs. Story, *Confl. Laws*, §§ 7, 20-23. There is no law in this state, nor in any other to our knowledge, by which a foreigner can succeed to and take the estate of a deceased citizen. *Spratt v. Spratt*, 1 Pet. 343; *Larreau v. Davignon*, 5 Abb. (N. S.) 367.

Grove L. Johnson and Armstrong & Hinkson, for defendants.

The points involved in the case have already been settled adversely to the plaintiff’s contention. *State v. Lyon*, 7 Pac. Rep. 763; *In re Estate of Bil-*

lings, 4 Pac. Rep. 639; *People v. Rogers*, 13 Cal. 159; *State v. Carrasco*, 7 Pac. Rep. 766.

MCKINSTRY, J. The constitution (article 1, § 17) prohibits the legislature from depriving resident foreigners of any of the rights enjoyed by native-born citizens with respect to the acquisition, possession, enjoyment, transmission, or inheritance of property. There is no provision of the constitution which prohibits the legislature from conferring the same rights upon those born in foreign countries who have never been residents of the state.

Section 671 of the Civil Code provides: "Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state." It is suggested that, inasmuch as laws can have no extraterritorial operation, the legislature has no power to provide for succession by foreigners who have never been residents. But this section of the Code provides a rule with respect to property within the state. It confers a right to be enjoyed within the jurisdiction.

Section 672 of the Civil Code reads: "If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property, in such case, is disposed of as provided in title 8, pt. 3, Code Civil Proc." The words "non-resident alien" are severely criticised by counsel for appellant. We find no difficulty in interpreting them as indicating those who are neither citizens of the United States nor residents of the state.

All aliens take *by succession*. Civil Code, 671. The failure of a non-resident alien to "appear and claim" within five years after descent cast, operates a bar of his right to assert any title in the property as against the state; and this, not on the idea that the property has escheated to the state as of the date of the death of the ancestor, but because by the law the "non-resident" takes subject to the loss of his right by a failure to make claim within the five years. The clause of section 672 is a limitation, applicable, however, not alone to the commencement of an action in the courts, but to any appearance within the state, and the assertion of a claim, whether by such action or otherwise. The claim may be *in pais*, as by taking possession of the property, or conveying, or contracting with respect to it. If he fails to appear and claim it, the property is escheat at the expiration of the five years. In "such case" the property is disposed of as provided in title 8, pt. 3, Code Civil Proc. It would seem to follow that a "non-resident alien" would have no defense to an inquest to "vest the title in the state" in the nature of office found, except a defense based on his "appearance and claim" within the five years, and it necessarily follows that a proceeding brought by the attorney general under title 8, pt. 3, is premature if commenced within five years after the death of the ancestor.

Section 1272 of the Code of Civil Procedure, so far as it applies to a non-resident alien, not a party or privy to the proceedings prescribed in title 8, only authorizes him to show that which he might have shown had he been made a party, to-wit, that he did appear and claim the property "within five years from the time of the succession." The statute gives to the non-resident alien full five years to "appear and claim" the property, and gives him no more. There is no limitation of time (certainly none less than 10 years after the "succession") within which the action provided for in the Code of Civil Procedure must be commenced by the attorney general. The five years given the non-resident alien can have no reference to the proceeding commenced by the attorney general. No statutory machinery is provided in accordance with which the alien must appear and give notice of his claim. The provision of section 672 of the Civil Code, requiring the alien to "appear and claim the property," relates to an appearance and claim, to be proved by acts within the state indicating that the alien asserts a right to it, or the provision means nothing.

Section 4 of article 9 of the constitution provides that "the proceeds" of the estates of deceased persons who may have died without leaving any "heir" shall constitute a part of the school fund. It does not limit the power of the legislature to declare that aliens may be heirs. Moreover, it speaks of the *proceeds* of the lands, evidently contemplating some procedure in the nature of office found, by which the right of the state shall be ascertained and determined, and legislation providing for the sale of the land. Judgment affirmed.

We concur: MYRICK, J; Ross, J.

(70 Cal. 6)

O'KANE v. HYDE. (No. 8,361.)

(*Supreme Court of California. May 28, 1886.*)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES—PROPERTY—PARTNERSHIP CREDITORS—INDIVIDUAL CREDITORS.

An assignment by a firm of their individual as well as partnership property, directing the property first to be applied to the payment of partnership debts, is void, as giving a preference to the partnership creditors over the individual creditors as to the individual property.¹

In bank. Appeal from superior court, city and county of San Francisco. This was an action brought by John O'Kane, as assignee of Daly & Hawkins, to recover of the defendant the sum of \$4,725, and interest, on two promissory notes. The defendant was indebted to that firm on these notes in the sum of \$3,445, as admitted by him, or in the first-mentioned sum, as claimed by the plaintiff. The firm were indebted at the same time to the Hibernia Savings & Loan Society in the sum of \$6,000, and the latter of them also owed an individual debt to the said corporation of about \$5,000. Some time afterwards, and on the twenty-second of March, 1879, the said firm made an assignment for the benefit of their creditors, by which they conveyed all their partnership and individual property to the plaintiff, to be applied to the payment of partnership debts prior to the payment of their individual debts; and on the seventh of October, 1880, the superior court of the city and county of San Francisco directed the plaintiff to bring this suit against the defendant. It further appears that on the twenty-seventh of March, 1879, at the suit of the Hibernia Savings & Loan Society, the debt due by the defendant, Hyde, to Daly & Hawkins was garnished, and in the following month they recovered a judgment against the firm, and an execution was issued thereon. The defendant in these proceedings admitted the debt for the amount as before stated, and paid to the sheriff a large part of it, leaving a balance still subject to the execution. A demurrer to the complaint having been overruled, the defendant answered, denying generally the allegations of the complaint, and alleging that he had paid to the firm of Daly & Hawkins all that was due on his notes to them, except the \$3,445 which he had paid, or a large part of it, to the Hibernia Savings & Loan Society, and claiming that the assignment was void as against them, as an execution creditor of the firm. The plaintiff contended, among other things, that the question of the validity of the assignment was *res adjudicata* as to those creditors who were parties to a former suit brought by him against Daly, and that the Hibernia Savings Bank was one. But it was admitted that the defendant was not a party to that suit. There was a judgment for the defendant in accordance with the findings of the court, and plaintiff appealed.

Edward P. Cole, for appellant. *Tobin & Tobin*, for respondent.

MYRICK, J. The court below construed the assignment by Daly & Hawkins to O'Kane as an assignment of their individual as well as of their part-

¹See Wooldridge v. Irving, 23 Fed. Rep. 676.

nership property, and, as it directed all of the property assigned to be applied to the payment of partnership debts, held the assignment void as thus giving a preference to the partnership creditors over the individual creditors as to the individual property. We are of opinion this construction is correct, and that the assignment was void as to creditors. The defendant, Hyde, was a debtor of the assignors. The Hibernia Savings & Loan Society was their creditor. As such creditor it recovered of Hyde, by garnishment proceedings, the amount of its debt due from the assignors. Hyde, by reason of his relation to the society under the garnishment proceedings, and his payment to it under such proceedings, could make inquiry into the legality of the assignment. We are of opinion that the former action (*O'Kane v. Daly & Hawkins*) was not, as to the defendant herein, or as to the Hibernia Savings & Loan Society, an adjudication as to the validity of the assignment.

Judgment and order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTY, J.

(70 Cal. 220)

HOADLEY v. CITY AND COUNTY OF SAN FRANCISCO.¹ (No. 8,762.)

(*Supreme Court of California. July 20, 1886.*)

1. MUNICIPAL CORPORATIONS—SAN FRANCISCO—PUEBLO LANDS—PUBLIC SQUARES—CALIFORNIA ACT OF MARCH 11, 1858.

The California act of March 11, 1858, ratifying and confirming the ordinances 822 and 845 of the common council of the city of San Francisco, providing for laying out public squares on pueblo lands within its limits, and the order made by the municipal authorities adopting them, operated as a selection and dedication to the public use of such squares, and no other further acceptance by the public than was afforded by the act was needed in order to make the dedication complete; following *Hoadley v. San Francisco*, 50 Cal. 265.²

2. SAME—PUBLIC SQUARES—PUEBLO LANDS—ACT OF CONGRESS, JULY 1, 1864.

The legal title to the public squares on the pueblo lands within the limits of the city of San Francisco vested in the city by the operation of the act of congress, July 1, 1864; following *Hoadley v. San Francisco*, 50 Cal. 265.

3. SAME—STATUTE OF LIMITATIONS—ADVERSE POSSESSION—TITLE—OCCUPANCY—DEDICATION—LANDS—PUBLIC USE.

In an action to quiet title to lands in a city which had been dedicated to public use, the occupancy of such lands by a private person cannot confer on him any rights against the city, no matter how long continued; following *Hoadley v. San Francisco*, 50 Cal. 265.³

4. SAME—SAN FRANCISCO—PUEBLO LANDS—COMPENSATION.

The city of San Francisco, as successor of the pueblo of that name, had the right to take pueblo lands, in the possession of others, for public squares, without making compensation therefor; following *Sawyer v. San Francisco*, 50 Cal. 370.

5. SAME—ORDINANCES 822, 845—TITLE TO LAND—CITY OF SAN FRANCISCO—ACT OF MARCH 11, 1858.

Wherever a person acquired any rights, under the California act of 1858, to any of the lands lying within the limits of the city of San Francisco, such rights were

¹Affirmed. See 8 Sup. Ct. Rep. 659, *sub nom. Clark v. City & Co. of S. F.*

²As to the necessity of an acceptance by the public to perfect a dedication to public use, see *Quinn v. Anderson*, (Cal.) 11 Pac. Rep. 746, and note; *Brooks v. City of Topeka*, (Kan.) 8 Pac. Rep. 392; *Rozell v. Andrews*, (N. Y.) 8 N. E. Rep. 513, and note.

As to what will constitute or prove an acceptance by the public, see *Morse v. Zeize*, (Minn.) 24 N. W. Rep. 287; *Laughlin v. City of Washington*, (Iowa,) 19 N. W. Rep. 819; *Brakken v. Minneapolis & St. L. R. Co.*, (Minn.) 11 N. W. Rep. 124; *Maywood Co. v. Village of Maywood*, (Ill.) 6 N. E. Rep. 868; *People v. Lohflein*, (N. Y.) 6 N. E. Rep. 784.

See, also, *Reilly v. City of Racine*, (Wis.) 8 N. W. Rep. 417.

³See *State v. Horn*, (Kan.) *post*, 148, and note.

subject to the provisions of the ordinances 822, 845, providing for laying out the public squares, and the order of the municipal authorities adopting and approving them, which had been ratified by the act.

In bank. Appeal from the late district court, Twelfth judicial district, San Francisco.

Action against the city and county of San Francisco to quiet title to certain lands lying west of Larkin street, and within the city limits as defined by the charter of 1851. Judgment below for defendant. A motion for new trial was refused, and plaintiff appealed from the judgment, and from the order refusing a new trial.

S. W. & E. B. Holladay, John Currey, and W. C. Belcher, for appellant.
John L. Love, for respondent.

THORNTON, J. This action was instituted to quiet title of plaintiff to two parcels of land situate in the city and county of San Francisco, and within that portion of said city and county to which the ordinances 822 and 845 of the common council of said city and county, and an order passed by the justices of the peace of the defendant corporation on the sixteenth of October, 1856, ratified by the act of the legislature of this state, approved March 11, 1858, apply. One of the parcels of land in controversy forms a part of Alta plaza, and the other a part of Hamilton square.

This cause was here before on appeal, (see 50 Cal. 265,) and on that appeal this court held that the plaintiff acquired no title to the lots or squares in question either by the Van Ness ordinance, or by adverse possession. The questions are presented now under the same state of facts, and the above rulings of the court must be regarded as the law of the case in all its stages. In this condition of things, we see no reason why the points above mentioned should be further considered. See *Sawyer v. San Francisco*, 50 Cal. 370; *People v. Holladay*, 5 Pac. Rep. 798; *City of Visalia v. Jacob*, 65 Cal. 434; S. C. 4 Pac. Rep. 433.

The point made on behalf of plaintiff, as to the fact that the squares in question embrace more than one-twentieth of the land in possession of the plaintiff, and that the excess above such one-twentieth was taken without compensation, as provided in section 6 of ordinance 822, we regard as settled by this court in *Sawyer v. San Francisco, supra*, adversely to the contention of the plaintiff.

The reasons on which the rule just above mentioned as to the taking of more than one-twentieth, as settled in *Sawyer v. San Francisco*, is rested, apply to the point made here that more than one block was taken to make up the squares in controversy. The survey and map of these squares, including four blocks each, were approved, ratified, and confirmed by the act of the eleventh of March, 1858, (St. 1858, p. 53,) and from such approval the survey and map above mentioned acquired validity. Whatever rights the plaintiff acquired under the Van Ness ordinance he took subject to the act of 1858, which approved the survey and map above mentioned. This is true under any proper application of the doctrine of relation invoked on behalf of plaintiff. The act of approval ratified the ordinance 822, allowing title to be made under it by a possession designated in it, and ratified also ordinance 845, and the order of the justices approving the survey and map above mentioned; and, when the act of 1858 was passed, the doctrine of relation could vest in the plaintiff no greater rights than he took under the act of 1858. Any rights which plaintiff derived under the act of 1858 would be subject to all its provisions. At the same time that ordinance 822 was ratified the order approving the map and survey above mentioned was also ratified, and whatever rights plaintiff took under the act were subject to the provisions of the ordinance and order so ratified. We find in the case no trace

of a contract between the plaintiff and any one which ever vested in plaintiff any rights different from those accorded to him herein.

The above embraces all the points in the case which are necessary to be considered. We find no error in the record, and the judgment and order must be affirmed. Ordered accordingly.

We concur: MCKEE, J.; MCKINSTRY, J.; SHARPSTEIN, J.; MYRICK, J.

(70 Cal. 128)

RED JACKET TRIBE, No. 28, etc., v. GIBSON and others. (No. 11,302.)

(*Supreme Court of California. July 12, 1886.*)

1. BENEVOLENT SOCIETIES—ACTION AGAINST TRUSTEES—ACTS OF CO-TRUSTEE.

Evidence that a trustee of a benevolent society acted without the concurrence of a co-trustee, or that the latter was induced to concur in his act by reason of misrepresentations which he had made with respect to the concurrence of a third trustee, is admissible.

2. SAME—PURCHASE—BENEFICIARY.

In an action against trustees to have declared void a purchase made by them, evidence that one of them understood the propriety of the purchase was first to be submitted to the beneficiary is admissible.

3. SAME—QUESTION FOR JURY—PURCHASE—ASSOCIATION—OFFICER—TRUSTEES.

Where a suit is brought by an association to have declared void a purchase made for it, by its trustees, from one of its officers, the question whether the acts of the officer were fair or unfair are to be determined by the jury, and not by the trustees who may be called as witnesses.

4. SAME—MORTGAGE—ENFORCEMENT OF SALE.

Where a mortgage, made by the officer of an association, has been paid off and canceled with funds derived from a fraudulent sale of property to the association, held, in a suit brought by the association against such officer to have the sale declared void, to which the mortgagee was a party, that the mortgage may be revived and enforced for its benefit against all the property therein described, to the extent of the amount applied by such officer to its satisfaction, obtained from such fraudulent sale.

5. SAME—“RED JACKET TRIBE,” CALIFORNIA—TRUSTEES—INVESTMENT—FUNDS IN BANK.

An order of the “Red Jacket Tribe,” California, instructing its trustees “to try and invest the money in the bank, not exceeding \$2,000,” does not purport to authorize an investment of money of the tribe otherwise than in stock, bonds, mortgages, or other securities approved by two-thirds of the members thereof present at a regular council.

6. EQUITY—RIGHTS OF VENDOR—CANCELLATION—SALE.

Where a deed for the sale of property is annulled, the vendor is entitled to a return of the money, or its equivalent paid for it.¹

7. SAME—COMPLAINT—RECONVEYANCE—PROPERTY.

A complaint not praying for a reconveyance of property, no reconveyance will be ordered.

Department 1. Appeal from superior court, county of Sacramento.

The plaintiff is a lodge or tribe of Red Men. The defendants Gibson, Bennett, and Dustman were members of it. Gibson was treasurer, and Bennett, Dustman, and Burt Worthington were the trustees of the tribe. The funds of the plaintiff were kept on deposit in the bank, subject to the order of the trustees. One of the by-laws of the tribe provided that the trustees should “keep the funds invested, for the best interests of this tribe, in such stocks, bonds, mortgages, or other securities as shall be approved by two-thirds of the members thereof present at a regular council.” On the thirty-first of October, 1884, the trustees were instructed to try and invest the money in the bank, not to exceed \$2,000; and defendants contend that they had full power to act regarding the investment of it.

Afterwards the defendant Gibson saw some of the trustees, and informed

¹See Worthington v. Campbell, (Ky.) 1 S. W. Rep. 714, and note.

them that he had a lot and a half he would sell for \$1,800. A conference having been held to consider the propriety of the purchase as an investment, it was agreed, on the twelfth of November following, the two trustees Bennett and Dustman conducting the negotiations, that the tribe should purchase the property at the above-mentioned price, which comprised the east half of lot 2, and the whole of lot 3, in a certain block in Sacramento. The money was thereupon paid, and a deed for the same delivered to the trustee Bennett, and by him duly recorded. At this time there was a mortgage on the property of \$1,200, and interest, in favor of the Occidental Building & Loan Association, and which was a lien, also, on the west half of the said lot 2, which had not been conveyed except by this mortgage. This lien was paid off out of the \$1,800, and the mortgage was surrendered up by the loan association, and canceled.

On the twenty-second of November of the same year, Edith L. Gibson, the wife of the defendant J. A. Gibson, filed a declaration of homestead upon the west half of said lot 2, claiming it as a homestead for the benefit of herself and husband. The plaintiff asks that the conveyance by Gibson to them be declared null and void; that the satisfaction of the mortgage be set aside; and that the association be required to transfer the mortgage to them; and that they be permitted to hold and enforce it against all the property therein described, notwithstanding the satisfaction thereof by Gibson, and the declaration of homestead by the wife. There was a verdict and judgment for the plaintiffs according to the prayer of the complaint, and also a personal judgment against Gibson for \$600, and costs. A motion for a new trial having been made and denied, the defendants appealed from the judgment, and from the order denying a new trial.

Young & Dunn, for appellants. *Freeman, Johnson & Bates*, for respondent.

MCKINSTRY, J. There was sufficient evidence to justify the findings of the court below.

Evidence that the defendant Bennett acted without the concurrence of his co-trustee Dustman, or that the latter was induced to concur by reason of misrepresentations made by the former with respect to Worthington's concurrence, was admissible.

Evidence that Dustman understood the propriety of the purchase was to be submitted to the "tribe" was admissible.

The objection to the question asked on cross-examination of the witness Dustman, "Now, then, do you know of any unfair act that he [Gibson] did to induce the sale?"—was properly sustained, because calling for the inference of the witness. The witness had already stated, on his cross-examination, what Gibson had said and done to induce the purchase. He had also been asked: "Did Gibson do anything that you know of to induce you to purchase that lot and a half other than what you have testified to?" To this question the witness had answered, "Not that I know of." Whether the acts of Gibson were "unfair" was to be determined by the jury.

The court was authorized to revive the lien of the mortgage of the Occidental Loan Association in favor of the plaintiff if the satisfaction of the mortgage was part of the fraud practiced on the plaintiff.

The court below properly admitted evidence that the trustees never assembled, and, as a board, considered the transaction,—the purchase from Gibson.

The prompt disavowal of the act of one of the trustees was a fact which the plaintiff was entitled to prove. Gibson was a member of the tribe, and acquainted with the by-laws, which did not authorize the trustees to invest in lands. The order instructing the trustees "to try and invest the money in the bank, not exceeding \$2,000," does not purport to authorize an investment of money of the tribe otherwise than "in stocks, bonds, mortgages, or other securities, approved by two-thirds of the members thereof present at a

regular council." Moreover, the by-laws of plaintiff could not be amended by a simple motion or resolution.

The decree of the court below annulled the deed from Gibson to the plaintiff, and did not provide for a reconveyance from the latter to the former. This on the theory that the transaction was fraudulent, and, in equity, the deed conveyed no title. The deed being annulled, the plaintiff was entitled to a return of the money or its equivalent.

The minutes of the proceedings of the tribe, showing a disavowal of the transaction, were admissible, notwithstanding the objection that "there was no allegation in the complaint of a tender of reconveyance." The complaint did not pray for a reconveyance, and none was ordered.

Judgment and order affirmed.

We concur: MYRICK, J.; Ross, J.

(71 Cal. 268)

SANTA CLARA MILL & LUMBER CO. v. BOARD OF SUP'RS OF SANTA CRUZ CO. (No. 9,698.)

(*Supreme Court of California. November 15, 1886.*)

Costs—MOTION TO TAX—JUDGMENT.

Until a motion to tax costs has been disposed of, the clerk has no authority to enter a judgment for costs.

Department 1. Appeal from superior court, county of Santa Cruz.

Mandamus. The Santa Clara Mill & Lumber Company sued the county of Santa Cruz, April 30, 1879, for \$15,000 damages, caused by the location of a proposed public road across the premises of the company, according to the order of the board of supervisors of that county. On January 19, 1880, the action was dismissed on motion of the defendant, the order laying out the road having been rescinded, and judgment was ordered in favor of the company for its costs of suit. The company filed a memorandum on January 29th, verified by its manager, claiming, as its costs, "clerk's fees, \$6.23; attorney's fees, \$200; total, \$206.23." On the same day the county filed a motion to tax costs, stating that the item objected to was the "attorney's fees, \$200." The clerk on January 30, 1880, entered judgment according to the plaintiff's claim, allowing \$206.23, costs. The motion to tax was never disposed of. The company, on refusal of the county to pay the costs as taxed, sued out a *mandamus* to compel the commissioners to pay.

Charles B. Younger, for appellant, Santa Clara Mill & Lumber Co. *James A. Hall*, for respondent, Board of Sup'rs of Santa Cruz Co.

BY THE COURT. The clerk had no authority to enter the judgment for costs while a motion to retax was pending. *Riddell v. Harrell, ante*, 67, (No. 11,363, filed November 4, 1886.)

Judgment affirmed.

(35 Kan. 686)

GRAY v. CROCKETT and others.

(*Supreme Court of Kansas. November 5, 1886.*)

ESTOPPEL IN PAIS—FAILURE TO DISCLOSE INTEREST IN LAND SOLD—MARRIED WOMAN.
Former opinion in 10 Pac. Rep. 452, affirmed.

Error from Wyandotte county.

On motion for rehearing. Motion overruled.

B. Gray, N. Cree, and J. W. Green, for plaintiff in error. *Stevens & Stevens, Barker, Gleed & Gleed*, and *J. B. Scroggs*, for defendants in error.

PER CURIAM. We are satisfied with the law as declared by us in this case, in 35 Kan. 66, and 10 Pac. Rep. 452, and we discover nothing to call for a
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rehearing. The plaintiff is entitled to the enforcement of the contract made by him with H. C. Long. Mrs. Long is estopped from setting up her title to the land under the deeds from Long, through Vedder, to herself. Her contingent estate in the premises rests upon the ground that she is the wife of H. C. Long, and did not sign the written contract of April 22, 1881. If H. C. Long outlives his wife, there will be no contingent interest to contest. It is not necessary now to decide whether Mrs. Long or Mrs. Crockett is the holder of the contingent estate of Mrs. Long.

The motion for a rehearing will be overruled.

(35 Kan. 678)

In re DASSLER.

(*Supreme Court of Kansas. November 5, 1886.*)

1. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—WORK ON STREET—KAN. LAWS 1881.

CH. 37, § 11.

The word "section," used in paragraph or subdivision 34 of section 11, art. 3, c. 37, Sess. Laws Kan. 1881, is to be construed as meaning "subdivision" or "sub-section."

2. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—ROAD ASSESSMENTS.

Road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt, as such provision applies only to liabilities arising upon contract.

3. SAME—INVOLUNTARY SERVITUDE—WORK ON STREETS.

The performance of work upon an assessment or levy payable in labor, for the repair of roads or streets, is not that kind of involuntary servitude intended to be embraced within the provisions of the constitution of the state, or of the United States.¹

4. ELECTIONS—RIGHT TO VOTE—ROAD TAX.

The satisfaction of an assessment or levy of labor to keep the streets in repair, in cities of the first class, is not a prerequisite of registration, and in no sense can it be said that said assessment or levy is a tax or an embargo upon the right to vote, although the list of registration is one of the methods of ascertaining who are liable to work upon the streets.

5. STATUTE—REPEAL—CONFLICTING ACTS.

Where the legislature has, by the passage of a later statute, constituted each city of the first class a separate road-district, and given such cities full control over the labor to be performed upon its streets, and authorized ordinances to be enacted to enforce the same, the later statute is controlling, as it is a substitute for the prior statute, so far as it conflicts therewith.

(*Syllabus by the Court.*)

Original proceedings in *habeas corpus*.

On January 12, 1885, there was filed in this court, on behalf of C. F. W. Dassler, a petition for a writ of *habeas corpus*. The petition set forth the following facts:

"(1) That your petitioner is restrained of his liberty by one W. D. Shallcross, of Leavenworth, Kansas, who is the city marshal of the city of Leavenworth, Kansas, a city of the first class; that said petitioner is restrained of his liberty by said city marshal, in the city and county of Leavenworth, in the state of Kansas, and in the city jail thereof.

"(2) The cause or pretense of the restraint of this petitioner, according to the best of the knowledge and belief of the applicant, is as follows: On December 30, 1884, this petitioner was arrested by a policeman of said city of Leavenworth upon a warrant issued by the police judge of said city upon a complaint, of which the following is a copy:

"THE STATE OF KANSAS. CITY AND COUNTY OF LEAVENWORTH—POLICE COURT, SCT.

"*The City of Leavenworth vs. C. F. W. Dassler.*

"W. D. Shallcross, being duly sworn, deposes and says that C. F. W. Dassler is now, and has been ever since January 1, 1884, a male resident and

¹See *Daly v. County of Multnomah*, (Or.) *ante*, 11.

citizen of said city of Leavenworth, and is now, and was during all of said time, between the ages of twenty-one and forty-five years, and a registered voter of said city, and that said Dassler unlawfully neglects and refuses to perform two days' labor, or any part thereof, upon the streets, alleys, and avenues of said city, and also unlawfully neglects and refuses to pay to the street commissioner of said city the sum of three dollars, or any part thereof, in lieu of said labor, and has, during all of the time since January 1, 1884, so neglected and refused to perform said labor or pay said money in lieu thereof, although duly notified in writing so to do by the street commissioner of said city; and further saith not.

[Signed]

"W. D. SHALLCROSS.

"Sworn before me, and subscribed in my presence, this thirtieth day of December, A. D. 1884.

"M. L. HACKER, Police Judge.'

—That on the thirty-first day of December, 1884, the case against said petitioner on said complaint was called for trial, and the petitioner moved to quash said complaint because the same did not state a public offense under the constitution and laws of the state of Kansas, or the laws or ordinances of said city, and because said city of Leavenworth had no power to arrest, fine, and imprison the petitioner for the non-payment of the road tax in said complaint mentioned, which motion was by the police judge of said city overruled. (A copy of the ordinance of said city of Leavenworth, in reference to the collection of road tax, is hereto attached, made a part hereof, and marked 'Exhibit A.') That thereupon said police judge, under protest of petitioner, proceeded to try the case, hear the evidence, and adjudged the petitioner guilty, and adjudged that petitioner pay a fine of five dollars, and stand committed to the city jail until said fine be paid, and issued a *mittimus* to the said W. D. Shallcross to that effect, and said petitioner was thereupon so imprisoned and restrained of his liberty by said city marshal, and still continues in said restraint; this petitioner refusing to pay said fine.

"(3) That the illegality of the said restraint consists in that the said city of Leavenworth, nor said police judge, have power to enforce the collection of said road tax by arrest, fine, and imprisonment; *second*, that, if there be any pretended law on the statute book to that effect, the same is unconstitutional, null, and void; *third*, that said police judge had no power to render the judgment for a fine, nor to issue a commitment to enforce the collection thereof; *fourth*, that the said ordinance under which said complaint was issued, and said proceedings were had, is void, in so far as it provides for the arrest, fine, and imprisonment of persons for the non-payment of road taxes; *fifth*, that the ordinance is repugnant to the constitution and laws of the state of Kansas.

"Wherefore petitioner prays that his said imprisonment be inquired into, and, if found illegal, that he be discharged therefrom."

EXHIBIT A.

"An ordinance relating to labor on the streets of Leavenworth City.

"Be it ordained by the mayor and councilmen of the city of Leavenworth:

"Section 1. [Repealed by Ordinance 1,044, *post*, § 905.]

"Sec. 897. *City Clerk.* Sec. 2. The city clerk shall deliver one copy of the duplicate list of persons registered, which he is required to make out by the thirty-fourth subdivision of section eleven of the city charter, to the street commissioner, and the other copy thereof to the city treasurer.

"Sec. 898. *Street Commissioner.* Sec. 3. After the duplicate list of persons registered has been delivered to the street commissioner, he shall from time to time, as work may, in his judgment, or upon order of the city council, be required to be done, notify the persons upon said list, or so many

thereof as may be necessary, to report to him at a time and place in said notice specified, which notice shall be either printed or written, or pay to him, at said time and place, the amount of money due for any delinquency in work, the same being for not less than one full day's labor.

"Sec. 899. *Same.* Sec. 4. The street commissioner shall also notify all other persons specified in the first section of this ordinance, whose names are not included in the list of registered persons, in the same manner as herein provided for persons registered, and such persons shall be subject to all of the provisions of this ordinance, and the names of such additional persons shall be, by the street commissioner, forthwith furnished to the city treasurer.

"Sec. 900. *Same—Failure.* Sec. 5. Upon the failure of any person notified as herein prescribed, and no valid excuse being given, to appear and perform said labor, or upon a failure to pay to the street commissioner the amount to be paid for such delinquency, the street commissioner shall mark opposite to his name, upon the list furnished him by the city clerk, or made by himself, the words, 'Notified and failed,' and such persons so failing shall, on due conviction thereof, before the police judge, be fined in a sum not less than three dollars, nor more than ten dollars, for each day he so fails or refuses to work or to pay therefor, and the list of said street commissioner, so marked 'Notified and failed,' shall be *prima facie* evidence of such notification and failure.

"Sec. 901. *Receipt.* Sec. 6. Upon doing the work required, or payment of the money specified in this ordinance to be paid to the street commissioner, he shall mark on said list the words, 'Notified,' 'Worked,' or 'Paid,' and give the person so working or paying a receipt therefor.

"Sec. 902. *Arrest.* Sec. 7. It shall be the duty of the street commissioner to turn over the list of delinquents, on Monday of each week, to the city marshal, who shall thereupon cause such persons to be arrested, and brought before the police judge for trial, under provisions of this ordinance.

"Sec. 903. *Moneys.* Sec. 8. It shall be the duty of the street commissioner to turn over, every day, all moneys collected by him, to the city treasurer, during the preceding one, and once each week to furnish the city treasurer with a list of those persons who have either performed the labor or paid the amount required by section 1 of this ordinance, and those who have been temporarily excused. The city treasurer shall furnish the city council, at each regular meeting, a true copy of all reports filed with him by the street commissioner since their last meeting.

"Sec. 904. Sec. 9. Any failure, upon the part of the street commissioner or city marshal, to perform their duties as specified in this ordinance, shall be deemed sufficient cause for dismissal from office.

"Sec. 10. This ordinance shall take effect and be in force from and after its approval and publication.

"Approved April 22, 1881. Published April 23, 1881."

"No. 1,044.

"An ordinance amending and repealing section one of ordinance No. 1,008, entitled 'An ordinance relating to labor on the streets of Leavenworth City.' Approved April 22, A. D. 1881.

"Be it ordained by the mayor and councilmen of the city of Leavenworth:

"Sec. 905. *Street Labor.* Section 1. That section 1 of an ordinance No. 1,008, entitled 'An ordinance relating to labor on the streets of Leavenworth City,' approved April 22, 1881, be amended so as to read as follows: Section 1. Each male resident of the city of Leavenworth, between the ages of twenty-one and forty-five years, is hereby required, in his own proper person, each year, upon notice from the street commissioner, his deputy, or an officer appointed for that purpose, to perform two days' labor, of ten hours each,

on the streets, alleys, or avenues of said city, under the direction and control of the street commissioner, or his deputies, or, in lieu thereof, shall pay to the street commissioner the sum of one dollar and fifty cents for each day.

"Sec. 906. Sec. 2. The original section one of this ordinance, above referred to, is hereby repealed, but all actions and proceedings thereunder shall be carried out the same as if this repeal had not been made.

"Sec. 3. This ordinance shall be in force from and after its publication.

"Approved October 5, 1882. Published October 7, 1882."

Upon such petition being filed, W. D. Shallcross, the respondent, waived the issuance of the writ and entered his appearance, and for his return stated that C. F. W. Dassler was restrained by him, and held in his custody, under the proceedings mentioned in the petition.

C. F. W. Dassler, for petitioner. *Wm. C. Hook*, for respondent.

HORTON, C. J. The petitioner was arrested December 30, 1884, under a warrant issued by the police judge of the city of Leavenworth, upon complaint of the city marshal, charging him with refusing to pay what is known as the "Road Tax," sometimes called the "poll-tax." Before the police court, he moved to quash the complaint, which was overruled. Upon the trial he was adjudged guilty, and assessed to pay a fine of five dollars, and stand committed to the city jail until the fine was paid. After being committed to the city jail, these proceedings were instituted, the petitioner alleging that he is illegally held in custody. He claims that there is no power conferred upon cities of the first class to enforce the collection of road taxes by arrest, fine, and imprisonment; that, if such alleged power has been attempted to be conferred, it is in conflict with the constitution of the state, (1) because taxes are debts, and are therefore within the meaning of the constitutional provision abolishing imprisonment for debt; (2) that section six of the bill of rights specifies there shall be no involuntary servitude, except for the punishment of crime, within the state, and the power attempted to be conferred violates this provision; (3) by attempting to confer such power the legislature has imposed additional qualifications upon the citizen to exercise the right of suffrage; and, finally, that the ordinance of the city under which the petitioner was arrested is invalid, because it is in conflict with the General Statutes in several respects.

The statutory authority for the ordinance relating to labor on the streets of Leavenworth City, under which the petitioner was arrested, is found in paragraph 84, § 11, c. 37, Sess. Laws 1881, of the act "to incorporate and regulate cities of the first class," and reads as follows: "Each city shall constitute a separate road-district, and the mayor and council are authorized and empowered to compel each male resident of said city, between the ages of twenty-one and forty-five years, to perform two days' labor, of ten hours each, on the streets, alleys, or avenues of said city, or, in lieu thereof, to pay to the street commissioner the sum of one dollar and fifty cents per day. The city clerk shall make out and certify to the street commissioner and city treasurer, on or before the first day of April of each year, duplicate lists of persons registered by him as voters, between the ages of twenty-one and forty-five years, and the street commissioner shall collect the sum of one dollar and fifty cents per day from each person so certified by the clerk, or compel such person to perform three days' labor on the streets, alleys, or avenues of said city. The street commissioner shall, every forty-eight hours, turn over to the city treasurer all moneys collected by him during said time, together with a list of the persons from whom said money was collected, and shall, once every week, make out and deliver to the city treasurer a list of all persons who have performed their three days' labor on the streets. The city treasurer shall place the money collected by the street commissioner in a special fund, which shall only be applied to the repairs of the streets, alleys,

or avenues of said city. All work or labor done under the provisions of this section shall be under the superintendence and control of the street commissioner. Each city shall have power to pass all ordinances, and to enforce the same by fine or imprisonment, or both, to carry out fully the provisions of this section."

The word "section," used in said paragraph 34, must be considered to mean "subdivision" or "subsection." The language of the whole paragraph or subdivision, taken together, will bear no other reasonable construction. The final sentence of subdivision 34 is: "Each city shall have power to pass all ordinances, and to enforce the same by fine or imprisonment, or both, to carry out fully the provisions of this section." The preceding sentence in subdivision 34 is as follows: "All work or labor done under the provisions of this section shall be under the superintendence and control of the street commissioner." In both of these sentences the word "section" is to be construed as meaning "subdivision" or "subsection." Said section 11, which contains the enumeration of powers delegated to the mayor and council, embraces 43 paragraphs or subdivisions, of which subdivision 34 is one.

It was decided by this court, in *Re Wheeler*, that "the provision of the constitution declaring 'no person shall be imprisoned for debt except in cases of fraud,' applies only to liabilities arising upon contract." Therefore, road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt. *In re Wheeler*, 34 Kan. 96, and 8 Pac. Rep. 276. See, also, 1 Desty, Tax'n, 9, 10; Cooley, Tax'n, (2d Ed.) 14; *Amenia v. Stanford*, 6 Johns. 92; *Johnston v. Mayor, etc.*, 62 Ga. 645.

The power to impose labor for the repair of public highways and streets has been exercised from time immemorial, and comes within the police regulation of the state or city. A commutation of such labor in money in lieu of work, while in the nature of a tax, is not, in common speech or in customary revenue legislation, understood as embraced in the term "tax." The power to impose this labor is exercised for public purposes, and the general good and convenience of the community. Cooley, Tax'n, (2d Ed.) *supra*; 1 Desty, Tax'n, 296; *Starksboro v. Town of Hinesburgh*, 13 Vt. 215; *State v. Halifax*, 4 Dev. 345; *Day v. Green*, 4 Cush. 433; 1 Dill. Mun. Corp. (3d Ed.) § 394. Such labor has never been regarded or construed by any of the authorities as falling within the terms of the constitution prohibiting slavery and involuntary servitude. Militia service is also compulsory, and, if the theory of the petitioner is correct, such service, when involuntary, is within the terms of section 6 of the bill of rights, and the thirteenth amendment to the constitution of the United States. Such, however, is not the case, and we do not think that article 8 of the constitution of the state conflicts in any way with section 6 of the bill of rights, or with the thirteenth amendment. There are certain services which may be commanded of every citizen by his government, and obedience enforced thereto. Among these services are labor on the streets or highways and training in the militia.

As the performance of work, upon an assessment or levy payable in labor, for the repair of roads or streets, is not the kind of involuntary servitude evidently intended to be embraced within the provisions of the constitution of the state or the United States, the power to impose such labor by the legislature, or a city acting under its authority, cannot well be questioned. If it be urged against the exercise of this power that, if the legislature has a right to require a man to work two days upon the road or street, it may compel him to work every day of the year, and thereby make him a slave to the state, the answer is sufficient to say that no such case is before us.

The claim that the levy, made payable in labor, to keep the streets in repair, which may be commuted in money in lieu of work, is a tax upon the right to vote, is not sustained. It is true that no one in a city of the first class can vote unless he is registered, but the satisfaction of the levy for street purposes

is not a prerequisite of registration. It is not true that the assessment can only be collected from those who register. The statute authorizes cities of the first class to compel each male resident between the ages of 21 and 45 years to perform the labor complained of, or, in lieu thereof, to pay the sum of three dollars. The list of registration is only one of the means of ascertaining who are liable to work upon the streets of the city; and, if a voter fails to register, he is not thereby exempt from the performance of labor upon the street. Section one of the ordinance reads: "Each male resident of the city of Leavenworth, between the ages of twenty-one and forty-five years, is hereby required in his own proper person each year, upon notice from the street commissioner, his deputy or an officer appointed for that purpose, to perform two days' labor, of ten hours each, on the streets, alleys, or avenues of said city, under the direction and control of the street commissioner or his deputies, or, in lieu thereof, to pay to the street commissioner the sum of one dollar and fifty cents for each day."

Section 3 reads: "After the duplicate list of persons registered has been delivered to the street commissioner, he shall from time to time, as work may, in his judgment, or upon the order of the city council, be required to be done, notify the persons upon said list, or so many thereof as may be necessary, to report to him at a time and place in said notice specified, which notice shall be either printed or written, or pay to him, at said time and place, the amount of money due for any delinquency in work; the same being for not less than one full day's labor." Section 4 also reads: "The street commissioner shall also notify all other persons specified in the first section of this ordinance, whose names are not included in the list of registered persons, in the same manner as herein provided for persons registered, and such persons shall be subject to all of the provisions of this ordinance, and the names of such additional persons shall be, by the street commissioner, furnished to the city treasurer."

It is not shown that the petitioner is a cripple, or unable to perform the work required of him, and therefore the exemption of a disabled person is not before us for determination.

As the legislature has constituted each city of the first class a separate road-district, and given such cities full control over the labor to be performed upon its streets, and authorized ordinances to be enacted to enforce the same, such statute is controlling, as it is a substitute for the prior statute, so far as it conflicts therewith. Chapter 37, Laws 1881; *City of Salina v. Seitz*, 16 Kan. 143; *City of Macomb v. Twaddle*, 4 Bradw. 254; *Fox v. City of Rockford*, 38 Ill. 452.

The petitioner in the case must be remanded.

(All the justices concurring.)

(35 Kan. 692)

HEATWOLE v. GORRELL and another.

(Supreme Court of Kansas. November 5, 1886.)

1. DAMAGES—PENALTY OR LIQUIDATED DAMAGES—BREACH OF CONTRACT.

Where H. sells his business and good-will to G., and, as a part of the same transaction, executes a written instrument, in which he says: "I * * * bind myself in the sum of \$500" that I will not engage in such business, at the same place, for the period of five years: *held*, that the sum named in the instrument is a penalty, and not liquidated damages; and, for a breach of the agreement by H., G. may recover only his actual damages.

2. SAME—FIXED SUM, WHEN A PENALTY.

Whenever a party binds himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or the number of any breaches that might occur, or the amount of the damages that might

ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages.

Error from Crawford county.

A. A. Fletcher, O. T. Boaz, and John Martin, for plaintiff in error. *Voss & Yeamans*, for defendants in error.

VALENTINE, J. This was an action brought in the district court of Crawford county by Thomas S. Gorrell and Louis M. Mosteller, partners as Gorrell & Mosteller, against Joseph F. Heatwole, to recover \$500 for an alleged breach of the following instrument in writing, to-wit:

"PITTSBURGH, KANSAS, February 26, 1883.

"I, Joseph F. Heatwole, of the city of Pittsburgh and county of Crawford and state of Kansas, bind myself in the sum of five hundred (500) dollars to Thomas S. Gorrell, Louis M. Mosteller, and James J. Avery, in said county and state above mentioned, that I will not engage in the business myself, or allow my name to be used in company to any one, in the dealer of hardware and implements in the said Baker township, Crawford Co., Kansas, for the period of five years from this date. If this agreement is performed on my part in good faith, this agreement to be null and void; otherwise to remain in full force.

"Witness my hand this twenty-sixth day of February, A. D. 1883.

[Signed]

"JOSEPH F. HEATWOLE."

The case was tried before the court and a jury, and the jury found a general verdict in favor of the plaintiffs, and against the defendant, for \$500, and the court rendered judgment accordingly, and the defendant, as plaintiff in error, now brings the case to this court for review.

Several questions were raised in the court below, but the only question which needs to be considered in this court is whether the sum of \$500 mentioned in the foregoing instrument in writing is a penalty or is liquidated damages. The plaintiff in error, defendant below, claims that it is a penalty, while the defendants in error, plaintiffs below, claim that it is liquidated damages. The court below did not directly decide the question, but submitted the same to the jury for their determination, and the jury found generally in favor of the plaintiffs below, and against the defendant below, and therefore, in effect, found that the above-mentioned sum was liquidated damages, and not a penalty, and the court below sustained the verdict.

The foregoing instrument in writing was executed under the following circumstances: On February, 26, 1883, the defendant, Heatwole, was engaged in business in Pittsburgh, Baker township, Crawford county, Kansas, as a retail dealer in hardware. He desired to sell his business, including his stock in trade, and the plaintiffs desired to purchase the same; but upon the condition only that the defendant should enter into a penal bond in the sum of \$500 that he would not again go into the hardware business at that place for five years. The plaintiff Gorrell testified on the trial, among other things, as follows: "When Mosteller and myself first spoke to Heatwole about purchasing his stock of hardware, he agreed to execute to us a bond in the penal sum of five hundred dollars. * * * When I spoke to Mr. Heatwole about buying his stock of hardware, I told him I didn't want to buy it, and he to stay in the business. He promised us he would go into a written bond, in the penal sum of five hundred dollars, he would not go into the business. *Question.* State whether or not that was part of the inducement. *Answer.* That was part of the inducement. *Q.* State whether or not you would have made this purchase if it had not been for the giving of the bond. *A.* No, sir;

I don't think I would." The purchase was made and the bond was given on February 26, 1883. Afterwards, and about the last of September, 1884, the defendant, Heatwole, again went into the hardware business at Pittsburgh, Kansas, and on December 3, 1884, this action was commenced.

Was the foregoing instrument in writing correctly interpreted in the court below? We think not. Of course, in all cases of this kind, the will and intention of the parties must govern; but from the language of the instrument in this case, and the circumstances under which it was executed, it cannot be supposed that the parties intended that the said sum of \$500 should be considered as liquidated damages, and not as a penalty. There was no expressed agreement that the defendant, Heatwole, should pay liquidated damages, or damages of any kind, or that he should pay anything; and evidently, if the parties believed each other to be honest, and each intended that the contract should be fulfilled, it was not expected or intended that the defendant should ever *pay* anything. The essence of the contract was that the plaintiffs should purchase the defendant's business, and his good-will for five years, and that he should not again for that period of time, and at that place, enter into that kind of business; and that during that period of time he should stand *bound* in the *penal* sum of \$500 as a security for the performance of the contract on his part. This instrument was, in terms, a bond. The defendant, in express terms, says in the instrument: "I * * * bind myself in the sum of \$500," etc.; and a bond of this character is always, *prima facie*, a *penal* obligation. Suth. Dain. 489. And there is nothing in all this case tending to show that the present bond is not a *penal* obligation. But if it were doubtful whether this bond should be construed to be a *penal* obligation or a contract to pay liquidated damages, then the courts should and would construe it to be a *penal* obligation; for in that case exact justice could be done between the parties by giving to the aggrieved parties their exact damages,—neither more nor less,—while, on the other hand, if the instrument were held to be a contract to pay liquidated damages, great injustice might be done by compelling the party who executed the instrument to pay to the other parties vastly more than their actual damages. In the present case the sum of \$500, as fixed by the parties, was intended to cover every breach and all breaches for the entire period of five years; and it was to prevent the defendant from engaging in the business of dealing in any hardware, or in dealing in any implements, or allowing his name to be used in dealing in any hardware, or in dealing in any implements, not only for the period of one day or one week or one month or one year, but for the entire period of five years; and the said sum of \$500 was considered as an ample and sufficient compensation, not only for a single breach of the contract for a single day, in dealing in the smallest quantity of hardware, or the smallest number of implements, but was considered as a sufficient compensation for all possible breaches, or for an entire breach, of the entire contract for the entire period of five years, and without reference to the amount of the stock of hardware, or the amount of the stock of implements, which the defendant might keep, if he committed any breach. And where an absolute sum is fixed in a contract as a security against all breach or breaches of the contract, without reference to the magnitude of the breaches or the number thereof, and without reference to the amount of the actual damages which might ensue from such breach or breaches, whether great or small, and this where there might be several breaches, and each of a greater or less magnitude, and each followed by greater or less damages, such fixed sum cannot be considered as agreed or liquidated damages, but must be considered as a *penalty*. It is simply a *penalty* intended to cover every breach and all breaches, and to be recovered in proportion to the actual damages which may result from any breach or breaches, and is not liquidated damages, to be recovered in full for the slightest or most trivial or insignificant breach of the contract; and where there

may be a doubt as to whether the sum fixed is a penalty or is liquidated damages, the courts will construe it to be a penalty.

Mr. Pomeroy, in his work on *Equity Jurisprudence*, uses the following language: "Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed—is of such a nature and effect—that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." 1 Pom. Eq. Jur. § 444.

The following cases, we think, support this doctrine: *Davies v. Penton*, 6 Barn. & C. 216; *Horner v. Flintoff*, 9 Mees. & W. 678; *Perkins v. Lyman*, 11 Mass. 76; *Ex parte Pollard*, 2 Low. 411; S. C. 17 N. B. R. 229; *Whitfield v. Levy*, 35 N. J. Law, 149. See, also, as tending to support the foregoing doctrine, the following: *Hamaker v. Schroers*, 49 Mo. 406; *Savannah & C. R. Co. v. Callahan*, 56 Ga. 331; *Jemmison v. Gray*, 29 Iowa, 537; *Dullaghan v. Fitch*, 42 Wis. 679; *Lyman v. Babcock*, 40 Wis. 504; *Taylor v. Marcella*, 1 Wood, 302; *Curry v. Larer*, 7 Pa. St. 470; *Shreve v. Brereton*, 51 Pa. St. 175; *Lampman v. Cochran*, 16 N. Y. 275; *Niver v. Rossman*, 18 Barb. 50; *Beale v. Hayes*, 5 Sandf. 640.

There are a few cases which seem to assert a contrary doctrine: *Streeter v. Rush*, 25 Cal. 68; *Cushing v. Drew*, 97 Mass. 445; *Grasselli v. Lowden*, 11 Ohio St. 349.

In the California case there is an able dissenting opinion by Mr. Justice SAWYER. In the Massachusetts case the material words are, "do agree to *pay*," while in the present case the material word is "*bind*." In the Ohio case the material words are that the party obligating himself "*agrees*, for himself and representatives, to *pay* to the said John Lowden, [the other party,] or his representatives, the sum of \$3,000, as *liquidated damages*." The Ohio decision is probably correct, and possibly, also, the Massachusetts decision, and yet we are not entirely satisfied with that decision, nor are we satisfied with the California decision; and, so far as any of these decisions differ from the views we have herein expressed, we cannot agree with them.

It would be an injustice in this case to require the defendant to pay the full sum of \$500 for the breach of his obligation for only about two months. That sum was intended as a full compensation for every breach and all breaches which he could possibly commit during the entire period of five years. The defendant fulfilled his obligation for about 19 months, and then violated the same for only a little more than two months, when this action was commenced; and shall he pay the entire sum of \$500 for a two-months breach, when that sum was considered and intended as a sufficient compensation for a five years' breach? Of course, if the sum of \$500 is to be considered as liquidated damages, and not as a penalty, then the plaintiffs would be entitled to recover the entire amount, although the breach might not have continued more than one day, and this day might be the last day of the five years, as well as the first or any intermediate day; and the breach might be only a slight and technical breach,—the inadvertent dealing as a clerk, or otherwise, in a small quantity of hardware, or a few implements. Such a result would be grossly unjust. If, however, we should consider the said sum as only a penalty, then the defendant would be required to pay only a fair compensation in damages for the breach of his obligation, and a fair compensation is all that the plaintiffs are in justice entitled to claim. It is the injustice that must necessarily ensue in many cases, from construing fixed sums in contracts to be liquidated damages rather than penalties, that has caused courts to generally construe such sums to be only penalties; and courts will always construe such sums to be penalties, unless it is clear that it was the intention of the parties that such sums should not be considered as penalties, but as liqui-

dated damages. Such does not appear to have been the intention of the parties in this case. Everything in the present case tends to show that said sum of \$500 was intended as a penalty, and not as liquidated damages.

About the only ground upon which it is claimed that the sum mentioned in the present contract should be considered as liquidated damages, and not as a penalty, is the claim that for a breach of the contract the damages would be uncertain, and would be difficult of proof. Now, the damages in this case are not more uncertain than the damages are in many other kinds of cases where the law unquestionably gives damages, and not more difficult of proof than they are in many of such cases. Take, for instance, the action of slander, or an action for a breach of promise to marry, or an action for a breach of warranty concerning property where the purchaser retains the property, or many other cases which may be imagined. In the present case, proof could be introduced concerning the length of time during which the defendant had been in business in violation of his contract, the amount of his stock, the number and amount of his sales, who were his customers, the loss of the plaintiff's sales, etc.; and from such facts, and others, the jury might determine with a sufficient degree of accuracy the amount of the damages. It is our opinion, from the authorities and from reason, that whenever a party binds himself in a fixed sum for the performance or non-performance of something, without stating whether such fixed sum is intended as a penalty or as liquidated damages, and without regard to the magnitude or to the number of any breaches that might occur, or the amount of the damages that might ensue, and the contract is such that it may be partially performed and partially violated, such fixed sum must be considered as a penalty, and not as liquidated damages.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

(35 Kan. 727)

REED v. NEW.

(*Supreme Court of Kansas. November 5, 1886.*)

1. FIRE INSURANCE—ACTION—EVIDENCE.

Where the question whether the defendant had an insurance on certain property or not arises incidentally in the case, and the plaintiff proves that he had, and the defendant afterwards, by his own testimony, shows that he had, it is immaterial whether the evidence showing in the first instance that he had such an insurance is competent or not.

2. EVIDENCE—OPINION—VALUE OF HORSES.

Where a witness is shown to have been a farmer and a livery-stable keeper, and that he has dealt in horses, and has some knowledge of the value thereof, he may testify with regard to the value of particular horses which he has known and owned; and it will generally be presumed, in the absence of evidence to the contrary, that a dealer in any particular kind of articles has sufficient knowledge of the value of such articles that he may testify with regard thereto.

3. TRIAL—INSTRUCTIONS.

Held, that there was no error in charging the jury.

Error from Dickinson county.

O. L. Moore and *J. H. Mahan*, for plaintiff in error. *J. R. Burton*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Dickinson county, Kansas, by Thomas G. New against Richard W. Reed, to recover \$1,373.50, the alleged value of certain personal property, consisting of horses, buggies, harness, etc., used in carrying on and conducting a livery stable, which property it is alleged the defendant intentionally burned and destroyed by fire. The answer was a general denial. The case was tried before the court and a jury, and the jury rendered a general verdict in favor of

the plaintiff, and against the defendant, for \$1,250, and the court rendered judgment accordingly; and the defendant, as plaintiff in error, brings the case to this court, and asks for a reversal of the foregoing judgment.

The right of the plaintiff to recover depends solely upon the question whether it was the defendant, or some one else, that set the fire to the livery stable that consumed it and the plaintiff's property; and the only proof that tended to show that it was the defendant that started the fire was purely circumstantial evidence. There was no direct testimony introduced on the trial tending to show that the defendant started the fire, while his own testimony was that he did not. It appeared at the trial that for some time prior to the burning of the livery stable, and up to within five days of that time, the defendant carried on and operated the livery stable himself; that he then owned the entire stock and materials necessary for that purpose; and that he also owned two sheds attached to the livery stable; but that he did not own the stable itself, but only had a lease thereof. It also appeared that prior to the fire the defendant's lease expired, and that the plaintiff leased the stable from the owners thereof, and had taken the possession thereof. The defendant, however, owned the following property, which still remained in the stable: six horses, four double sets and four single sets of harness, four saddles, and some other articles; and he also owned the two sheds above mentioned. All this property was consumed by the fire, except three of the horses. The plaintiff also had a large amount of property in the stable, all of which was consumed by the fire, except one horse. The plaintiff's property destroyed by the fire was found by the jury to be worth \$1,250. The value of the defendant's property destroyed by the fire was about \$650.

The plaintiff prosecuted this action upon the theory that the defendant set the fire to the stable for the following reasons: For revenge against the owners of the stable for renting it to the plaintiff, and for revenge against the plaintiff because he procured a lease thereof, and deprived the defendant of the use of the same; and the plaintiff also introduced evidence for the purpose of showing that the defendant had his own property insured for more than it was worth, and therefore that he would not lose anything by having it destroyed by fire. The defendant objected and excepted to the introduction of this evidence, and whether the introduction of such evidence constitutes material error or not is the principal question involved in this case, and the first one which we shall consider.

It was clearly proper for the plaintiff to prove that the defendant had an insurance on his property, but whether the evidence introduced to prove this fact was competent or not is the real question which the defendant (plaintiff in error) desires to present. We hardly think that we need to consider this question, for the defendant himself proved by his own testimony that he had an insurance on the property; that he had a sufficient insurance to cover all the property destroyed; that the property destroyed was worth about \$650; and that he received from the insurance company, by way of compromise, \$500. This was a waiver of the original error, if any error was committed. There does not appear to have been any claim in the case that the original insurance was excessive; nor does it appear that in fact it was excessive. The defendant's property in the barn was, in all probability, at the time the insurance was effected, worth vastly more than the amount of the insurance; and while he had removed a large portion of the property from the barn before the fire, yet it appeared from the evidence that he had removed it for a sufficient reason. In fact, all of it should have been removed before that time, as the defendant no longer had any right to the premises. It will also be noticed that the question whether the defendant had an insurance on his property or not arises only incidentally in the case, and not directly. The suit is not an action on the insurance policy.

It was necessary on the trial for the plaintiff to prove the value of the prop-

erty for which he sued, and which was destroyed by fire, and in doing so he introduced the testimony of himself and several other witnesses; and it is claimed that the court below erred in permitting these witnesses to testify with regard to the value of the property, for the reason that they were not shown to have sufficient knowledge of the value of such property. And here, again, we might say that it is not necessary to decide whether the court erred in admitting the testimony without sufficient preliminary proof of the witnesses' knowledge of values having first been introduced, for additional evidence of their knowledge of values was afterwards introduced. The question is whether it appears from the whole of the witnesses' testimony that they had sufficient knowledge of the value of this kind of property to testify intelligently with regard thereto. The plaintiff testified with regard to the value of the horses. He stated that he had some knowledge of the value of this kind of property. It was also shown that he was 38 years of age; that for several years he had been a farmer in that county, and had been such up to about 18 months before the fire occurred, when he removed to the city of Abilene, where he remained for about 18 months before the fire occurred; that he had dealt in cattle and horses; that he had leased the livery stable, and had stocked it with horses of his own; and that he had been in the possession of the livery stable, and in the livery business, for about five days before the fire occurred. This, we would think, gave him sufficient knowledge of the value of horses to enable him to testify with regard thereto. Indeed, the most of people, and particularly farmers and livery-stable men, have some knowledge of the price of horses. Besides, the defendant did not attempt, by cross-examination or by other evidence, to dispute the values placed upon the horses by the plaintiff. It is also claimed that the evidence of the witness Worley, with regard to the value of harness, whips, lap-robés, etc., was not competent. We, however, think otherwise. He was shown to be a dealer in such articles, and evidently knew their value. In the absence of evidence to the contrary, such at least will be presumed.

It is further claimed that the court below erred in charging the jury. Now, we think the instructions of the court were very fair, as towards the defendant; and the defendant did not ask for any additional instructions, nor, indeed, for any instructions.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(35 Kan. 687)

BANKS and another, Partners, etc., v. EVEREST and others, Partners, etc.

(*Supreme Court of Kansas*. November 5, 1886.)

1. PRINCIPAL AND AGENT—LIABILITY OF PRINCIPAL FOR ACT OF AGENT.

A principal is bound for the acts of his agent, done within the scope of his authority, and the principal will also be responsible for the unauthorized acts of the agent where the conduct of the principal justifies a party dealing with the agent in believing that such agent was acting within, and not in excess of, the authority conferred on him.¹

2. SAME—PRIVATE INSTRUCTIONS.

Where an agent is held out to the world as one having the authority of a general agent, any private instructions or limitations not communicated to the persons dealing with such agent will not affect them, nor relieve the principal from liability, where the agent oversteps such limitations.

(*Syllabus by the Court*.)

Error from Atchison county.

Everest & Waggener, of Atchison, Kansas, brought an action in the district court of Atchison county against Banks Bros., who are plaintiffs in error here, to recover damages for the breach of an alleged contract. They allege

¹ See note at end of case.

that, in 1883, Banks Bros., through their duly-authorized agent, J. E. Frederick, sold and agreed to deliver the reports of the states of Vermont, New Hampshire, and Colorado for the sum of \$600, the delivery to be made at Atchison, Kansas, free of any charges, and the price of the books to be paid within 30 days from the delivery thereof. They allege that Banks Bros. have failed and refused to comply with the agreement, by which the plaintiffs below were damaged in the sum of \$300. The case was tried without a jury, and the court, at the request of the parties, stated its conclusions of fact and of law, which are as follows:

"CONCLUSIONS OF FACT.

"(1) The plaintiffs are partners engaged in the practice of law at Atchison, Kansas, and they have been such partners, so engaged, for several years last past.

"(2) The defendants are partners engaged in the business of publishing, selling, and dealing in law-books, at Albany, in the state of New York, and they have been such partners, so engaged in said business, for several years last past, and they are assisted in their business by traveling salesmen, canvassers, or agents.

"(3) On and prior to March 6, 1883, one J. Edward Frederick was a traveling agent in the employ of the defendant, and was duly authorized to represent them. It was intended by the defendants, however, that all sales made by J. Edward Frederick should be subject to the approval of the defendants before they should be binding upon the defendants, and said J. Edward Frederick so understood his authority. The plaintiffs did not know of such limitation of the authority of said J. Edward Frederick. They had frequently bought books from the defendants through such traveling agents or salesmen, after agreeing with such agents or salesmen upon the books and the price; and such books had always been furnished by the defendants at the price agreed upon between the plaintiffs and such traveling agents or salesmen; and the defendants never notified the plaintiffs, through the agents of the defendants, nor otherwise, that the authority of their agents or salesmen was so limited until after the controversy arose in this case.

"(4) On March 6, 1883, said J. Edward Frederick called upon the plaintiffs at their office in Atchison, and asked them if they wanted to buy any law books from the defendants. After considerable negotiation the plaintiffs agreed to purchase, and said J. Edward Frederick agreed on the part of the defendants to sell, a set of New Hampshire reports, a set of Vermont reports, and a set of Colorado reports for the sum of \$600, to be delivered in Atchison in the usual course of business, and to be paid for in thirty days thereafter. Some of the books were to be old, and some new; but the old ones that needed rebinding were to be rebound, so as to make them in good condition. Said agreement was wholly in parol, and nothing was said about the same being subject to the approval of the defendants, and the plaintiffs understood the agreement to be an absolute contract, and not subject to any condition other than as stated in this conclusion of fact.

"(5) Said J. Edward Frederick immediately requested the defendants, by letter, to send said reports to the plaintiffs at said price; but the defendants refused, and have ever since refused, to forward said reports to the plaintiffs at said price, and they then denied, and have ever since denied, the validity of said agreement, on the ground that it was conditional only, and not complete or binding until after their approval, and that they never approved it.

"(6) At the time and place at which such books should have been delivered, under the terms of said agreement, they were worth, in the condition that they should have been delivered, the sum of \$870.

"(7) Said books have never been forwarded by the defendants to the plaintiffs, although the plaintiffs have ever been ready and willing to pay for the

same in accordance with said agreement, and the plaintiffs often demanded performance of said agreement by the defendants before this action was commenced.

"CONCLUSIONS OF LAW."

"(1) The defendants were and are bound by the agreement made by the plaintiff with said agent of the defendants.

"(2) The plaintiffs are entitled to recover from the defendants the sum of \$270, and costs of this suit."

Judgment was given in favor of Everest & Waggener for the sum of \$270, to reverse which the present proceeding is brought.

Jackson & Royse, for plaintiffs in error. *Everest & Waggener*, for defendants in error.

JOHNSTON, J. The plaintiffs in error attack the findings of fact and conclusions of law made by the court below, but raise no other questions. The findings of fact are so far supported by the evidence that they must be accepted here as a correct narration of the actual facts in the case. The real inquiry in the case is whether the conduct of the plaintiffs in error rendered them responsible as principals for the acts of their agent done in excess of the express authority given him. The rule of law governing this case, as stated by a noted text writer, is that "a principal is responsible either when he has given to an agent sufficient authority, or when he justifies a party dealing with his agent in believing that he has given to this agent this authority." Pars. Cont. 44. Judge STORY, in speaking of the liability of a principal for the unauthorized acts of his agent, where the apparent authority with which the agent is clothed is greater than was intended by the principal, says: "In such cases good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority; for he has held him out to the public as competent to do the acts, and to bind him thereby. The maxim of natural justice here applies with its full force, that he who, without intentional fraud, has enabled any person to do an act which must be injurious to himself or another, shall himself suffer the injury, rather than the innocent party who has placed confidence in him." Story, Ag. § 127, and note.

The same principle was recognized and applied by this court in a case where an agreement was made by an agent and commercial traveler, and the principal contended that the agent exceeded his authority in making the agreement. It was said "that the defendants had no personal acquaintance—no negotiations—directly with the plaintiff. The entire trade was made between this agent and them. They had no knowledge of the extent or limitations of his authority. If the plaintiff accepted the contract of his agent, he must accept it as a whole, and cannot accept that which suits him, and reject the balance. The principal is bound by the representations of his agent,—bound by the contracts he makes within the apparent scope of his authority." *Babcock v. Deford*, 14 Kan. 408.

Here we find that Frederick was the acknowledged agent of the plaintiffs in error, and "was duly authorized to represent them." He and others of their agents had frequently sold law-books to the defendants in error, fixing the terms of sale, and in each case the books had been furnished and forwarded at the price agreed upon between the agent and the defendants in error. It turns out that the extent of the agent's authority was to solicit orders for his principals, which orders were subject to their approval or rejection. But, although there had been a long course of dealing between the parties, this limitation had never been disclosed to the defendants in error, nor had it in any way come to their notice. Instead of revealing this limitation through their agents, by circular or otherwise, the plaintiffs in error

allowed the agents to go out to the public, and act in the character of general agents. When the orders were sent in, they could easily have notified their customers that the orders had been approved or rejected, and thus brought to the attention of their customers the extent of their agents' authority; but this was not done. It also appears in the testimony that the agent from whom the books were purchased in this case brought a book to the office of the defendants in error at another time, which he sold and delivered to them, without communicating with, or obtaining the approval of, his principals. A bill for this book was forwarded by the plaintiffs in error, requesting payment from defendants in error, which was the same procedure that was pursued in other cases where the books were furnished from the publishing house. Under these circumstances, we think the defendants in error had a right to believe that the agent was acting within, and not exceeding, the authority conferred on him when the sale in question was made. The defendants in error have dealt in good faith with the agent, upon the strength of his apparent authority, and ought not now to suffer. It is true that in making the sale he violated the express authority given to him by the plaintiffs in error; but, under the familiar principle that has been stated, where one of two innocent persons must suffer by the misconduct of an agent, it should be the one who, by his conduct, has enabled the agent to perpetrate the wrong.

The point urged, that the principal cannot be held liable for the unauthorized act of his agent unless the persons dealing with the agent have sustained some loss, cannot apply, as the findings show that the defendants in error suffered a loss of \$270, and it was for that loss the present action was brought.

The judgment of the district court will be affirmed.

(All the justices concurring.)

NOTE.

A principal is bound by the acts of his agent to the extent of the apparent authority conferred on him, Webster v. Wray, (Neb.) 24 N. W. Rep. 207; Griggs v. Selden, (Vt.) 5 Atl. Rep. 504; Philadelphia, W. & B. R. Co. v. Brannen, (Pa.) 2 Atl. Rep. 429; Lebanon Mut. Ins. Co. v. Erb, (Pa.) 4 Atl. Rep. 8; Dewar v. Bank of Montreal, (Ill.) 3 N. E. Rep. 746; Schley v. Freyer, (N. Y.) 2 N. E. Rep. 280; Alderson v. Crocker, 28 Fed. Rep. 745; May v. Western Assurance Co., 27 Fed Rep. 260; and those dealing with him are entitled to presume that his agency is general, Trainer v. Morison, (Me.) 3 Atl. Rep. 185. Private instructions or limitations of his authority, not communicated to the third party, will not relieve the principal. White Lake L. Co. v. Stone, (Neb.) 27 N. W. Rep. 395.

As to what acts of an agent are within, and which are beyond, the scope of his apparent authority, see Voorhees v. Chicago, R. I. & P. R. Co., (Iowa,) 30 N. W. Rep. 29, and note.

(35 Kan. 709)

HINNEN v. NEWMAN.

(Supreme Court of Kansas. November 5, 1886.)

1. ACTION—ILLEGAL TRANSACTION.

As a general rule, an action which grows out of and is founded upon an illegal transaction, where the plaintiff and defendant are in equal guilt, cannot be maintained.¹

2. CONTRACT—PUBLIC POLICY—AGREEMENT TO PURCHASE AT EXECUTOR'S SALE.

N. was employed by the executors of an estate to sell the property of the estate at public auction, and he entered into a secret agreement with H. to attend the sale, and purchase certain horses, belonging to the estate, for him. In pursuance of the agreement, H. appeared at the sale, and without any notice to those interested in the estate, or to the by-standers, he bid in the horses for N., but in his own

¹ That no action of any character can be maintained to enforce a right growing out of an illegal transaction, see Feineman v. Sachs, (Kan.) 7 Pac. Rep. 222; Bach v. Smith, (Wash. T.) 3 Pac. Rep. 831; Mackintosh v. Renton, Id. 830; Fisher v. Lord, (N. H.) 3 Atl. Rep. 927, and note; Gould v. Kendall, (Neb.) 19 N. W. Rep. 483; Clarke v. Lincoln Lumber Co. (Wis.) 18 N. W. Rep. 492; Gibbs & Sterrett Manuf'g Co. v. Brucker, 4 Sup. Ct. Rep. 572.

name, and paid for them with his own funds. Afterwards the horses came into the possession of N., and H., claiming the ownership, brings an action of replevin to recover the possession of them. Held, that the conduct of the parties in the purchase and sale of the horses contravenes public policy, and is illegal, and that, as the plaintiff's right of action is founded solely on the illegal transaction, and as he is equally culpable with the defendant, he must fail.

(*Syllabus by the Court.*)

Error from Jackson county.

Action by Gotlieb Hinnen in the district court of Jackson county to recover from Samuel Newman the possession of two horses alleged to be the property of the plaintiff, and to be unlawfully detained by the defendant. A trial was had at the November term, 1884, without a jury, when the following findings of fact and law were made by the court:

"FINDINGS OF FACT.

"(1) That on and before the fifth day of September, 1884, the property in controversy in this action was then property of the estate of Samuel Horner, deceased.

"(2) The defendant was employed by the executors of said Samuel Horner as auctioneer to sell said property, and, as such auctioneer sold said property on said fifth day of September, 1884.

"(3) That, prior to said public sale, the said plaintiff entered into a secret agreement with the defendant to appear at said sale, and bid in property for him, the said defendant.

"(4) That said plaintiff did appear at said sale, and did, as aforesaid, bid in said horses in controversy in his own name, but for the defendant; and that he (plaintiff) paid to the executors of said last will and testament the amount of said bids.

"(5) No notice was given to said executors, or to any one interested in said estate, or to the by-standers, or to any other person, of the fact that defendant had requested the plaintiff to bid said property in for him, the defendant.

"(6) In bidding in said property, the plaintiff bid the same in his own name; and the property was stricken off to him personally by the defendant, and was then and there delivered to him (said plaintiff) for the defendant; the defendant at the same time declaring that the property was sold to Gotlieb Hinnen.

"(7) The plaintiff paid to the executors, with his own funds, the several amounts for which said horses were respectively sold to him, and defendant has paid nothing for either of said horses.

"(8) Before the commencement of this suit the plaintiff demanded of the defendant the delivery of the horses in controversy in this action to him, the said plaintiff, which defendant refused to do, and defendant ever since that time, and up to the commencement of this action, has refused, and still refuses, to return the property in controversy to the plaintiff.

"(9) The horse first described in the petition, to-wit, one sorrel horse with white strip in forehead, about fifteen hands high, was, at the date of said sale and at the commencement of this action, of the value of \$60, and the other horse in said petition described was, at the date of said sale and at the commencement of this action, of the actual value of \$20.

"(10) The use of said horses, since the fifth day of September, 1884, is worth \$25.-

"(11) The executors of the estate of Samuel Horner, deceased, have made no objections to said sale so made to the plaintiff, and have never asked to have the same rescinded.

"(12) The said defendant, on the day succeeding the day of said sale, to-wit, the sixth day of September, 1884, tendered payment to said plaintiff of the amount for which said property in controversy was sold.

"(13) The terms of said sale was nine months' credit without interest, the purchaser giving note with approved security."

"CONCLUSIONS OF LAW.

"(1) That the secret agreement made by plaintiff with defendant, whereby plaintiff was to act as agent for defendant in bidding off said horses for the benefit of defendant, was fraudulent and void as against public policy.

"(2) That by reason of said agreement, so made between plaintiff and defendant, being fraudulent and void, as against public policy, the defendant is entitled to a judgment for his costs herein. To which conclusions of law, and each of them, the plaintiff at the time duly excepted."

In accordance with the foregoing findings, the court entered judgment in favor of the defendant for costs, and the plaintiff brings the case here by petition in error and transcript of the record for review.

Hayden & Hayden, for plaintiff in error. *Lowell & Walker*, for defendant in error.

JOHNSTON, J. The foundation of the plaintiff's action is a pretended sale to him of the horses in controversy at a public auction. The defendant, Samuel Newman, was employed by the executors of the estate of Samuel Horner, deceased, as an auctioneer, to sell the property of the estate. Before the day set for the public auction the plaintiff entered into a secret agreement with the defendant to attend the sale, and there purchase the horses in question for the defendant. In pursuance of the agreement the plaintiff attended the sale, and without any notice to those interested in the estate, or to the by-standers, of his purpose, he bid in the property for the auctioneer, but in his own name. The horses having come into the possession of the defendant, the plaintiff now asks the court to assist him in reclaiming them.

The whole transaction between these parties contravenes public policy, and is clearly illegal; and the general rule is that an action founded upon an illegal transaction, where the parties are *in pari delicto*, cannot be maintained. In all such cases the courts refuse to assist the parties to carry out or to reap the fruits of the illegal transaction, but will leave them in the condition in which they were found. In applying this principle, the supreme court of the United States has said: "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practiced fraud, which, when detected, deprives him of anticipated profits, and subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself, by the exertion of its powers, by shifting the loss from one to the other, or equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws." *Bartle v. Coleman*, 4 Pet. 184.

Here both of the parties before the court were directly concerned in the transaction. Together they secretly conspired to and did commit a wrong against others. The transaction, tainted with illegality, was voluntarily entered into and consummated by them. There was no constraint upon the plaintiff compelling him to carry out the unlawful purpose, nor does any fact appear which affords him any excuse for his misconduct, or that would bring him within any of the exceptions to the rule that has been stated. He concedes that the transaction was illegal; but, to escape the penalty which the law justly imposes upon a guilty participant, he says that the property was bid in in his own name, and paid for with his own funds, and he claims that his right of action is based on these facts rather than on the illegal transaction, and that he can make out his cause of action without the aid of that transaction. It is claimed that the true test for determining his right of recovery is by considering whether he can establish his case without the neces-

sity of having recourse to the illegal transaction; and, if so, he must prevail. This test is applied for the only purpose of determining whether the parties before the court are *in pari delicto*, in which case they are remediless. Broom, Leg. Max. 645; *Holt v. Green*, 73 Pa. St. 198; Waite, Act. & Def. 64. There is little necessity or room for the application of this test, where the plaintiff and defendant are so obviously in equal fault as we have seen the parties are in this case. But, if the test proposed is applicable, it will not avail the plaintiff. The only interest or right of possession which he has in the property is derived from the sale, which is confessedly illegal. To establish his case he must show that he purchased the property at that sale, and he thereby brings the illegal transaction into the case. Both parties claim under that sale,—the plaintiff because he bid in the property in his own name, and the defendant because it was bid in for him, and not for the plaintiff. Neither of them can come into court with clean hands and ask anything, under the fraudulent and illegal transaction. If the possession of the property was changed, and the defendant were in court seeking to obtain possession of it, he would be refused assistance, although, from the findings, it appears that the property was purchased solely for him. He is in no better position than the plaintiff, and would be entitled to no greater consideration. It has been said that the objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but is founded on general principles of policy, which the defendant has the advantage of, contrary to the rule of justice as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant were to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis*. *Holman v. Johnson*, 1 Cowp. 343. As the plaintiff's right of action grows out of and rests solely upon the illegal transaction, and as he is equally culpable with the defendant, he must fail.

The judgment of the district court is right and just, and will be affirmed.
(All the justices concurring.)

(35 Kan. 717)

STATE v. HORN.

(Supreme Court of Kansas. November 5, 1886.)

1. WAYS—PUBLIC HIGHWAY—USES—VACANT LAND.

Where land is vacant and unoccupied, the mere fact that individuals travel over it, and use it as a road, for more than 15 years, is not sufficient to constitute it a public highway.¹

2. SAME—PRESCRIPTION—POSSESSION BY PUBLIC AUTHORITIES.

Where a road has been traveled for more than 15 years, but has not been established under the statutes of the state, and has not been expressly dedicated nor impliedly dedicated, unless by prescription or limitation, and the land over which it runs was for several of the first years vacant and unoccupied, *held*, that such road is not a public highway by prescription or limitation, unless the public, by its constituted authorities, took the possession of the road, and used it and maintained it as a public highway for at least 15 years.²

(Syllabus by the Court.)

Appeal from Leavenworth county.

S. B. Bradford, Atty. Gen., and Wm. Dill, for the State. J. P. Usher and Charles Monroe, for appellant.

VALENTINE, J. This case has once before been in this court. *State v. Horn*, 34 Kan. 556; S. C. 9 Pac. Rep. 208. After its return to the district court, it was again tried before the court and a jury, and the defendant was again convicted, and was adjudged to pay a fine of \$50, and the costs of the suit, and he again appeals to this court.

On the second trial the state introduced evidence which tended to prove that A. Stephens resided at Lenape; that he had a son, William, a young man, who generally signed his name "W. Stephens;" that this young man was very well known at that place; that the two owned a drug-store at Osawatomie; that the son kept the drug-store, though he was frequently at home at Lenape; that A. Stephens acted as one of the commissioners in locating the road, and that W. Stephens took no part therein. It will be remembered that it was W. Stephens, and not A. Stephens, who was appointed one of the commissioners. Only one of the commissioners out of the three appointed acted in viewing and locating the road. The state then offered in evidence the records of all the proceedings had in, or having any connection with, the location or establishment of the road, and just such records as were introduced on the former trial, but the court excluded the evidence. The state then attempted to prove that the road had become a public highway by prescription, limitation, or dedication; but about the only evidence introduced which tended to show this is as follows: In April or May, 1868, William G. Harris, with a half-breed Indian, traveled along this road as an Indian trail. From this time on, up to the present time, the road has been more or less traveled. The land, however, over which this road ran, and the land in that vicinity, was, at that time, and for several years afterwards, open and unfenced, permitting people to travel where they pleased. On September 20, 1869, proceedings were commenced to lay out and establish a public county road in that vicinity; and on December 6, 1869, the proceedings culminated in the attempted establishment of this road as a county road, as stated in the case of *State v. Horn*, *supra*.

¹ As to the abandonment of highways by non-user, see *Watkins v. Lynch*, (Cal.) 11 Pac. Rep. 808; *City of Visalia v. Jacob*, (Cal.) 4 Pac. Rep. 433; *City of Topeka v. Russam*, (Kan.) 2 Pac. Rep. 669; *Stevenson's Appeal*, (Pa.) 6 Atl. Rep. 266, and note; *Driggs v. Phillips*, (N. Y.) 8 N. E. Rep. 514.

² As to highways by prescription, see *Kripp v. Curtis*, (Cal.) 11 Pac. Rep. 879, and note.

As to the necessity of acceptance by the public, see *Quinn v. Anderson*, (Cal.) 11 Pac. Rep. 746, and note; *Rozell v. Andrews*, (N. Y.) 8 N. E. Rep. 513, and note.

This road is the old Indian trail, and the road now in dispute. Some time after the supposed establishment of this road, but just when is not shown, the road was opened and improved by the road overseer, and has since been traveled, up to the present time. The land claimed to have been taken and appropriated as a public highway by the attempted establishment of this road was not at that time fenced or occupied in any manner, nor was it, or any of the land in that vicinity, so fenced or occupied for several years afterwards, except that the railway company operated its railway over a portion of such land; and it does not appear that the railway company has ever acknowledged or admitted that any public highway has ever been located or established over the ground over which the present road runs. The land over which the present road runs was granted to the railway company's predecessor by the act of congress of July 1, 1862, for a right of way, (12 U. S. St. at Large, 489 *et seq.*) and the road runs near to and parallel with the company's railway track. This action was commenced on August 18, 1884.

Now, the question as to what the rights of the railway company are, as between it and the United States, is a question which it is wholly unnecessary to decide in this case; for the case may be decided, and finally disposed of, as between the present parties, without deciding such question. The railway company claims that under the facts of this case no public highway has been created where the present road is located, either by the foregoing proceedings, or by prescription or limitation, or by dedication; and it further claims that under the acts of congress, and the Indian treaties, giving to the railway company its right of way, no public highway could be so created. We shall assume, however, for the purposes of this case, and as the prosecution claims, that the railway company owns the land over which the road runs to such an extent, and in such a manner, that the road could be created and established as a public highway by legal proceedings under the statutes of Kansas, or by prescription, or limitation, or dedication, notwithstanding the acts of congress and the Indian treaties, and notwithstanding the fact that the road is located on the railway company's right of way, and near to and parallel with its tracks. But the question then arises, has the present road been created a public highway in any such manner, or in any manner whatever? That the road has not been created a public highway by any kind of proceedings under the statutes of Kansas is clear beyond all question, nor has it been created a public highway by any express dedication; for no owner of the land—neither the Indians, nor the United States, nor the railway company, nor any one of its predecessors—has ever expressly dedicated the same as a public highway, and there has never been any implied dedication, unless it is such a dedication as arises from prescription or limitation. Therefore, if such road has ever become a public highway at all, it must have become such by prescription or limitation, or a dedication in the nature of prescription or limitation; and if it has become such in this way, then it must have become such only by the authoritative use of the same by the public as a highway for at least 15 years, with the knowledge of the owner of the land, for 15 years in this state is the limitation prescribed by statute for the commencement of civil actions for the recovery of real property held adversely to the owner.

The mere fact that individuals, many or few, may have traveled along this road, or over the same, for more than 15 years, is not enough to constitute it a public highway, where the land itself is vacant and unoccupied, as this has been, and where no action has been taken by the public authorities to constitute the road a public highway, or to keep it in repair, or to maintain it, as such. *Smith v. Smith*, 34 Kan. 293, 301, and authorities there cited; S. C. 8 Pac. Rep. 385, 390. Individuals travel over the ground merely because it is convenient for them to do so, and generally without any expectation or design or authority to constitute the place where they travel a public highway; and by such traveling they cannot set in operation any prescriptive

right, or any right by limitation. In order to start in operation any prescriptive right, or any right by limitation, to use a piece of ground as a public highway, the public, by its constituted authorities, must take the actual possession of the ground, and use it as a public highway. Ang. Highw. (3d Ed.) § 151.

Now, if we are correct in this, then the present road was not a public highway when this action was commenced. The public, by its constituted authorities, did not take possession of this property as a public highway prior to the attempted establishment of the same as a public highway, which was December 6, 1869; and probably the public, by its constituted authorities, did not take the possession of this property *as a highway* for many months, possibly years, after that time. When it was first opened or worked by the road overseer is not shown, but it was more than 15 years before this action was commenced. It was not 15 years from December 6, 1869, when the attempt was made to establish this road as a public highway, to August 18, 1884, when this action was commenced. Indeed, it was not 15 years from the time when the first legal proceedings were instituted to make this road a public highway to the time when this action was commenced. Hence there is no room in this case for any right by prescription or limitation to operate, and under no aspect of this case can this road be considered as a public highway.

The judgment of the court below is erroneous.

Errors were committed by the court below in the instructions given to the jury, and in the refusal to give instructions, and in not granting a new trial; and for these errors the judgment of the court below must be reversed, and cause remanded for a new trial.

(All the justices concurring.)

(*Colo. 318*)

BOARD OF COUNTY COM'RS OF ARAPAHOE CO. v. CROTTY.

(*Supreme Court of Colorado, October 19, 1886.*)

MANDAMUS—TO BOARD OF COUNTY COMMISSIONERS—APPROVAL OF BOND OF JUSTICE OF THE PEACE—JUDICIAL DISCRETION—SECTION 1942, GEN. LAWS COLO.

The board of county commissioners adjudged the bond of a justice of the peace insufficient, and refused to approve the same. Proceedings were instituted for a writ of *mandamus* to compel the board to approve the sureties. Held, that *mandamus* would not lie to control the board's discretion in the matter; it being authorized by section 1942, Gen. Laws Colo., to judge of the sufficiency of official bonds of this character.

Error to the superior court of Denver.

One of the sureties on the official bond of the defendant in error, who was a justice of the peace of Arapahoe county, gave notice to the board of county commissioners, as provided by law, that he was not longer willing to be such surety. Thereupon the county clerk notified said justice of the fact, and likewise that the board of county commissioners required him to file other surety as required by law. The justice filed a new bond, which the said board of county commissioners, at a regular meeting held five days afterwards, adjudged insufficient, and refused to approve. The defendant in error thereupon instituted this proceeding in the superior court of Denver for a writ of *mandamus* to compel the board to approve the sureties, alleging their sufficiency, and alleging, on information and belief, that the action taken by said board was with a view of making it impossible for the petitioner to give a bond that the board would approve in order that it might declare the petitioner's office vacant. The court granted an alternative writ, whereupon the attorney of the board appeared in court, and raised the question of the court's jurisdiction to grant the relief sought, by demurring to the petition. The court overruled the demurrer, and awarded a peremptory writ, commanding the board to approve the bond. This writ of error was sued out, and, being made to operate as a *supersedeas*, stayed the execution of said writ.

Wm. B. Mills, Co. Atty., for plaintiff in error.

BECK, C. J. The rule is well established that, where the exercise of official discretion or official judgment is required of an officer or board, *mandamus* will not lie either to control the exercise of such discretion, or to determine what judgment shall be given. If an officer or board of officials, vested by law with discretionary powers, refuse to act, *mandamus* is the proper remedy to compel action, but not to interfere with the exercise of official discretion or judgment. *High, Extr. Rem.* § 42, and authorities cited.

By section 1942, Gen. Laws, the board of county commissioners is authorized and empowered to judge of the sufficiency of official bonds of this character, and to approve the same. Upon tender of the new bond the board appears to have taken prompt action to investigate its sufficiency. The result of that investigation was expressed by its resolution, in these words: "It is deemed that said bond is insufficient for the public security." If, then, the order for the peremptory writ be sustained, it must be sustained on the theory that the bond is sufficient, notwithstanding the action of the board of county commissioners. But to so decide would be to set aside the official judgment and discretion of the body authorized by law to determine the sufficiency, and to approve such security, and to substitute therefor the judgment and discretion of a tribunal not clothed by law with such powers. It is plain, therefore, that the judgment cannot be sustained. *Holland v. Eldredge*, 43 N.Y. 460.

Judgment reversed, and cause remanded, with directions to the superior court to dismiss the proceeding, at the cost of the petitioner.

(9 Colo. 304)

LAFFEY and others v. CHAPMAN.

(Supreme Court of Colorado. October 19, 1886.)

1. **EXCEPTIONS—SIGNING OF BILL BY JUDGE—APPEAL.**
A bill of exceptions which is neither signed nor sealed by the judge cannot be considered on appeal.

2. **PLEADING—CONCLUSION OF LAW—COMPLAINT.**
In an action of unlawful detainer, where the plaintiff claimed under a decree in connection with a certificate of purchase, and the only allegation in the complaint concerning the nature or provisions of the decree was "that under and by virtue of being the owner of said certificate, and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances," held, to be simply a conclusion of law, and not sufficient to constitute a cause of action.

Error to county court, Clear Creek county.

W. T. Hughes, for plaintiff in error. *Thos. J. Cantlon* and *John C. Fitnam*, for defendant in error.

ELBERT, J. This is an action of unlawful detainer under section 3 of the act concerning forcible entry and detainer. Gen. St. 502. What purports to be a bill of exceptions is neither signed nor sealed by the judge, and cannot be considered.

It is objected, however, that the complaint does not state facts sufficient to constitute a cause of action, and this objection we think well taken. The decree under which, in connection with her certificate of purchase, the plaintiff claims to be entitled to the possession of the premises in dispute, is very imperfectly alleged. We are not told the time when, the place where, or the court in which (except inferentially) the decree was rendered. We are not advised who were the parties, nor is it alleged that the defendants were either parties or privies to it. There is not a single allegation respecting the nature or provisions of the decree. Every fact concerning it is withheld. The only allegation is "that under and by virtue of being the owner of said certificate, and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances." The certificate of sale would not entitle the plaintiff to possession prior to the expiration of the time for redemption and the delivery of the sheriff's deed. The allegation that the plaintiff is entitled to recover by virtue of "the decree upon which said certificate of sale was issued" is simply a conclusion of law, which, as a rule, ought not to be pleaded. The complaint should have set forth the provisions of the decree sufficiently for the court to judge of the plaintiff's rights under it. It was not the intention that section 69 of the Code should dispense with so plain a rule. As the pleadings stand, we are unable to say that the plaintiff was entitled to recover in this action, or in any action.

The judgment of the court below must be reversed.

(9 Colo. 295)

POMEROY v. ROCKY MOUNTAIN INS. & SAV. INST.

(Supreme Court of Colorado. October 19, 1886.)

LIFE INSURANCE—REVIVAL—AUTHORITY OF COMPANY'S OFFICER—KNOWLEDGE OF BREACH OF CONDITION.

A policy of life insurance contained a provision that if the insured should become so far intemperate as to impair his health, or induce *delirium tremens*, it should become void. The insured allowed the policy to become forfeited, but, being indebted to the plaintiff, he transferred it to him, and the plaintiff arranged with the president of the company for its revival, and paid the sums required to keep the policy in force until the insured's death, which happened shortly after the revival. The president of the company knew the habits of the deceased at the time of the revival, and that he had become so intemperate as to injure his health. *Held*, that the knowledge of the president must be regarded as the knowledge of the company, that the company was bound by his acts in permitting the revival or renewal of the policy, and that the plaintiff could recover under the policy. *HELM*, J., dissents. Former opinion, 7 Pac. Rep. 295, overruled.

Error to district court, Arapahoe county.

On rehearing. For original opinion, see 7 Pac. Rep. 295.

The plaintiff, by Benedict & Phelps, his attorneys, complains of the defendant, and avers:

That the Rocky Mountain Insurance & Savings Institution is a corporation, existing under and by virtue of the laws of the state of Colorado, and was such corporation on and prior to the twentieth day of April, 1878; that on said day said corporation, being authorized by law to do a life insurance business in said state, and to write policies or certificates for that purpose, and issue the same, did, by B. F. Johnson, its president, and W. L. McCauley, its assistant secretary, they being duly authorized, issue under its corporate seal, a certificate, commonly called a "Policy of Insurance," called by said corporation a "Certificate of Membership," setting forth that the said corporation, in consideration of \$16 in hand paid, and of the semi-annual payment of \$2.50, to be paid on or before the twentieth day of October and April, at noon, of each and every year during the continuance of the said certificate, and also in consideration of the payment of the amount assessed within 30 days next after each and every notice of the death of a member of the life insurance department of said company should be sent, did thereby constitute Lintner J. Barton (who was the husband of the defendant Elizabeth Barton) a member of said company; and by the said certificate the said corporation did agree, in the event of the death of said member, well and truly to pay at its office, in Denver, the amount of assessments which might be collected to pay the death claim of the said member whose life was thereby insured, not to exceed the sum of \$2,500, payable to his wife, Elizabeth M. Barton, for her use, benefit, etc., within three months after satisfactory proof of the death of said member, during the continuance of the said certificate; which agreement aforesaid was and is subject to certain conditions of forfeiture, among which are these: That if payment of the semi-annual premiums of \$2.50 required to be made on the twentieth days of October and April of each year, as above stated, should not be made according to the terms of the said policy or certificate, or if payment should not be made of assessments due on the death of a member of the life insurance department of said corporation as required by said policy, or if the member insured as aforesaid should become so far intemperate as to impair his health, or induce *delirium tremens*, then, and in any such case, the certificate should be void. And the said policy contained also this further provision: That, in case the sum should be assigned, the assignment should be made on the back of the same, in conformity with the rules of the company, and a copy of the said assignment be delivered at the office of the company, in Denver, immediately after its being made, and

due proof of the interest of the assignee be produced with the proof of the claim, in case of death.

And the plaintiff avers, on information and belief, that at the time of the issuing of said certificate or policy the said Lintner J. Barton in fact paid the sum of \$16, and the said policy was delivered to him; that afterwards, and on or about the twenty-second day of October, 1878, the said Lintner J. Barton was in default as to his payments and dues on said policy or certificate, and the same became forfeited, or was declared by said company to have become so; and he, the said Lintner J. Barton, was also indebted to the plaintiff at that time in a large amount of money, that is, the sum of \$599.15, for which he had given his note dated September 2, 1878, with interest at the rate of 2 per cent. per month until paid, and at the same time, to secure the same, had delivered to said plaintiff the aforesaid policy, which indebtedness the said defendant Elizabeth Barton had promised to pay to the plaintiff.

And the plaintiff avers that said Lintner J. Barton, on the twenty-second day of October, 1878, was also without means of paying what might be required to revive and keep in force the said policy or certificate; and the plaintiff further avers that in this condition said Lintner J. Barton applied to the plaintiff for assistance in the premises, and for further advances, and offered to indorse the said policy to plaintiff, to secure him in so doing; that thereupon the plaintiff and said Lintner J. Barton applied at the office of said corporation, and to the said Johnson, who was the president and general manager of said corporation, with full power to write insurance, and to represent the said corporation, and then and there stated to said Johnson that, in consideration of the indebtedness aforesaid, and advances to be made as aforesaid, and money to be paid by the plaintiff to revive the said policy, if the same could be done, the said policy was to be assigned to the plaintiff; that thereupon said Johnson, acting as aforesaid, directed said Lintner J. Barton to make upon the back of said policy an assignment of the same, as follows:

"DENVER, October 22, 1878.

"For value received, I hereby assign and transfer to Morris Pomeroy all of my right, title, and interest in and to the within policy of insurance, as security for money borrowed.

"ELIZABETH M. BARTON, by Her Husband.
"L. J. BARTON, for Himself."

—Which assignment the said L. J. Barton made as aforesaid, for the sole purpose aforesaid, in consideration of which assignment, and the securing thereby of the past indebtedness aforesaid, the plaintiff paid the dues and assessments required to revive and keep in force said policy, amounting to the sum of about \$20, and received the said policy of insurance aforesaid, and has since retained the same, the said Johnson assuring the plaintiff that said assignment was proper, and sufficient to transfer the said policy to the plaintiff, and that, although said policy has become forfeited, yet the same had been revived for the purpose aforesaid, and stood as security for the plaintiff as aforesaid; that from thence afterwards, until the death of said Lintner J. Barton, the plaintiff made the payments, from time to time, required to keep said policy in force, amounting to the sum of about \$6.75; that the defendant Elizabeth M. Barton, as the plaintiff is informed and believes, never had the possession of the said policy, never paid anything to procure the same, or to keep the same alive, and did not know of its existence till after the death of said Lintner J. Barton, or, if she did, she treated the same as the property of said Lintner, and assented to his using it as his; that in equity the same belonged to the said Lintner J. Barton until after the transfer of the same to the plaintiff, and now in equity belongs to the plaintiff, to the extent of the indebtedness from said Lintner J. Barton to the plaintiff at the

time of his death, including advances made, as aforesaid, with interest at the rate of 2 per cent. per month, as per agreement between said Lintner J. Barton and the plaintiff.

And plaintiff further avers that on or about the eighth day of March, 1879, said Lintner J. Barton died intestate and insolvent, leaving the defendant Elizabeth M. Barton, his widow, surviving him; that thereafter, and on or about the eighth day of May, 1879, proofs of said death, and of the plaintiff's interest in said policy, were made by the plaintiff, and accepted by said corporation; that the amount of such interest—that is, of the indebtedness from said deceased to the plaintiff—at that time amounted to the sum of about \$555.30, all of which, with interest since that date, is due and unpaid.

And the plaintiff further avers that the said corporation [interlineation by plaintiff, as amended, as follows] "has been, since the death of said Lintner, requested by the plaintiff, as well as by the said Elizabeth M. Barton, to make the assessment upon its members required by its rules and regulations, for the death claim due by reason of the death of the said Lintner J. Barton, and to pay over the said assessment, both of which said company refused to do, and has been also since said death" frequently requested to pay the amount due, according to the terms of said policy, but refused to pay the said sum of \$2,500, or any part thereof, or any part of any assessment aforesaid; alleging, as a ground of such refusal, and as the only ground thereof, that said Barton, deceased, either died of *delirium tremens*, or became so far intemperate as to impair his health.

And the plaintiff avers, on information and belief, that said deceased did not die of *delirium tremens*, or became so far intemperate as to impair his health, after said policy or certificate was so renewed or revived, but the plaintiff avers that he was not aware of the existence of the said clause regarding intemperance and *delirium tremens* until after the death of said deceased; that said Johnson, when acting on behalf of said corporation, knew the habits of said deceased, and that he was, at the time of the renewal or revival of said policy, intemperate, and was likely to continue so; that his intemperance was such as to impair his health; and yet the said corporation permitted the said plaintiff to make payment to revive and renew said policy, and extend the time of payment of the said indebtedness, and to make advances aforesaid, on the faith of the renewal or revival and assignment of said policy or certificate as aforesaid, and continued thereafter to receive payment of dues and assessments on said policy from the plaintiff, and is estopped to say that intemperance impaired the health or caused the death of said deceased.

And the plaintiff further avers that he is informed and believes that said defendant Barton is claiming the money due from said corporation adversely to the plaintiff, as her own property; but which claim of the said defendant the plaintiff, on information and belief, avers to be false and illegal, and that in equity the plaintiff is entitled to the moneys aforesaid, to the extent of the amount due from said deceased, at the time of his death, to the plaintiff, with interest as aforesaid.

Wherefore the plaintiff seeks the equitable interposition and assistance of the court herein, that the said defendants may be summoned and required to answer the premises, and all and singular the matters and things herein contained; and demands judgment against the said corporation for the said sum of \$25,000; and that out of whatever sum may be recovered, as aforesaid, the amount of indebtedness owing from said deceased to the plaintiff at the time of his death may be first paid, and the residue thereof, only, paid to the said defendant Barton, and that plaintiff recover costs.

Demurrer, *inter alia*, "that said complaint does not state facts sufficient to constitute a cause of action." Demurrer sustained, and judgment for defendant

Stuart Bros., for plaintiff in error. *B. F. Harrington* and *W. W. Cover*, for defendant in error.

ELBERT, J. Johnson was the president and general manager of the defendant company, and had charge of its home office, at Denver, with full power to write insurance, and to represent the company. The company is bound by his acts in issuing the policy of insurance, in permitting its renewal and assignment, and in receiving the back dues necessary to its renewal, and the premiums thereafter coming due. Bliss, Life Ins. § 278; Whart. Ag. § 202; Wood, Fire Ins. §§ 383, 391. His knowledge touching the condition of health of the insured must be regarded as the knowledge of the company. Story, Ag. § 140; Bliss, Life Ins. § 76 *et seq.*; Ang. & A. Corp. § 303; Whart. Ag. § 184.

Johnson having permitted the renewal of the policy, and its assignment, with full knowledge of Barton's impaired health by reason of his intemperate habits, and with full knowledge that the plaintiff renewed and took an assignment of the policy as a security for advances already made, and thereafter to be made, having at the time received from the plaintiff payment of all back dues necessary to its renewal, and thereafter payment of the premiums on the policy as they became due, is to be regarded as having waived the condition respecting the impairment of health of the insured by intemperate habits. The company cannot be allowed to treat the contract as valid for the purpose of collecting dues, and as void when it comes to paying the insurance; or, as otherwise stated, "the company cannot be permitted to occupy the vantage ground of retaining the premium if the party continued in life, and repudiating it if he died." *Insurance Co. v. McCain*, 96 U. S. 84; *Home Ins. Co. v. Duke*, 84 Ind. 253; *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; S. C. 7 N. W. Rep. 735; *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 186; S. C. 10 N. W. Rep. 91; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 154; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Miller v. Mutual Ben. Life Ins. Co.*, 31 Iowa, 216; *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561; *Bevin v. Connecticut Mut. Life Ins. Co.*, 23 Conn. 244; *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458; *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230; *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202; *Short v. Home Ins. Co.*, 90 N. Y. 16; *Bennett v. North B. Ins. Co.*, 81 N. Y. 273; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; *Buckbee v. United States Ins. Co.*, 18 Barb. 541; *Putnam v. Commonwealth Ins. Co.*, 18 Blatchf. 368; S. C. 4 Fed. Rep. 758; Bliss, Life Ins. § 278 *et seq.*, and cases there cited; Wood, Fire Ins. "Waiver," c. 20; Id. "Es-toppel," c. 21, and cases there cited.

If there was collusion between the plaintiff and Johnson, the president, to defraud the defendant company, it is matter of defense, to be pleaded.

While it appears from the complaint, generally, that the defendant company is a mutual company, we are not prepared to admit the proposition that that fact necessarily takes the case without the operation of any of the rules which we have stated. Theoretically, the insured in mutual companies are members of the company, but immunity from the above rules would not follow from that relation alone. The charter and by-laws of the company are not before us, nor are we advised that they prescribe any form of policy or limitation upon the powers and duties of the general officers and agents of the company that would exempt the company from liability in this case. As the record stands, the question made by counsel in this behalf is not fairly presented, and we intimate no opinion respecting it.

The court erred in sustaining the demurrer to the complaint. The judgment must be reversed, and the case remanded.

HELM, J., (dissenting.) Construing the averments of the complaint filed in this case, under established principles of law and rules of pleading, I am of

the opinion that plaintiff ought not to recover upon them. To my mind the complaint must be regarded as showing that when plaintiff procured the renewal of the policy he had knowledge of Barton's impaired physical condition, and that such impairment was the result of intemperance. Having been in no way deceived, misled, or imposed upon, he cannot be heard to say that he was ignorant of the clause in the policy avoiding the contract upon this ground. The legal inference from the averment made on the subject is that the death of Barton 10 weeks after the policy was renewed, resulted from Barton's impaired health and intemperate habits, existing at the time of such renewal.

If these conclusions be legitimately drawn, they show an attempt on the part of plaintiff to indemnify himself through a policy of insurance which he must be held to have known ought not to issue. The fact that Johnson had knowledge of the assured's impaired physical condition, coupled with the principle that insurance companies are bound by the knowledge of their officers and agents, does not answer my objection. Assuming that no distinction should be made between the mutual and the old line companies in this respect, I do not believe that Johnson's knowledge amounted to a waiver of the condition in question. In the first place this is not a case where the waiver of a condition in the contract *subsequent to its execution* is claimed to have occurred. On the contrary, reliance is placed upon the proposition that the condition, though inserted by the parties, was waived at the *inception* of the contract. And, secondly, the doctrine of waiver, predicated upon the knowledge of officers or agents, is recognized for the purpose of protecting *innocent third persons* dealing with insurance companies. It ought to have no application where the other contracting party is acting in bad faith. The law does not wholly ignore the rights and interests of innocent members and stockholders in these corporations; and I take it that, if an officer or agent and an outside party conspire to perpetrate a fraud upon the company, the courts will not lend their aid to its consummation. The fraud appearing in this case upon the face of the complaint, it was unnecessary, in my judgment, to plead it by answer. The demurrer sufficiently presented the issue. I do not say that, in fact, plaintiff actually intended to perpetrate a fraud upon the company. He may have been ignorant of the intemperance clause in the policy, as he asserts. He may also have been ignorant of the fact that insurance companies do not knowingly accept risks upon parties who are so low with disease that death is only a question of a few days or weeks at the utmost. What I assert is that the law, under the facts disclosed by his complaint, does not permit him to plead or rely upon his ignorance in these respects.

For the foregoing reasons I feel constrained to dissent from the conclusion reached by a majority of the court.

I think the judgment of the district court should be affirmed.

(9 Colo. 285)

TABOR, impleaded, etc., v. ARMSTRONG.
Appeal from the District Court, Arapahoe county.

ARMSTRONG v. TABOR.

Error to District Court, Arapahoe county.

(*Supreme Court of Colorado.* October 19, 1886.)

1. MECHANICS' LIENS—EXTENT—GEN. LAWS COLO. § 1657—"MONEYS DUE OR TO BECOME DUE UNDER THE CONTRACT."

The expression "due or to become due under the contract," in Gen. Laws Colo. § 1657, relative to subcontractors' and mechanics' liens, is not confined to moneys due or to become due for labor or materials furnished previous to the service of the statutory notice upon the owner, and the lien notice entitles the subcontractor to be paid out of moneys that may become due the contractor for labor performed or materials furnished by other employees or material-men *subsequent to the date of the notice, but under the same contract.*

2. SAME—DAMAGES FOR ENFORCED IDLENESS—WORK RENDERED NECESSARY BY CONTRACTOR'S FAULT.

Under the statute the subcontractor is not entitled to a lien upon the premises, and action against the owner, for damages and expense incurred through idleness enforced, or on account of work made necessary, by the default or negligence of the principal contractor.

3. SAME—EXTRA LABOR NECESSARY TO THE ERECTION.

The subcontractor is entitled to a lien for work rendered necessary by the contractor's failure to distribute the cut stone for a building in convenient order and places about the building, for labor in removing the cut stone furnished for the second story in order to reach that required for the first, and in transferring such stone from the front upon one street to that upon another, where it belonged; such labor being necessary in the erection of the structure, and not properly extra work wholly outside of the principal contract.

Armstrong, as subcontractor, brought a mechanic's lien suit against Cook as original contractor, and also against Tabor as owner of the property upon which the labor was performed and materials furnished. Armstrong claimed certain damages for enforced idleness and extra expense in consequence; also for work on the building caused by the delay, default, and negligence of Cook, as well as compensation for the labor performed in the immediate work of placing the stone in position. Cook made default, and a personal judgment was entered against him; it being expressly stipulated that such judgment should not in any manner prejudice or affect the rights of either Tabor or Armstrong in the action. Upon trial a decree was entered against Tabor, allowing the lien for the sum of \$922.68; but the damages claimed on account of the so-called extra work and expenses above mentioned were disallowed. From the decree and judgment Tabor took his appeal to the supreme court. To review the same, because of the rejection of his claims for the consequential damages aforesaid, Armstrong sued out a writ of error.

By stipulation both causes in the supreme court were submitted together, and were to be taken as though Armstrong had filed cross-errors in the Tabor appeal. The objections raised in both are therefore considered and determined by one opinion. The complaint, among other things, alleges "that the sum [an amount sufficient to cover plaintiff's entire demand] became due from defendant Tabor to defendant Cook for work and materials furnished and performed on said building on and after April 15, A. D. 1880;" said April 15th being the date of Armstrong's notice to Tabor of his intention to claim a subcontractor's lien, Armstrong himself doing no work after that date.

Section 1657 of the General Laws, being section 6 of the mechanic's lien law, in force at the time the transactions out of which the original action arose took place, reads as follows: "Every subcontractor, journeyman, laborer, or other person performing work or labor, or furnishing materials, shall, under the provisions of this act, have a valid lien upon the building or superstructure or other property upon which a lien may be claimed, as hereinbefore provided, and upon which such work or labor was performed, or for which such materials were furnished; and if any money be due, or is to become due, under the contract, from the owner or owners to such contractor, upon being served with a copy of the statement as provided in section two (2) of this act, by a subcontractor, journeyman, or laborer, as aforesaid, [the] owner or owners may withhold out of any moneys due or to become due under the contract a sufficient amount to satisfy the lien claimed by such subcontractor, journeyman, or laborer, or other person performing work or labor, or furnishing materials, until the validity thereof be established by proper legal proceedings, if the same be contested; and, if so established, the amount thereof shall be a valid set-off, to that extent, in favor of such owner or owners, and against the contractor. And, after such copy of the statement shall have been properly served upon such owner or owners in case of a failure to comply with the provisions of this section, then each subcontractor, journeyman, or laborer, or party furnishing materials, may sue and recover from

such owner or owners the amount of any damages he may have sustained by reason of such failure. * * *

Sullivan & May and *J. M. Ellis*, for plaintiff in error and appellee. *L. C. Rockwell*, for appellant and defendant in error.

HELM, J. Two questions are presented by the records and arguments in these cases: *First*, is the expression "due or to become due under the contract," used in section 1657 of the General Laws, confined to moneys due or to become due for labor or materials furnished previous to the service of the statutory notice by the subcontractor upon the owner, or does the subcontractor's lien notice entitle him to be paid out of moneys that may become due the contractor for labor performed or materials furnished by other employees or material-men subsequent to the date of such notice, but under the same principal contract? And, *second*, is the subcontractor entitled to his lien upon the premises, and action against the owner for damages and expense incurred through idleness enforced, or on account of work made necessary, by the default or negligence of the principal contractor? These questions will be answered in the order of statement.

The statute treats the original contract as an entirety. It gives the subcontractor or laborer a lien if money is due and unpaid to the contractor at the time of serving his notice upon the owner, or if thereafter money becomes due under the contract. Having received the requisite notice, if the owner fails to withhold money thereafter becoming due under the principal contract, his statutory liability to the subcontractor or laborer attaches. Upon this liability there is no language in the law that expressly imposes a limitation. The statute itself does not say that the money spoken of as "to become due" must be payments that have not yet matured for the work previously performed or materials previously furnished by the party claiming a lien. We cannot conclude that it was the intention of the legislature to thus limit the language used. That body would hardly have left so important a qualification wholly unexpressed. For us to recognize such a limitation would be to interpolate into the statute something we cannot, by any fair intendment, find therein.

It is urged that this view of the law might produce gross injustice; that it allows one man the benefit of another's labor or property. The evident answer to this objection is that the entire completed building is necessary to the adequate protection, under the law, of all connected with its erection. The various subcontractors, material-men, and laborers all act under the same general contract, though not privies thereto,—the only contract to which the owner is a party. They each and all contribute to the structure, which is the common product of their materials and labor. The lumber furnished by one person cannot be segregated from that furnished by another; nor can the interest of a material-man be protected without the work of the laborer; while, of course, the combined labor of all the workmen furnishes the foundation for each individual workman's security. Thus the subcontractors, laborers, and material-men who contribute to build one part of the structure would be receiving the benefit of each other's contributions, even if, according to counsel's contention, the materials and labor furnished by those completing another part could be and were excluded from the statutory lien and right of action. The truth is that each subcontractor, laborer, and material-man who invokes the statute must of necessity reap a benefit from the aid given the enterprise by other sub-contractors, material-men, and laborers. A moment's careful reflection will show how futile would be a legislative attempt to confine each man's lien to the result of his own labor, or to his own materials, or to the particular part of the structure to the erection of which his labor or materials contributed, and at the same time accomplish the beneficent purposes for which the law is framed.

We now turn to the second question above stated. As already suggested, there was no privity of contract between Armstrong and Tabor. Whatever right Armstrong may have against Tabor or his property must be derived solely from the statute; but the statute contains a provision expressly limiting the liability of the owner and his property to those cases where the lien is claimed for labor actually performed upon the "building or superstructure," and materials actually furnished therefor. The language used is so plain that it needs no judicial construction. But provisions in other states, similar in this respect, have been passed upon; and, so far as we are aware, it has been universally held that the demand "must be due as a consequence of actual performance." *Minor v. Hoyt*, 4 Hill, 193; *Houghton v. Blake*, 5 Cal. 240; *Taggard v. Buckmore*, 42 Me. 77. See, also, *Barnard v. McKenzie*, 4 Colo. 251. In view of this conclusion we cannot indorse the proposition advanced, that the amount for which the subcontractor is entitled to his statutory lien and action is always to be measured by the extent of his valid claim against the principal contractor. Where, by the default or neglect of the principal contractor, the subcontractor is obliged to remain idle, and suffers loss in consequence, he may undoubtedly recover of the contractor; but such damages could constitute no valid claim, under the statute, against the owner. Therefore Tabor had a right to inquire into the validity of Armstrong's demand, and the evidence concerning the latter's alleged claims of \$500 and \$75, respectively, was properly excluded. The \$50 item is abandoned by counsel in argument, and hence we do not consider it.

There remains but a single question, viz., did the court err in rejecting evidence of the \$260 demand? This amount was claimed by Armstrong for labor which he was obliged to perform in consequence of Cook's failure to distribute the cut stone in the most convenient order and places about the building. The labor of removing cut stone furnished for the second story in order to reach that required for the first, and the work of transferring such stone from the Larimer-street front to the front on Sixteenth street, where it belonged, became necessary in the erection of the structure. It cannot properly be termed extra work, wholly outside of the principal contract. It had to be done before Armstrong could go on with his work of setting the stone into the respective walls. Had Cook himself employed some day laborers to do this work, they would, in our judgment, have been as much entitled to a lien as is the man who does any other work preliminary or incidental but essential to and directly connected with the actual laying of the foundation walls, or erection of the superstructure. And we can discover no good reason for applying a different rule to Armstrong merely because he happens to be a subcontractor instead of laborer. If, therefore, Armstrong could have succeeded, through the introduction of proper evidence, in establishing a valid claim against Cook for the so-called extra work now under consideration, we are of the opinion that he was entitled to have it included in his recovery against Tabor. For error in the view taken upon this subject, and consequent rulings by the district court, its judgment must be reversed.

None of the foregoing conclusions conflict with anything decided in *Jensen v. Brown*, 2 Colo. 694, or *McIntire v. Barnes*, 4 Colo. 205, cited by counsel. Reversed.

PEOPLE v. RAY. (No. 11,065.)

(Supreme Court of California. September 17, 1886.)

WRIT AND PROCESS—SERVICE OF SUMMONS BY PUBLICATION—AFFIDAVIT—ACTIONS CONCERNING STATE LANDS.

In an action to annul a certificate of purchase of state lands for non-payment of principal or interest, the service of summons by publication must be made in the manner provided by the Code of Civil Procedure for service by publication. Such a service, therefore, without any affidavit for publication of the summons, or order therefor, is insufficient.

In bank. Appeal from superior court, county of Santa Cruz.

Action to foreclose defendant's interest in certain state lands by virtue of a certificate of purchase, and to annul such certificate on the ground that defendant was delinquent in the payment of part of the principal and interest. No personal service of summons was made on the defendant, but an alleged summons by publication was made, by publication in the county newspaper for the statutory time, and affidavit of service by such publication. There was, however, no affidavit for service by publication, nor any order of court therefor. Judgment by default against defendant, who moved to open the default on the ground that there had been no service of summons. The court, upon hearing of the motion, set aside the default. Plaintiff appeals.

W. F. Jeter, for plaintiff and appellant. *J. M. Wood*, for defendant and respondent.

BY THE COURT. On the authority of *People v. Applegarth*, 64 Cal. 229, and *People v. Mullan*, 65 Cal. 396, S. C. 4 Pac. Rep. 348, order affirmed.

(71 Cal. Unrep. 717)

MCAVOY v. BOTHWELL. (No. 11,744.)

(Supreme Court of California. September 27, 1886.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Appeal will be dismissed, in pursuance of rules 3 and 4 of the California supreme court, for failure to file transcript, on clerk's certificate of that fact.

In bank. Appeal from superior court, county of Alameda.

Judgment in the lower court having been rendered for plaintiff, defendant gave notice of appeal. On the expiration of the statutory time for filing the transcript, plaintiff moved to dismiss for failure to file the transcript within the proper time, under rules 3 and 4 of the supreme court, and presented the certificate of the lower court stating the fact that such transcript had not been filed as required by such rules.

W. Whitmore, for appellant, Bothwell. *B. McFadden*, for respondent, McAvoy.

BY THE COURT. Application, on clerk's certificate, to dismiss an appeal for failure to file the transcript in time. The application is granted.

(71 Cal. 273)

LEVINS v. ROVEGNO and others.¹ (No. 9,055.)

(Supreme Court of California. November 22, 1886.)

1. TRIAL BY COURT—FINDING—CONCLUSION OF LAW, WHAT IS.

Whether a finding is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning, or by the application of the artificial rules of law, and where plaintiff's mother owned property which, by proper steps, became the homestead of plaintiff's mother and father, and thereafter the mother died, and the father married again, and conveyed the homestead, his wife joining in the conveyance under the name of the first wife, a finding of the court that this conveyance passed the title, as against the plaintiff, is a conclusion of law.

2. HOMESTEAD—RIGHTS OF WIFE AND CHILDREN—DESCENT—ST. CAL. 1860, PAGE 311.

In this case, under the amended homestead act of 1860, (Cal. St. 1860, p. 311,) the plaintiff, being an only child, became the owner, by descent, of one-half of the

¹See post, 343.

homestead property, upon the death of her mother; section 4 of that act modifying the joint tenancy of the husband and wife created by section 1, so that, upon the death of either, one-half of the estate descends to the survivor, and one-half to the children of the deceased.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco.

S. F. Rhodes & Barstow, for appellant. *Flournoy & Whoon* and *Jos. Rothschild*, for respondents.

SEARLS, C. Action of ejectment to recover possession of the undivided one-half of a portion of 50-vara lot No. 469, in the city and county of San Francisco. The cause was tried by the court, written findings filed, and judgment entered for defendants, from which judgment, and from an order denying a motion for a new trial, plaintiff appeals.

George W. Manchester and Mary Ann Manchester were husband and wife. On the first day of August, 1857, the land in question was conveyed to Mary Ann Manchester, by deed of grant, bargain, and sale, and thereupon Manchester and wife entered into possession, and occupied the same as a homestead, and continued to reside in a dwelling-house thereon, and to occupy the premises, except as hereinafter stated, until the third day of April, 1862, when the said Mary Ann departed this life. On the twenty-seventh day of April, 1861, George W. Manchester filed in the recorder's office of the city and county of San Francisco his declaration of homestead, executed and acknowledged in due form, as required by the provisions of the act of April 28, 1860, describing the premises in controversy, and whereby the homestead continued to exist as such under said act. The value thereof never exceeded \$5,000. After the death of the said Mary Ann Manchester, George W. Manchester married a second wife, and on the third day of April, 1868, joined with her in an abandonment and conveyance of the homestead property, in due form, to Isaac M. Ward, under whom the defendants claim the property in question by sundry mesne conveyances, all of which were duly recorded. The second wife executed the deed and declaration of abandonment in the name of Mary Ann Manchester, the first wife, which was not her true name. Plaintiff is the only child of George W. and Mary Ann Manchester, or either of them, who survived the said Mary Ann Manchester, and was under the age of 22 years when this action was brought. A small portion of the lot was sold by Manchester and his first wife, which, however, cannot affect the case.

The court found, as a *conclusion of law*, "that the defendants are the owners in fee-simple, and entitled to the possession of the same, and that plaintiff is not entitled to any part of the same, or to any damage for the withholding thereof."

We are asked to determine whether the foregoing is an ultimate fact, to be found by the court as such, or a conclusion of law to be drawn from the facts as found. The line of demarcation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. It is quite easy to say that the ultimate facts are but the logical conclusions deduced from certain primary facts evidentiary in their character, and that conclusions of law are those presumptions or legal deductions which, the facts being given, are drawn without further evidence. This does not, however, quite meet the difficulty. We deduce the ultimate fact from certain probative facts by a process of natural reasoning. We draw the inference or conclusion of law, by a process of artificial reasoning; but this last process is often in such exact accord with natural reason that the distinction is scarcely appreciable.

If ultimate facts were found only from direct evidence to the very fact, the distinction between them and conclusions of law would be easily drawn; but, as they are to a great extent presumed from the existence of other facts, they are conclusions reached by argument, by reason,—are results deduced from

an inferential process, in which the evidentiary facts become the premises, and the ultimate fact the conclusion; and this process, by which ultimate facts or presumptions of fact are reached, differs from presumptions of law only in this: that the latter "are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong;" the former, being "merely natural presumptions, are derived wholly and directly from the circumstances of the particular case, by the common experience of mankind, without the aid or control of any rules of law whatever." 1 Greenl. Ev. §§ 44-46. "A presumption of fact is the natural connection of one fact with others by a combined process of proof and argument; a presumption of law is a similar connection, artificially made by annexing a rule of law or legal incident to a particular fact proved." Burrill, Circ. Ev. 52.

The result reached by a presumption of law may be a *fact* equally with that attained by a deduction of the same *fact* from the existence of other and evidentiary facts. It is the *process* by which the result is attained which is or may be different, and the tribunal through which such result is reached that differs, rather than the result itself. An act, deed, circumstance, or event is none the less a *fact* because reached as a conclusion of law. Sanity or insanity, guilt, innocence, fraud, and negligence are all facts; and whether their existence or non-existence is reached by a process of natural reasoning, or by artificial process known as "conclusion of law," does not in the least alter their *status* as facts.

Suppose A. sues B. for services performed. The latter pleads payment. Here payment becomes the ultimate fact to be established. B. proves that he employed a large number of men, and was accustomed to make weekly payments; that A. was observed among others at the time and place where payment was made; that a considerable period has elapsed since A. left the employ of B., during which time the former made no claim: these are circumstances from which, as evidentiary facts, a jury may presume the ultimate fact of payment; but the presumption is one of *fact*, and not of law. Again, suppose the same case, but that the time prescribed by the statute of limitations in bar of the action has run. The law steps in, and presumes payment. The result reached may be the same, but it is reached by a different process. Again, the same fact may be found to exist as a deduction from other facts, which, for that purpose, are treated as evidentiary; or the law will take such evidentiary facts, not as evidence in the sense in which we use that term when applied to the investigation of facts, but as a basis from which to presume the existence of the ultimate fact or conclusion. We have no doubt but that the terms "title" and "owner," considered in the abstract, are facts, and may be found as such.

The question which we are to determine—who has the title? who is the owner?—is quite a different one, and will usually depend, not upon the natural deductions from the facts in proof, but upon the application of those legal principles found to apply justly to all like cases; and, when necessary, and thus applied, to work out a result, the conclusion is one of law, or a mixed question of law and fact. To illustrate: A. and B., parties to an action tried by a jury, each hold a conveyance, in all respects regular and sufficient in form to convey the legal title, executed and delivered at different periods by the holder of the paramount title. These facts established, and manifestly, as we think, it would be the duty of the court to find as a conclusion of law, that the title vested in the one who first received a conveyance. Such duty arises, not because title is or is not a fact, but because it cannot be determined by the application of the process of reasoning adopted for the establishment of facts, pure and simple, and must be determined by the application of the process of artificial reasoning adopted by the law; and, when thus determined, we designate the result a "conclusion of law."

If we have made our meaning clear, we have conveyed the impression that

in legal proceedings it is, in many cases, the means by which the result is to be reached which must determine whether a given conclusion is one of fact or of law. If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law, in order to reach a final determination, the result is a conclusion of law.

A court of original jurisdiction, in determining issues of fact without the interposition of a jury, must, of course, apply the law, so far as it relates to the admissibility and weight to be given to evidence; but beyond that it simply finds the facts as a jury would do in the case of a special verdict. This accomplished, and the facts as found are subject to such intendment or conclusions of law as would apply to a special verdict. Applying this rule to the case at bar, and we are of opinion the court below properly treated the ownership and right to possession of the demanded premises as a conclusion of law, to be deduced from the facts as found.

The main question in the case is this: Did the plaintiff upon the death of her mother, Mary Ann Manchester, on the third day of April, 1862, succeed to the ownership of the undivided one-half of the demanded premises, or did the title thereto vest in George W. Manchester, her father, as survivor of said Mary Ann Manchester, deceased? The court below found, as we think properly, that the premises were community property of George W. and Mary Ann Manchester; or, rather, found facts from which this conclusion must be drawn.

Under the homestead act of 1851, no declaration, acknowledgment, or record was necessary to constitute a homestead. It consisted of a quantity of land, together with the dwelling-house thereon, and its appurtenances, not exceeding in value the sum of \$5,000, to be selected by the owner thereof. St. 1851, p. 296. Occupancy of the premises by the family was treated as presumptive evidence of dedication to homestead purposes, and was notice to all the world. *Taylor v. Hargous*, 4 Cal. 268. It was necessary that such residence or occupancy as a family residence should be with the good-faith intention to dedicate the premises to the purposes of a homestead, in order to impress upon them that character. *Holden v. Pinney*, 6 Cal. 234; *Moss v. Warner*, 10 Cal. 296. The homestead thus dedicated under the act of 1851 was exempt from forced sale, and could only be conveyed in the manner prescribed by the statute. The statute did not in terms define the character of the estate which the husband and wife enjoyed in the homestead property during the existence of the marital relation. It did provide that upon the death of the head of the family the homestead, and other property exempt from forced sale, should be set apart by the probate court "for the benefit of the surviving wife and his own legitimate children, and, in case of no surviving wife or his own legitimate children, for the next heirs at law."

As might be expected, the supreme court was repeatedly called upon to define the estate held by the husband and wife in the homestead.

In *Taylor v. Hargous*, 4 Cal. 273, it was said: "As soon as a place acquires the nature of a homestead, the nature of the estate becomes changed without reference to the manner in which the title to the property originated, whether it was the separate estate of either husband or wife, or the common property of both. It is turned into a sort of joint tenancy, with the right of survivorship, at least as between husband and wife."

In *Cook v. McChristian*, 4 Cal. 24, the same general doctrine was enunciated.

In *Reynolds v. Pixley*, 6 Cal. 167, the court expressed its regret that no provision had been made in the act of 1851, for recording the homestead, and alluded to the laws as "a fruitful source of fraud and perjury."

In *Poole v. Gerrard*, 6 Cal. 73, and in *Revalk v. Kraemer*, 8 Cal. 66, the

doctrine that the homestead is a joint estate of husband and wife, with right of survivorship, is recognized as well as in all other cases in which the question arose prior to *Gee v. Moore*, 14 Cal. 472. In this last-mentioned case the court (FIELD, C. J., delivering the opinion, concurred in by BALDWIN, J., and COPE, J.) reviews the former cases, compares them with the constitution and statute, and in referring to the law as announced in *Taylor v. Hargous*, *Poole v. Gerrard*, and *Revalk v. Kraemer*, says: "This doctrine has never met the approbation of the profession, and it is not warranted by any language of the constitution or the statute. There is nothing in the nature of the homestead right or privilege which justifies its designation as such an estate. The right or privilege has no single feature resembling a joint tenancy. The estate rests where it existed before the premises were appropriated as a homestead. The appropriation of them confers a right upon the wife to insist that their character as a homestead shall continue until she consents to the alienation, or another homestead is provided, or they are otherwise abandoned. The wife, if surviving her husband, takes the homestead not by virtue of any right of survivorship arising from the alleged joint tenancy, but as property set apart by law from her husband's estate for her benefit, and that of his children, if there be any. In the same way other property exempt from forced sale is set apart to her." This decision was rendered in October, 1859.

At the next session of the legislature the homestead act of April 21, 1851, was amended (St. 1860, p. 311) so as to require homesteads to be selected by the husband or wife, or both of them, or other head of a family, by a declaration in writing, executed, acknowledged, and recorded as in the statute provided. Persons holding homesteads under former acts were allowed one year within which to file for record their declaration, and, if not so filed, the homestead was deemed to have been abandoned. The declaration in the case at bar was executed and filed within the year.

By section 1 of this amendatory act it was provided that "from and after the filing for record of said declaration the husband and wife shall be deemed to hold said homestead as joint tenants; and all homesteads heretofore appropriated and acquired by husband and wife under the act to which this act is amendatory shall be deemed to be held by such husband and wife in joint tenancy." Section 4 of the amendatory act provided that "the homestead, and other property exempt from forced sale shall, upon the death of either husband or wife, be set apart by the probate court for the benefit of the surviving husband or wife, and his or her legitimate children."

As before stated, Mary Ann Manchester died in 1862, before the act of that year on the same subject took effect, and the rights of the parties are to be determined as fixed by the act of 1860. Under section 1 of the act of 1860, standing by itself, the husband and wife became and were joint tenants in the homesteads, with right of survivorship, and all other incidents which the term implies. Doubtless in some instances the relation was wanting in some of the unities which at common law were requisite to such an estate. We know of no reason, however, why the legislature, in its wisdom, may not create such an estate, without having at hand all the material requisite under the common law. We suppose that branch of the government might enact that a linear foot should consist of 13 inches, and that the act would not be void because ordinarily 12 inches have indicated such a measure. The real question is not what section 1, standing alone, imports, but is it modified, and its effect as a statute of descent controlled, by section 4 of the same act? Did section 4 regulate and establish the line of descent or succession of the title to the homestead otherwise than as it would have passed under section 1 standing alone?

Rich v. Tubbs, 41 Cal. 36, was a case in which Tubbs and wife acquired a homestead under the act of 1860. Tubbs died, and the probate court set aside

the homestead property for the use of the family of the deceased, consisting of the widow and two children. The widow married Rich, and brought an action against the children to quiet title, which was decided in her favor in the court below. On appeal, the judgment was affirmed, upon the ground that the record failed to show that the husband died prior to the passage of the act of 1862, under which last-mentioned act the surviving husband or wife became entitled to the homestead. The court held: (1) That the act of the probate court in setting apart the homestead for the use of the family of the deceased husband, under the act of 1860, did not change nor transmit title; that the effect of such order is merely to relieve the property from administration; that it does not constitute assets of the estate to be administered; and that it leaves the title where it found it, to be determined by claimants thereto in another forum. (2) That although section 1 of the act of 1860 denominates the husband and wife "joint tenants," yet that section is so modified by section 4 that they are not such in the full definition of the common-law term, and that under the latter section the children take some interest by inheritance from their deceased father or mother. The precise interest thus taken, it was said, was not in that case necessary to be determined.

In *Estate of Headen*, 52 Cal. 294, the court, in referring to *Rich v. Tubbs*, said: "The fourth section of the homestead act of 1860, which was involved in that case, is clearly a statute of descent and distribution, as applicable to property which had been appropriated as a homestead."

In *Herrold v. Reen*, 58 Cal. 443, the doctrine of *Rich v. Tubbs* is referred to and approved.

There can be no question but that the first section of the act of 1860, standing alone, creates a joint tenancy in the homestead between husband and wife, with all the incidents and consequences which the term implies, including its principal incident of the *jus accrescendi*. But in the light of the construction which has been given to section 4 of the same act by this court, we are constrained to hold that such section modifies the joint tenancy, so that upon the dissolution of the marital relation by death, prior to the amendment of the act in 1862, one-half of the homestead descends to the survivor, and the other half to the legitimate child or children of the deceased. This result follows from the theory that section 4 of that act was in effect a statute of descent, regulating the succession, and that no act on the part of the probate court was necessary to or could change the title, as was said in *Rich v. Tubbs, supra*, and in *Estate of Headen, supra*.

It follows from this construction that upon the death of Mary Ann Manchester on the third day of April, 1862, the undivided one-half of the homestead property descended to and vested in her only child, the plaintiff herein; and that, as the statute is one of descent, regulating the succession, no action on the part of the probate court was necessary to vest the title in the latter.

It results from these views that the conclusion of law by the court below was erroneous, for which error the judgment and order appealed from should be reversed, and the court directed to enter judgment upon the findings in favor of plaintiff for the undivided one-half of the premises described in the complaint.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, with directions to the court below to enter judgment in favor of plaintiff for the undivided one-half of the premises described in the complaint.

(71 Cal. 295)

HEINLEN v. BEANS and others. (No. 9,121.)*(Supreme Court of California. November 23, 1886.)***APPEAL—BOND—CODE CIVIL PROC. § 945—CONSTRUCTION OF—SPECIFIC PERFORMANCE.**

Where, upon an appeal from a judgment for specific performance, the defendants, in order to retain possession of the land during the pendency of the appeal, enter into an undertaking under section 945, Code Civil Proc., conditioned, in case the judgment is affirmed, or the appeal dismissed, that they will pay the value of the use and occupation of the property from the time of the appeal to the delivery of the possession thereof, *held*, in an action on the undertaking, that the extent and meaning of the undertaking is that they will pay the judgment appealed from, if affirmed, as rendered by the court below.

In bank. Appeal from superior court, Santa Clara county.

Action on an undertaking under section 945, Code Civil Proc., to recover the value of the use and occupation of land during the pendency of an appeal from a judgment in a suit for specific performance. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion.

Houghton & Reynolds, for appellants. *J. C. Black and G. A. Heinlen*, for respondent.

THORNTON, J. In an action for specific performance, brought by John Heinlen against Calvin Martin and Wayne B. Rogers, judgment was rendered on the twenty-eighth of January, 1878, that plaintiff recover of the said defendants the sum of \$10,000, the value of the use and occupation of the land in controversy from the twenty-seventh of November, 1868, to the date of the rendition of the judgment; that defendants execute a deed of conveyance of the land above mentioned, and deliver possession thereof to plaintiff, with costs of suit. Defendants, in the same case, made a motion for a new trial, which was denied on the eleventh of December, 1878, and they appealed from the judgment and the order denying their motion for a new trial. On these appeals the defendants, on the date last mentioned, filed the \$300 undertaking required by sections 940, 941, Code Civil Proc., an undertaking of stay as to the \$10,000 above mentioned, under section 942, Code Civil Proc.; and, as they desired to retain possession of the land involved in the suit, they executed and filed a further undertaking for that purpose, under section 945, Code Civil Proc. These undertakings were executed by T. Ellard Beans and E. Auzerais, the defendants herein.

This action is brought on the undertaking last above mentioned, to recover the value of the use and occupation of the land above mentioned during the period of the pendency of the appeal, and until the delivery of possession of said land to the plaintiff. The extent of the engagement of defendants under the provisions of the undertaking above mentioned may be perceived from the following portion of it, viz.:

"And whereas, the appellants are desirous of staying that part of said judgment directing said defendants and appellants to execute a deed to said plaintiff and respondent of the premises described therein, and the judge of this court having fixed the amount of the undertaking for that purpose at \$5,000: Now, therefore, in consideration of the premises, and the said stay of the execution of the judgment, we do further, jointly and severally, undertake and promise, and do acknowledge ourselves bound in the further sum of \$5,000, that during the possession of such property by the appellants they will not commit, or suffer to be committed, any waste thereon; and that if judgment be affirmed, or the appeal be dismissed, they will pay the value of the use and occupation of the property from the time of the appeal to the delivery of the possession thereof, pursuant to the judgment, not exceeding said sum of \$5,000.

T. ELLARD BEANS. [Seal.]
"E. AUZERAIS." [Seal.]

The above-named appeals came on for hearing in this court, and were determined by it in January, 1879. This court reversed the judgment, remanded the cause, and directed the court below to modify the judgment in accordance with the opinion. See report of the cause entitled *Heinlen v. Martin*, 53 Cal. 321-346. The *remittitur* was transmitted to the court below with the judgment of this court, and its opinion containing the directions given to the court below.

The court below had adjudged that the plaintiff was entitled to a conveyance and possession of the whole land in suit, and to rents and profits of the entire tract during the period above mentioned. This court held plaintiff entitled only to a conveyance and possession of five-sixths of the tract of land, and to the same proportion of the rents and profits, commencing, not from the twenty-seventh of November, 1868, as in the judgment appealed from, but from the tenth day of May, 1870, the date of the commencement of the action. The *remittitur* was filed in the court *a quo* on the third day of April, 1879. The court, proceeding to follow the directions of this court, on the third day of April, 1879, modified its judgment as required, as of the twenty-eighth of January, 1873, the date of the judgment previously rendered by it. It gave judgment in favor of plaintiff for the rents and profits accruing previous to the twenty-eighth of January, 1873, in the sum of \$5,260, which judgment was affirmed, (see *Heinlen v. Martin*, 59 Cal. 181,) and held to accord with the former judgment of this court. The amount last mentioned was paid by Martin & Rogers, the defendants in the action.

The contention of defendants is that there is no breach of the undertaking committed by them until the affirmance of the judgment, or the dismissal of the appeal. The plaintiff concurs in this view, and such are the express words of the undertaking. By its express words, the defendants only agree to pay when the judgment is affirmed or the appeal dismissed. But the plaintiff puts forward the contention that the judgment in *Heinlen v. Martin* was affirmed. The court below was of the same opinion, and so held. Now, if this judgment was affirmed at all, it was only affirmed in part, and the undertaking does not impose on the parties the obligation to pay on any such contingency, but only in case the judgment appealed from is affirmed. We construe this to mean affirmed as rendered by the court below. It does not mean affirmed in part. The conclusion that affirmed in part is not here meant is strengthened by the language used in section 942, Code Civil Proc., where the requisites of the undertaking to stay execution in case of an appeal from a judgment or order directing the payment of money is prescribed. In that section the obligation of the sureties is expressed as follows: "That they are bound, in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of the amount as to which the judgment or order is affirmed, if affirmed only in part." There is no such language in section 945, under which the undertaking sued on herein is given, and the language of which section it follows. This omission in section 945 is significant, and manifests the intention of the legislature that the sureties were not to be bound in case of a partial affirmation, but only in case the judgment was affirmed as rendered and entered in the court below.

The conclusion here reached is sustained by the judgment of this court in *Chase v. Rtes*, 10 Cal. 518, which was an action on an appeal-bond executed by defendants, conditioned to pay the judgment appealed from, if the same should be affirmed by the appellate court. It appeared from the record in that case that the judgment appealed from was reversed, with directions to the court below to enter a different judgment; consequently no liability attached to the defendants under the conditions of the bond.

The meaning attributed to section 945 in this case is, in our judgment, in

accord with the intent of the legislature as manifested by the language employed in it; and, when we are satisfied that the meaning and intent of the law-making power have been arrived at, it is useless to speculate as to the views with which it was enacted. We must presume that the members of the legislature who enacted the law deliberated fully on the subject-matter of the enactment, and that, after full consideration, their deliberate views were embodied, and their intention manifested, in the statute as enacted, in which they laid down, as the best rule, that sureties were not to be bound if the judgment was, in effect, affirmed in part. The construction put on section 945, and the undertaking executed under it, accords with the rule laid down in section 2836, Civil Code, and with what is said in *People v. Breyfogle*, 17 Cal. 509.

For the reasons above given the judgment and order are reversed, and cause remanded, and the court below is directed to enter judgment for defendants.

We concur: MORRISON, C. J.; MCKINSTRY, J.; MYRICK, J.; SHARPSTEIN, J.; MCKEE, J.

(2 Cal. Unrep. 719)

HEINLEN v. BEANS and others. (No. 8,969.)

(*Supreme Court of California*. November 23, 1886.)

INTEREST—JUDGMENT—APPEAL—CODE CIVIL PROC. § 945.

Where, in an action on an undertaking on appeal, given to secure rents and profits of certain real estate pending an appeal to the supreme court of California, under Code Civil Proc. § 945, if the judgment is affirmed, but not as rendered by the court below, the plaintiff is not entitled to recover anything of defendants, and therefore a ruling of the lower court adverse to his claim of interest, in this action on the judgment appealed from, is not erroneous.

In bank. Appeal from superior court, Santa Clara county.

Action on an undertaking under section 945, Code Civil Proc., to recover interest on a judgment. Judgment for defendants. Plaintiff appealed. The facts are stated in the case with the same title, (No. 9,121,) *ante*, 167.

G. A. Heinlen and J. C. Black, for appellant. *Houghton & Reynolds*, for respondents.

BY THE COURT. This is an appeal by plaintiff from the judgment and certain orders in the case with the same title, (No. 9,121,) *ante*, 167. The court below rendered judgment herein in favor of plaintiff for the sum of \$5,000. The plaintiff claimed that he was entitled to legal interest on this sum from the fifth of April, 1879, the day on which possession of the land involved in the suit of *Heinlen v. Martin and Rogers* was delivered to him. The court held against him on this contention, and this appeal was prosecuted, to have it determined whether he was so entitled or not.

Inasmuch as we have held in case 9,121 that the plaintiff was not entitled to recover anything of defendants, he was not hurt by the ruling of the lower court adverse to his claim of interest, and there was no error in the court's so ruling. The same contention is presented on the orders appealed from, and the same conclusion follows.

As regards the above-mentioned appeals of plaintiff, the judgment and orders are without error, and are affirmed; but, on the return of this cause to the court below, that court will enter judgment as directed in case 9,121.

(71 Cal. 236)

In re Estate of PHILLIPS, etc. (No. 9,642.)

(*Supreme Court of California*. November 23, 1886.)

1. ASSIGNMENT—INTEREST IN ESTATE—COLLATERAL SECURITY.

An assignment by a legatee of his interest in the estate of the testator, as security for a debt, entitles the assignee to receive, in the distribution of the estate, so much of the legacy as is necessary to pay the amount due upon the debt at the time of distribution.

2. EXECUTORS AND ADMINISTRATORS—DISTRIBUTION—*LIS PENDENS.*

Distribution of a person's interest in an estate to his assignee's assignee should not be refused on account of the pendency of a suit to set aside the assignment, brought a few days before the date fixed for distribution, against the original assignee, in which suit no service had been had or appearance entered at said date.

Commissioners' decision.

Department 2. Appeal from decision of superior court, Sonoma county, upon petition for distribution.

Chas. F. Hanlon, for appellant. *J. T. Campbell* and *A. W. Thompson*, for respondents.

FOOTE, C. Margaret Phillips died on the twelfth day of December, 1882, leaving a will, which was probated, and an administrator with the will annexed appointed. The estate was composed of \$17,963 in money, of which the sum of \$6,000 was bequeathed to one William R. Johnson, who on the first day of December, 1883, borrowed of one Joyce \$425, executing and delivering therefor his promissory note for such amount, and securing its payment by a written instrument reading as follows:

"Know all men by these presents, that I, William R. Johnson, of the city of Petaluma, county of Sonoma, state of California, the party of the first part, for and in consideration of the sum of \$425, gold coin of the United States, in hand paid by Martin Joyce, of the same place, party of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, and conveyed, and by these presents do bargain, sell, convey, assign, and transfer, unto said party of the second part, all and singular, my rights, titles, and interests, of any and all kinds of, in, and to the estate of Margaret Phillips, deceased, and each and every part and parcel thereof, and the property of any and all kinds belonging to said estate. And I do hereby nominate and appoint said party of the second part my attorney in fact, and irrevocably (except as herein provided, on payment of the promissory note hereinafter mentioned) for me, and in my name, place, and stead, to receive, receipt for, take, and have all my share, part, and interest in said estate, and the property thereof. The foregoing transfer, conveyance, and assignment is made for and as security to secure payment of a certain promissory note for \$425, bearing even date herewith, of which the following is a copy:

"\$425.00.

PETALUMA, December 1, 1883.

"On demand, for value received, I promise to pay to Martin Joyce, or order, the sum of four hundred and twenty-five dollars, with interest from date till paid, at the rate of 1 per cent. per month, payable in United States gold coin.

W.M. R. JOHNSON."

"And upon full payment thereof, principal and interest, this assignment to become void; the said party of the second part, under the foregoing assignment and power, to collect and receive the principal and interest due upon said note.

"In witness whereof the party of the first part has hereunto set his hand and seal this the first day of December, A. D. 1883.

"W.M. R. JOHNSON." [Seal.]

On the eighth day of December, 1883, as the record discloses, this note and security were assigned for value to one Hill, the respondent here; who thereupon duly notified the administrator of the assignment and transfer, and filed the same among the papers in the court having jurisdiction on the probate of the will. On the seventeenth day of December, 1883, Johnson made another assignment of his interest in the estate to his sister, who is the appellant here. The assignment is in due form. On the eighteenth day of December, 1883, she notified the administrator of the assignment made to her, and filed it.

On the first day of February, 1884, she filed her petition for distribution, claiming all that had been bequeathed to her brother, William R. Johnson, admitting notice of the Joyce assignment and note, and averring that a suit had been instituted in another court to set it aside, but not stating by whom instituted. She prayed that the matter of the Joyce assignment be settled in the court having jurisdiction of the estate of the decedent, and made no claim to have such proceedings stayed to await the determination of the suit to set aside the note and assignment. Before the filing of her petition the administrator had filed his final account and petition for distribution. The assignee, Hill, duly filed his petition to have the amount of the note and interest distributed to him out of Johnson's share of the estate. Upon the three petitions the matter of distribution was heard before the superior court of Sonoma county. The trial resulted in the distribution to Hill, from Johnson's share of the amount due upon the note and interest, and the balance to his sister, the appellant here. The due execution of the note to Joyce, and that it was for value, and that the assignment to him was for value, and duly made, executed, and delivered, served on the administrator, and filed in court, was admitted by counsel for the appellant. This trial was had on the fourth day of February, 1884, and by the record it appears that the action to cancel the note was commenced by the appellant on the thirtieth day of January, 1884, five days before the trial, and against Joyce, not Hill, the then assignee, and that no service of the summons or complaint therin had been had, and no plea or appearance made or had, by the defendant Joyce thereto.

It does not appear from the record precisely what the grounds of the suit for cancellation of the note were. According to the admissions of the appellant's attorney, the note was made for value, and no fraud appears to have tainted it. The appellant contends, however, that the assignment conveyed no interest in the estate to Joyce or his assignee, Hill, but was a mortgage, with a defeasance to secure a debt, without authority to pay it; that neither of such parties were the grantees of W. R. Johnson, and therefore not entitled to have any distribution made to them directly; and that the plea of *lis pendens* was sustained by the evidence, and should have been held good.

As we view the matter, the assignment and note, taken together, transferred to any *bona fide* assignee thereof the legal title to so much of the money bequeathed to Johnson as should be due on the note when the distribution was made, and that, therefore, so far as that matter is concerned, Hill was entitled to that which the court awarded him. A similar assignment and decree for the distribution of money, as distinguished from real property, was upheld in *Estate of Hite*, Myr. Prob. 232, and, as we think, properly.

There certainly was no other suit pending to which Hill was a party, nor does the record sufficiently disclose that any other was pending which could affect the rights of the parties to the proceedings in the matter of the distribution; for the petition which assumes to allege the pending suit as a bar to the respondent's right does not state who the parties to that action were, or the grounds upon which it was based. The evidence does not show that Hill was a party to that suit, but, to the contrary, that it was brought against Joyce, and there is no pretense made therein but what the note was made for a valuable consideration, and without fraud. To us it is clear that Hill was entitled to that which the court awarded him, and we perceive no ground, either legal or equitable, upon which to reverse the decree of that tribunal.

It, and the order denying a new trial, should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 290)

GILBERT v. SLEEPER. (No. 9,473.)

(Supreme Court of California. November 23, 1886.)

1. VENDOR AND VENDEE—ORAL AGREEMENT FOR EXCHANGE OF LANDS—OBLIGATIONS OF GRANTEE OF ONE PARTY—TRUSTS.

In 1875, A. and B. orally agreed upon an exchange of lands. Possession was taken by each under the contract, and it was agreed that deeds should be given when B., who had only a swamp-land certificate for his land, should obtain a patent. In 1881, A. conveyed all his property, including the land so sold, to his wife, who agreed to carry out the contract made with B. About the time of this conveyance B. paid the balance due upon the price of the swamp land, but did not then take out a patent. In January, 1883, A.'s wife brought an action against B. to recover the land in the latter's possession under the contract. She had meanwhile filed a homestead upon it. B. had made improvements thereon without objection being made by A. or his wife. The wife since A.'s death had been in possession of the swamp land. *Held*, that plaintiff held the title impressed with a trust in favor of B.; and that the latter having obtained a patent soon after the beginning of the action, and tendered a deed to plaintiff, he was entitled, under a cross-complaint praying for such relief, to a performance of the contract by her.¹

2. STATUTE OF LIMITATIONS—TRUSTS—VENDEE IN POSSESSION.

The statute of limitations will not run against a vendee in possession of lands agreed to be sold, as he is to be regarded as a *cestui que trust*.²

Commissioners' decision.

Department 2. Appeal from superior court, Lake county.

Action to recover possession of lands. Defendant filed a cross-complaint, and had judgment below. Plaintiff appealed.

R. W. Crump, for appellant. *E. W. Britt*, for respondent.

BELCHER, C. C. This is an action to recover possession of 17.67 acres of land. The defendant answered, and, by way of cross-complaint, set up an equitable defense. The plaintiff demurred, and then answered to the cross-complaint. After trial judgment was entered in favor of the defendant, from which, and from an order denying a new trial, plaintiff appealed.

The demurral to the cross-complaint was properly overruled. If the facts were as alleged, the plaintiff held the legal title to the land in controversy in trust for the defendant, and he was entitled to the relief demanded.

It appears from the record that in September, 1875, one Jacob Gilbert, the husband of plaintiff, was the owner of 160 acres of land in Lake county, and the defendant had a certificate of purchase from the state of a tract of swamp and overflowed land lying adjacent thereto. In that month the parties entered into a verbal contract to exchange parcels of their lands, Gilbert taking the parcel described in the cross-complaint, and the defendant the parcel described in the complaint. Under the contract each party was to take and thenceforth hold possession of the parcel given him, and they were to execute deeds, each to the other, whenever the defendant should obtain a patent for his land from the state. Gilbert took possession of the parcel given him, and remained in possession of it till he died, in April, 1882, and since his death the plaintiff has continued in possession without offering to surrender it to the defendant. When the contract was made defendant was in possession of the parcel given him, and has ever since continued in such possession, and, without objection from Gilbert or plaintiff, has placed permanent improvements on the land of the value of \$400. On the third day of December, 1881, Gilbert, being then in very bad health, under advice given him by defendant, and to save

¹That the vendor of lands under a contract of sale holds the legal title as trustee for the vendee, see *Burkhart v. Howard*, (Or.) 12 Pac. Rep. 79, and note.

²The statute of limitations does not begin to run against a *cestui que trust* until actual ouster or disavowal of the trust. See *Henderson v. Maclay*, (Pa.) 6 Atl. Rep. 52, and note.

the expense and trouble of a settlement of his estate in the probate court, for the expressed consideration of five dollars, conveyed all of his property, including the 160 acres of land before mentioned, to the plaintiff. Before making the deed he exacted from plaintiff, and she agreed, that, when defendant should obtain a patent for his swamp land from the state, she would execute to him a deed for the land in controversy, in accordance with the terms of the contract for exchange. On the sixth day of December, 1881, plaintiff filed a homestead upon all the land conveyed to her by her husband, and on the thirtieth day of January, 1883, she commenced this action. The defendant paid the balance of the purchase money due on his swamp land in December, 1881, and on the twentieth of February, 1883, received a patent therefor. Thereafter, on the tenth of March following, he tendered to plaintiff a good and sufficient deed of the parcel which her husband took in exchange, and which is described in the cross-complaint, and she refused to accept it.

The court below found the facts to be substantially as above stated; and, as a conclusion of law, decided "that plaintiff took the deed of December 3, 1881, which included the land here by her demanded, charged with the duty of conveying to the defendant such demanded premises in accordance with the previous promise of her husband, and upon receiving a deed from defendant for the 17.67 acres of land described in his cross-complaint."

The Civil Code provides as follows: "Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only." Section 1804. "The provisions of the title on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives, and of the buyer as to that which he takes." Section 1806.

Under these sections, a contract for the exchange of lands is a contract of sale, which, as in other cases of contracts for the sale of lands, may be enforced in a court of equity by a decree for specific performance. *Bigelow v. Armes*, 108 U. S. 10; S. C. 1 Sup. Ct. Rep. 83. When, therefore, Gilbert and defendant agreed to exchange their lands, and, under the contract, took possession of the parcels exchanged, each became the vendee and equitable owner of the parcel received by him. The legal title was retained by the seller, but it was held by him in trust for the buyer, to be thereafter conveyed at the stipulated time and on the stipulated conditions. If Gilbert had lived, and, retaining the legal title in himself, had commenced this action, there can be no question that a defense to the action like that interposed here would have been entirely good.

Has the plaintiff any greater rights than her husband would have had in the case supposed? We fail to see that she has. "It is a universal rule that, if a man purchases property of a trustee with notice of the trust, he shall be charged with the same trust, in respect to the property, as the trustee from whom he purchased. And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person. Of course, a mere *volunteer*, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, whether he have notice or not; for in such case no wrong or pecuniary loss can fall upon him, in compelling him to execute the trust to which the property that came to him without consideration was subject." *Perry, Trusts*, § 217.

It is unnecessary to consider whether the plaintiff paid a valuable consideration for the property conveyed to her by her husband, or took the title as a mere volunteer, for the reason that, when she received her deed, she had actual knowledge of the exchange that had been made, and of all its attending circumstances. It must follow then that plaintiff took the title charged with all the rights, liabilities, and duties which at that time rested upon her grantor.

But it is insisted that defendant lost the right to demand a deed from the plaintiff because he did not perfect his title, and tender his deed, until after the commencement of this action, and so his cause of action was barred by the provisions of section 339 of the Code of Civil Procedure. There are two sufficient answers to this: *First*, the statute of limitations was not pleaded; and, *second*, Gilbert, while he held the title, acquiesced in defendant's delay in procuring his patent, and, besides, the statute never runs in favor of a trustee, as against his *cestui que trust*, while the latter is in possession of his estate. *Love v. Watkins*, 40 Cal. 547; *Beebe v. Doud*, 22 Barb. 255.

There was no error in refusing to admit in evidence plaintiff's declaration of homestead. Obviously she could not, by filing it, defeat or impair the previously existing rights of defendant.

The point is made that defendant has no title to a small part of the land described in his cross-complaint as having been exchanged to Jacob Gilbert. No such issue was presented by the pleadings, or appears to have been raised at the trial. On the contrary, the pleadings admit that the legal title was in the defendant, and the court so found.

On the whole, we find no error in the record, and the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(14 Or. 98)

DAVID and others v. CITY OF PORTLAND and others.

(*Supreme Court of Oregon*. November 16, 1886.)

1. CONSTITUTIONAL LAW—AMENDING ACT MUST SET FORTH AMENDED ACT—SECTION 22, ART. 4, CONST. OR.

Where a city has not hitherto been given the power to construct water-works, an act authorizing such construction, and making the city liable for the bonds issued therefor, is not amendatory of an act declaring that the city is not bound by a contract not in writing, and not authorized by a city ordinance, the operation of this act not being affected by the new law, and therefore need not set forth the previous act, under the requirement of section 22, art. 4, Const. Or., that "no act shall be revised or amended by a mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

2. SAME—CONSTITUTIONAL REQUIREMENT.

Where an act purports in its title to amend a city charter, and in fact amends two sections, which are set forth in the amending act, the above constitutional requirement is fully complied with.

3. OFFICE AND OFFICERS—SECTION 3, ART. 15, CONST. OR.—REQUIREMENT OF OATH OF OFFICE—WATER-WORKS COMMITTEE NOT OFFICERS.

In an act providing for water-works for a city, and that certain persons shall be the "water committee" to purchase the plant and issue the bonds, the absence of a provision requiring them to take an official oath under section 3, art. 15, Const. Or., which declares that "every person elected or appointed to any office under the constitution shall, before entering upon the duties thereof, take an oath or affirmation to support the constitution of the United States, and of this state, and also an oath of office," does not render the act unconstitutional, the committee not being "officers under the constitution."

4. SAME—SECTION 2, ART. 15, CONST. OR.—OFFICIAL TERM LIMITED TO FOUR YEARS—WATER COMMISSIONERS NOT OFFICERS.

The act placed the management of the water-works in the hands of a water commission, whose term of office was 10 years. Held, that the commissioners were not officers, but agents, of the corporation, and therefore the act was not unconstitutional, and within the inhibition of section 2, art. 15, Const. Or., providing that "the legislative assembly shall not create any office the term of which shall be longer than four years."

5. SAME—LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS—APPOINTMENT OF WATER COMMISSION.

Such a commission is not of so local a character that the legislature has no authority to elect or appoint it, and it is not a valid objection to the act that the commission is to be selected by the committee from their own number, and vacancies to be filled by appointment of the governor. In the absence of constitutional restrictions, the power of the legislature over municipal corporations, except so far as they are endowed with the rights incident to private corporations, is practically unlimited.

6. CONSTITUTIONAL LAW—TITLE OF ACT EXPRESSING SUBJECT.

The title of an act providing for water-works for the city of Portland was "An act to amend an act entitled 'An act to incorporate the city of Portland.'" Held to be sufficient, under section 20, art. 4; Const. Or., providing that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title;" especially as the enacting clause was immediately followed by a statement that the city charter was amended by the addition of a chapter providing for water-works.

Appeal from circuit court, county of Multnomah.

A. H. Tanner, C. E. S. Wood, and G. H. Williams, for appellants, City of Portland and others. *J. K. Kelly and W. Williams*, for respondents, David and others.

THAYER, J. The respondents commenced a suit in said circuit court to restrain said "water committee from constructing certain water-works, and from issuing and disposing of certain bonds, under and in pursuance of an act of the legislative assembly of the state of Oregon entitled 'An act to amend an act entitled 'An act to incorporate the city of Portland,'" approved October 24, 1882, approved November 25, 1885," claiming that said act was unconstitutional and void, and that the issuing and disposing of said bonds, as the obligations of the city of Portland, would render the real and personal property of the respondents, and all other tax-payers in said city, liable to pay a large amount of additional taxation for the interest on said bonds, and to pay the principal thereof when the said bonds became due and payable according to the tenor thereof; and that respondents would be subject to a multiplicity of actions to recover the taxes so wrongfully to be assessed and collected from them to pay the interest and principal of the bonds. It is alleged in the complaint in the suit that the respondents are residents of the city of Portland, and owners of a large amount of real estate and personal property situated in said city, and are tax-payers therein. The acts of the appellants, the water committee, complained of are, in effect, that they are proceeding to carry out the provisions of the said act. The appellants interposed a demurrer to the complaint, upon the grounds that the facts therein alleged did not constitute a cause of suit. The circuit court overruled the demurrer, and the decree appealed from was thereupon entered. The mayor and common council of the city are named defendants also, and the ground upon which the suit is sought to be maintained is that resident tax-payers have a right to invoke the interposition of a court of equity to prevent an illegal creation of a debt which they, in common with the other property holders of the city, might otherwise be compelled to pay.

The validity of said act is questioned upon several grounds. It is claimed that the act and sections amended are not set forth and published at full length, as required by article 4, § 22, of the state constitution, which declares that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length;" that the members of the water committee are officers of the city, and are not required by the act to take an oath of office. The heading of the act, after the title, is as follows: "Be it enacted by the legislative assembly of the state of Oregon that the act entitled 'An act to incorporate the city of

Portland,' " approved October 24, 1882, be, and the same is hereby, amended by adding thereto the following sections, numbered from 142 to 167, inclusive of both, which sections shall constitute and be numbered as chapter 18 of said act, and be entitled "Water-works."

Sections 142 and 143 read as follows:

"Sec. 142. The city of Portland, hereinafter referred to as 'the city,' is authorized and empowered to construct or purchase, keep, conduct, and maintain water-works therein of a character and capacity sufficient to furnish the city, and the inhabitants thereof, with an abundance of good, pure, and wholesome water for all uses and purposes necessary for the comfort, convenience, and well-being of the same; and to that end may acquire, by purchase or otherwise, and own and possess, such real and personal property, within and without the limits of the city, as in the judgment of the persons herein authorized to construct, purchase, conduct, and maintain the same may be deemed necessary and convenient, and for such purpose may also issue bonds, and dispose of the same as hereinbefore provided.

"Sec. 143. The power and authority given to the city by section 142 hereof, to construct or purchase water-works, and issue and dispose of bonds therefor, shall be exercised, as hereinafter provided, by the following-named substantial tax-payers and *bona fide* residents thereof, namely, John Gates, F. C. Smith, C. H. Lewis, Henry Failing, W. S. Ladd, Frank Dekum, L. Fleischner, H. W. Corbett, W. K. Smith, J. Loewenberg, S. G. Reed, R. B. Knapp, L. Therkelsen, Thomas M. Richardson, and A. H. Johnson, who shall be styled collectively 'the water committee,' and are hereinafter mentioned and referred to as 'the committee.'"

These two sections specify the general power conferred, and designate the persons who are to exercise it, and the name they should collectively be styled.

Sections 153 and 154 of the act are as follows:

"Sec. 153. For the purpose of carrying this act into effect, the committee is authorized to issue and dispose of the bonds of the city of the denomination of from \$100 to \$1,000, as the purchaser may desire, with interest coupons attached thereto, the par value of which shall not exceed the sum of \$700,000, signed by its chairman and countersigned by its clerk; whereby the city shall be held and considered, in substance and effect, to undertake and promise, in consideration of the premises, to pay to the bearer of each of the said bonds, at the expiration of thirty years from the date thereof, the sum named therein, in gold coin of the United States, together with interest thereon in like coin at the rate of five per centum per annum, payable half yearly, as provided in said coupons.

"Sec. 154. Whenever and as soon as the water-works herein provided for are, in the judgment of the committee, ready for use, there shall be selected, as herein provided, five persons, for the purpose of maintaining and conducting said water-works, who shall be styled individually 'water commissioners,' and collectively 'the water commission,' and are hereinafter referred to as the 'commissioners' and the 'commission,' respectively; and thereafter the power and authority hereby given to the city to keep, conduct, and maintain water-works therein shall be exercised, as hereinafter provided, by said commission."

These latter sections indicate the mode the power is to be exercised, and the extent of the duty of the committee. The respondents claimed that the commissioners referred to in the last section are officers, and that as their tenure of office, as provided in section 155 of the act, which reads as follows: "Sec. 155. The commissioners shall be selected, in the first instance, by the committee, from their own number, for the several terms of two, four, six, eight, and ten years; but, in case a sufficient number thereof do not consent to serve as such commissioners, the remainder may be selected from the resident tax-payers of the city; and thereafter the commissioners shall be ap-

pointed by the governor of the state from such tax-payers as follows: In case of a vacancy arising otherwise than by the expiration of a term, for the remainder of the term; but in case of the expiration of a term, for the full term of ten years next thereafter,"—is more than four years, it is violative of section 2 of article 15 of the constitution," the last paragraph of which section provides that "the legislative assembly shall not create any office the tenure of which shall be longer than four years." And another ground upon which the respondents assail the validity of the act is that the legislative assembly had no authority, under the constitution, to appoint the water committee, or authorize that committee to elect the water commissioners; that it is a violation of sections 6 and 7 of article 6 of the constitution, which read as follows:

"Sec. 6. There shall be elected in each county, by the qualified electors thereof, at the time of holding general elections, a county clerk, treasurer, sheriff, coroner, and surveyor, who shall severally hold their offices for the term of two years.

"Sec. 7. Such other county, township, precinct, and city officers as may be necessary shall be elected or appointed in such a manner as may be prescribed by law."

They also contend that the subject of the act is not expressed in the title, as required by section 20 of article 4 of the constitution, which provides as follows: "Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The main ground of objection to the act is that the water committee has no authority to construct the water-works for the city, and compel it to pay for the same, without the consent of the people, through the corporate authorities; that the legislature had no power to compel the authorities of the city to enter into a contract to make the improvements, or to authorize the committee to issue the bonds in its name, and make it liable for their payment.

These several objections against the validity of the act have been presented to the court with much force and ability, and, if any of them are found to be tenable, it will be our duty to pronounce it void, however meritorious the enterprise may be which it was intended to promote. The constitution of the state is paramount to any act which the legislative assembly may pass. It is the voice of the people, speaking in their original condition, and binds the legislative assembly as well as private persons. It declares to that body that its enactments must be in accordance with certain restrictions, which its members have no more power to transcend than has the humblest person within the jurisdiction of the state. It is a limitation upon legislative power, and however formal a measure may be enacted by the legislative assembly, if it contravenes any of the provisions of that instrument, it will no more have the force of law than would a resolution adopted by a voluntary assembly of private individuals. When the people established the state government they prescribed in the outset the mode in which legislative power should be exercised, and especially limited it in many particulars; and every enactment not in conformity with that mode, or which transcends such limit, is a nullity. The duty of administering the law devolves upon the courts, and they must of necessity decide what the law is, as applicable to the particular case before them. Hence they must determine whether a legislative act granting a right, or conferring an authority, which is sought to be enforced or exercised, is valid or not. If the constitutional requirements have been observed in its adoption, and it is found to be in conformity with its provisions, it is a law; otherwise it grants no right, nor confers any authority. But whether it is constitutional or not must depend upon the express provisions of that instru-

ment, or necessary implication arising therefrom; and courts should not adjudicate it unconstitutional unless it is clearly repugnant to those provisions. The people of this state possessed originally all legislative power, subject to the restrictions contained in the constitution of the United States, and they have invested the legislative assembly with that power to the fullest extent, except so far as they have expressly inhibited its exercise, as before suggested. The question in such cases is not as to the extent of power that has been delegated by the people to the legislative assembly, but as to extent of the limitations they have imposed upon that body. It therefore becomes essential, in determining the various objections that have been made against the validity of the act in question, to consider whether or not it conflicts with the provisions of the constitution before referred to.

The argument presented by the respondents' counsel in support of their objection, "that the act and sections amended were not set forth and published at full length," is that sections 2 and 149 of the original act are the only ones which are amended, and which are set forth and published at full length, and that neither of them has any connection with or reference to the water-works, or the committee to construct them; that no other sections of the original act are amended in terms, but remain in full force, unless amended by implication; that a number of sections are added to the original act not amendatory of any particular section of it, but merely supplementary thereto; that the added sections do materially amend by implication other provisions of it, and they refer as an example to section 143 of the original act, which provides that "the city of Portland is not bound by any contract, or in any way liable thereon, unless the same is authorized by a city ordinance, and made in writing, and by order of the council, signed by the auditor or some other person in behalf of the city," etc. This, in particular, they claim has been amended, or is attempted to be amended, by the act in question, without being set forth and published as required by said section 22 of article 4 of the constitution, and in violation thereof. It is undoubtedly true that a section of a statute of this state cannot in terms be amended by a mere reference to the title of the act containing it. The provision of the constitution referred to is decisive upon that point. But that a subsequent statute cannot be legally enacted affecting the provisions of a prior one, without setting forth and publishing the prior provisions as amended, does not follow. *People v. Mahaney*, 13 Mich. 481, 496.

By the title of the act in question it purports to be an amendment of the original act to which it refers, and the act itself does in terms amend the two sections that have been referred to, and which are set forth and published therein at full length; but does it amend said section 143 of the original act? This I very much doubt. By that section the city of Portland is not bound by any contract, or in any way liable thereon, unless the same is authorized by a city ordinance, and made in writing, etc. The amended act undertakes to make the city liable upon bonds to be issued in its name by the committee. This would, seemingly, change the former provisions; but does it do so in fact? The contract referred to in said section 143 must have been such a one as a city ordinance could properly authorize,—a contract which the city was empowered to enter into. The amended act introduced another subject in the city affairs,—one which the city theretofore had no control over. It could not contract for the construction of water-works. No such contract could have been authorized by a city ordinance. The said section had no reference to any such contracts; it merely applied to such contracts as could be made under existing laws; and it retains the same right, and enjoys the same immunity, since the adoption of the said amendment, it had before. I cannot see that said section has been amended, or in anywise affected, further than this. The city may now become liable upon a contract not authorized by an ordinance of the common council, but not upon any contract that can now or

could have been then authorized by any ordinance which that body could adopt. It is unshorn of any power it then possessed.

In *Dolan v. Barnard*, 5 Or. 390, cited by the respondents' counsel, the provisions of the former statute were attempted to be amended by a subsequent one in a material particular. Those of the former provided the time when an assessor should enter upon the discharge of his official duties, and the subsequent one changed it to a different time. This the court held to have been an amendment; but here there has been no change at all, if we read the two provisions in accordance with the construction courts are compelled to give them. If said section 143 is read according to its meaning, as before indicated, it will be found not to have been altered or changed in the least by the subsequent act.

It was claimed by one of the respondents' counsel upon the argument that the original act should have been set forth and published at full length, as amended by the addition of the new sections. Such would have been the case if the former act had been revised; but the "amendment," as it is termed, is in the nature of a supplemental act, and its object and purpose is clearly indicated by the heading,—"To amend the act entitled 'An act to incorporate the city of Portland,' approved October 24, 1882," by adding thereto certain sections, to be numbered, and constitute chapter 13 of said act, and entitled "Water-works." It was no covert legislation such as the constitutional provision was intended to prevent. No attempt is shown to smuggle into the original act provisions whose object and meaning are obscure; but the whole purpose of it is fully disclosed, and the average legislator could not have been misled by an inspection of it. The objection to the act upon this ground cannot be sustained.

The next objection—the objection that the members of the "water committee" are officers of the city, and are not required to take an oath of office—the respondents' counsel attempt to sustain by section 3 of article 15 of the constitution, which provides as follows:

"Sec. 3. Every person elected or appointed to any office under the constitution shall, before entering upon the duties thereof, take an oath of affirmation to support the constitution of the United States and of this state, and also an oath of office."

This presents the question whether or not the members of the committee are officers under the constitution. They are named and their duties are prescribed in the act, which duty, as we have seen, was to construct the water-works. The object of the act was to supply the city of Portland with water. In order to carry it out it was necessary to establish water-works, and the gentlemen named were designated as a committee for that purpose. That they are "officers" in the broad sense of the term, there can be no question; but whether they are such officers as were intended by the said section of the constitution is very doubtful. In order to be such officers, they must have been elected or appointed to an office under the constitution, which I understand to be an office provided for by that instrument.

In the case of *McArthur v. Nelson*, 81 Ky. 67, cited by the appellants' counsel, a district styled the "Court-house District" had been created by the legislature of that state, with a view to imposing a tax upon the people within the prescribed boundary sufficient to construct a new court-house within the city of Newport, Campbell county, in said state. The act authorized the judge of the circuit court to appoint three commissioners of the district, who should hold their office at the will and pleasure of the judge. It was made the duty of the commissioners to have the court-house constructed at a cost not exceeding \$50,000, and, to enable them to raise the money, they were authorized to issue bonds, to redeem them, and to levy an annual tax upon the real and personal property in the district. In determining the question as to whether such commissioners were officers or not, under the constitution of

the state, the court said: "Nor do we think it was necessary for the legislature to prescribe the term of office for the commissioners, although they are made a body corporate and politic, with power to sue and be sued, contract and be contracted with, under the style of 'Commissioners of the Court-house District.' They are not district officers, within the meaning of section 10 of article 6 of the constitution, but are the mere agents of the district, required by the act to discharge certain duties with reference to the building of the court-house, and when those duties end their employment terminates. It could not have been intended by the framers of the constitution that commissioners appointed to superintend and control the erection of state or county buildings, and to receive and collect the taxes from the sheriff imposed by the act itself, should be regarded as district officers, coming within that provision of the constitution forbidding the creation of any office the term of which shall be for a longer time than a term of years. * * * To hold that such commissioners are to be selected, and when selected to be removed, as officers, within the meaning of the constitution, would be determining by judicial precedent every one charged with the execution of a ministerial duty, under legislative sanction, an officer whose term of office must be designated, or the appointment will be held invalid."

The question involved in that case is very similar to the one here, and the language of the court expresses the view we entertain regarding it,—that the members of the water committee are no more than agents of the city, required by the act to carry out its provisions, as was said in that case regarding the commissioners to build the court-house. It might be said that the act need not require the members of the committee to take an oath of office, and still be valid, even if they came under the denomination of "officers" under the constitution, as the clause in the constitution upon that subject is a law that executes itself, and requires no enabling act for that purpose; but we prefer to place our decision of the point upon the merits of the question presented.

The next objection for consideration, as we have arranged the several objections against the validity of the act, is whether the "water commissioners," as they are styled in it, and collectively termed the "water commission," are officers whose term of office is required to be limited by the clause of the constitution contained in section 2 of article 15, before referred to. Section 154 of the act is set out in full herein, and it will be seen from an inspection of it that, whenever the water-works are ready for use, five persons shall be selected, as provided in another part of the act, and thereafter the power and authority given to the city to keep, conduct, and maintain the water-works devolves upon this commission. The commissioners are to be selected in the first instance from the old committee, for the term of two, four, six, eight, and ten years, if a sufficient number of the committee will consent to serve as such commissioners; if not, the remainder must be selected from the resident tax-payers of the city. Thereafter the commissioners are to be appointed by the governor of the state, to fill vacancies for parts of terms, and for full terms, which are made 10 years. This commission is to have full charge of the water-works. Each commissioner is to receive, on account of his services under the act, \$500 a year; is not eligible unless he has paid within a year before his selection a tax of not less than \$25; and whenever he shall thereafter fail to pay such tax to the city for one year he shall cease to be a member of the commission, and his place be deemed vacant. The following sections of the act contain the main provisions relating to the powers and duties of the commission:

"Sec. 158. All money collected or received by the commission, for the use and consumption of water or otherwise, shall be deposited with the treasurer of the city, who shall keep the same separate and apart from the other funds of the city, and pay it out on the order of the chairman of the commission,

countersigned by the clerk thereof, and to the holder of any over-due interest coupons of the bonds aforesaid, upon the presentation and surrender thereof, and not otherwise.

"Sec. 159. The commission has power and authority (1) to employ, hire, and discharge, from time to time, all such agents, workmen, laborers, and servants as it may deem necessary or convenient in the conduct and management of said water-works; (2) to make all needful rules and regulations for the conduct and management of the same by the city, and inhabitants thereof; (3) to establish rates for the use and consumption of water by the city, and the inhabitants thereof, including the people living along the lines, or in the vicinity of the works, without the city; (4) to provide for the payment of water-rates monthly, in advance, and to shut off the water from any house, tenement, or place for which the water-rate is not duly paid, or when any rule or regulation is disregarded or disobeyed; (5) to do any other act, or make any other regulation, necessary and convenient for the conduct of its business, and the due execution of the powers and authority given it by the act, and not contrary to law.

"Sec. 160. The commission shall annually, before the first day of January, make a written estimate of the probable expense of maintaining and conducting the water-works during the ensuing year, and also the cost of any contemplated alteration, improvement, or extension thereof, and thereupon ascertain and prescribe, as near as it conveniently can, a water-rate for such year as will insure a sufficient income from the sale of the water to pay such expenses and costs, together with one year's interest on the bonds aforesaid, then issued and outstanding.

"Sec. 161. After the expiration of five years from the selection of the commission, a sum equal to 1 per centum on the par value of the bonds aforesaid, then issued and outstanding, may be annually estimated for in fixing the water-rate, in addition to the expenses, cost, and interest aforesaid, and collected as a part thereof, which sum, when so collected, shall be kept and invested, under the direction of the commission, as a sinking fund for the payment or redemption of said bonds.

"Sec. 162. The committee and commission shall each cause a quarterly statement, in detail, of its receipts and disbursements, to be made and signed by its chairman and clerk, and filed by the city auditor and clerk, who shall preserve the same among the files of his office, and shall cause the same to be published in two daily papers of the city; and the commission shall cause to be so made, filed, and published, as a part of its last quarterly report, in each year, an inventory or statement of the property, implements, and material, in its possession or control, pertaining to the water-works, together with the condition and approximate value thereof."

There is much more reason for holding that the commissioners are officers within the meaning of the constitution, than that the members of the water committee are; and, besides, the words, "elected or appointed to any office under the constitution," do not occur in said section 2 of article 15. The language there, as already shown, is simply "that the legislative assembly shall not create any office the term of which should be longer than four years;" but still I cannot persuade myself to believe that they are such officers as said clause refers to; that they will be any more than agents for the city under the act, the same as the members of the water committee are. This objection to the act would not, if it were to prevail, materially affect its validity. The said commissioners will not, in all human probability, be selected for a long time, and the main object of the act can be accomplished without carrying out that portion of it. Our attention has been called to sections 6 and 7 of article 6 of the constitution, relating to the manner of selecting county, township, precinct, and city officers. The provisions would have an important bearing, no doubt, if the commissioners were necessarily officers, belong-

ing to either class. We agree with the respondents' counsel "that in the election of officers to administer the affairs of a municipal corporation which are of a purely local character, in which the state has no interest, the legislature has no authority either to elect or appoint such officers." The constitution has pointed out the mode of their selection, and it must be followed, except, perhaps, as a temporary expedient, it designates persons to administer those affairs until an organization of the municipal government can be effected. At least it has frequently pursued that course, and I discover no impropriety in it. There is, however, left in the legislature a supervisory power over municipal corporations regarding certain matters, and which, in the absence of constitutional directions, may be exercised in accordance with legislative discretion. As was remarked by the supreme court of the United States in *Barbier v. Connolly*, 113 U. S. 31, S. C. 5 Sup. Ct. Rep. 357, in speaking of the effect of the fourteenth amendment to the constitution of the United States: "But neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts,—such as draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits; for supplying water, preventing fires, lighting districts, clearing streets, opening parks, and many other objects."

The respondents' counsel concede that the power here referred to resides in the legislature, and have set forth in their brief the doctrine in apt and appropriate language, which I here quote: "It is to be understood, however, that the right of the qualified electors of a municipal corporation to choose their own officers is confined to those who administer the local affairs of the municipality, and that the legislature has the unquestioned power, if it deems fit, to appoint officers within a municipal corporation to execute and administer laws of a public nature, in which the people at large are interested,—such as the preservation of the public peace, police regulations, and the like. In these the power of the legislature is plenary and undoubted." Page 23, respondents' brief. I do not see that the opposing counsel differ, or can differ, in their respective premises. Their disagreement is narrowed to the point as to whether the object of the act relates to a private affair, or is for a public purpose. Upon that, however, their views diverge very widely; but I shall defer the further discussion of that question until I reach the last objection against the validity of the act, as whatever else is said in regard to this objection applies equally to that.

The objection that the subject of the act is not expressed in the title in accordance with section 20 of article 4 of the constitution, which provides that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title, is not maintainable unless there is a clear defect in that particular. It is sufficient if the subject be stated generally. It is not necessary that the title specify the object in all its particulars. The provision of the constitution was adopted to prevent the blending of incongruous subjects in the same act, and using the title as a deception. "There has been a general disposition to construe this provision of the constitution liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purpose for which it has been adopted." Cooley, Const. Lim. *146.

Neuendorff v. Duryea, 69 N. Y. 557, illustrates the liberality with which such provisions of the constitution have been construed. In that case a similar objection was made to a private act of the legislature of that state. The

title of the act was "An act to preserve the public peace and order on the first day of the week, commonly called Sunday." The court of appeals held that this was a sufficient title, under a similar clause of the constitution to the one in question, to an act forbidding operatic and dramatic performances in the city of New York on Sunday. The court said that the title was broad enough to indicate legislation in regard to the public peace and order on Sunday throughout the state. Hence it gave information to the people in New York city, and to their representatives in the legislature, that that locality was interested in the proposed enactment.

In *Brandon v. State*, 16 Ind. 197, it was held by the supreme court of that state that, "if the title of an original act was sufficient to embrace the provisions contained in an act amendatory thereof, it need not be inquired whether the title of the amendatory act would of itself be sufficient." That ruling was in accordance with former rulings of the supreme court of that state, and all of them were upon a provision of the constitution of Indiana from which the one under consideration was taken. The title of the act in question is helped materially by the matter immediately following the enacting clause, which shows very clearly what the object of the act was. It certainly embraced but one subject, and I think the title was broad enough to indicate the general object of the act, and that, within the great majority of authorities, is sufficient.

The objection that the legislative assembly had no power to authorize the water committee to issue the bonds in the name of the city, and make it liable for their payment, is, to my mind, the most serious one that is made against the validity of the act. And this brings me back to the former objection again. The power of the legislature over municipal corporations, in the absence of constitutional restrictions, is unlimited, except so far as they are endowed with rights incident to a private corporation; which, according to Mr. Dillon, only extends to the private advantage of the particular corporation as a distinct legal personality, and to property acquired thereunder, and to contracts made in reference thereto. Section 66, Dill. Mun. Corp. (3d Ed.) And that author, in section 67, same work, says, in effect, that that description is unsatisfactory, and the private character thus ascribed to those corporations is difficult to comprehend; and he inquires in what sense powers conferred and to be exercised for the good of all the people of the place are private, and wherein they differ in their origin and nature from those admitted to be public; and concludes that the distinction between the two classes originated in the courts, to promote justice, and to escape technical difficulties, in order to hold such corporations liable to private action.

The supreme court of Michigan, however, in the case of *People v. Hurlbut*, 24 Mich. 44, cited by the respondent's counsel in support of their position, undertook to distinguish between powers not municipal and those which were, and classed "boards of police commissioners" as coming under the former head, and of "water commissioners" and "sewer commissioners for a particular city" as coming under the latter head, and held that the legislature of that state, while it might appoint the former, had no power to divest the city authorities of a particular city of the power to establish water-works and construct sewers, and confer it upon persons of its own designation. This decision was made under a construction which the court placed upon the constitution of the state in regard to the incorporation of cities and villages, and the election and appointment of their officers. It is entitled to great respect and consideration, but it by no means settles the question as to what authority belongs to the local affairs of a city, and what is of a public nature; nor does it necessarily follow that this court should construe provisions of the constitution of this state the same as that court construed a similar provision of the constitution of that state. The past history of the state, and the circumstances attending the adoption of a constitutional provision,

may have much to do with the construction courts give it. Besides, the legislative assembly of this state has not attempted by this act to usurp any power possessed by the city of Portland at the time of its adoption. It has simply undertaken to supply its population of more than 30,000 inhabitants with pure water at reasonable rates, from a point beyond the city limits, and to accomplish it in the manner pointed out in the act; and if that is a matter of public interest, then the legislature had the right to appoint agents through which it might be accomplished, unless the constitution of the state has deprived it of the authority.

Counsel on both sides have cited a number of authorities as to the character of such a power. They do not differ in the main. Both concede that primarily municipal corporations are public, and their powers governmental. But it is claimed upon the part of the respondents, and they have produced several authorities to show, that they are also endowed with peculiar powers and capacities for the benefit and convenience of their own citizens, and that these are of a private nature, and the state cannot interfere with them, for the reason that they are private.

Thus, in *Atkins v. Town of Randolph*, 31 Vt. 226, it was held that an act for the appointment of an agent of the town by the county commissioners, with power to purchase liquors on the credit of the town, and to sell the same for certain specified purposes, and to account for and pay over the proceeds to the town as prescribed, was unconstitutional; and the town, not having consented to the appointment, or rather the contract, was not liable for the liquors purchased upon its credit by such agent pursuant to the act, because, the court said, the contracts were of a private character, although they would conduce to the public good by enabling the government to suppress traffic in intoxicating liquors. The court was clearly correct in its conclusion, if its premises were correct. If the contracts were of "a private character," the legislature could not provide that the town should enter into them against its will.

In all that class of cases cited by the respondents' counsel, where the authority has been denied, the decisions have been placed upon the ground that the power attempted to be exercised related to a private affair of the corporation. This class of decisions has in some instances undertaken to draw the line between powers which are governmental in their nature and those which relate to local convenience for the citizen, and to place those relating to water, gas, and public parks on the *quasi* private side of the corporation, and the respondents' counsel strenuously insist that these subjects *per se* relate to private affairs. I doubt whether such is the rule. Subjects of that character might, under some aspects, be regarded as belonging to the private affairs of a corporation; but under others, would be regarded as a public matter. The legislature is often the judge in such cases. It has frequently authorized municipal corporations to take land for a public park, for water-works, and for bringing water into a town. *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y. 234; *Kane v. Mayor, etc., of Baltimore*, 15 Md. 240; section 597, *Dill. Mun. Corp.; Inhabitants of Wayland v. County Com'r's Middlesex*, 4 Gray, 500.

The court in *Attorney General v. City of Eau Claire*, 37 Wis. 435, held that providing for the erection of water-works "is so essentially a public and municipal purpose that it is obvious that the city can take any legitimate power in aid of it." Dillon, in section 597, *supra*, says that the exercise of the right of eminent domain for the purpose of supplying the inhabitants of towns with pure water is clearly a public use; and in 4 Gray, 500, *supra*, where land was taken to supply the city of Boston with pure water, the court said: "The petitioners seek to take the case out of the rule, contending that in this case the appropriation of property cannot be held to be for public use; its benefits being confined to one city alone, and not shared by the whole public. This ob-

jection, it is obvious, goes deeper than to the mere question of taxation,—to the validity of the act itself; for it can only be on the ground that this land was taken for public use that the exercise of the right of eminent domain by the government can be justified. But we think it is too narrow a view of the object and purposes of the act. Many public works would perhaps be found to be peculiarly beneficial to the city or town in which they are located, though the benefits are not restricted and confined to such town or city. In the present case the benefits are shared by a large portion of the public directly, and indirectly by the whole commonwealth. It would be difficult, we think, to find any class of cases in which the right of eminent domain is more justly or wisely exercised than in provisions to supply our crowded towns and cities with pure water,—provisions equally necessary to the health and safety of the people. It is, perhaps, scarcely necessary to remark that it is for the legislature, in the first instance, to determine what may be regarded as a public use, and that it is only in a clear case of departure from the rule that this court would feel justified in determining such an act to be invalid.

In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, S. C. 6 Sup. Ct. Rep. 252, the supreme court of the United States held that a legislative grant of an exclusive right to supply gas to a municipality and its inhabitants through pipes, etc., upon condition of performance of service by the grantee, was a grant of franchise vested in the state; that it was a business of a public nature, and meets a public necessity. Page 669.

Public parks, gas, water, and sewerage in towns and cities may ordinarily be classed as private affairs; but they often become matters of public importance, and, when the legislature determines that there is a public necessity for their use in a certain locality, I do not think they can be designated as mere private affairs. That is a relative question. Take the case at bar. The city of Portland needs a supply of water. It has to be brought from some place outside of the city. The matter is presented to the legislature, and it determines that it is a matter of public necessity; that steps should be taken to insure to the city wholesome water, at cheap rates; and can it be claimed that it was a mere private affair, and the legislature had no authority to interfere with it? It seems to me that this act bears upon its face ample proof that its object and design were to promote the public good, and that it is the exercise of a power that is governmental in its nature; nor do I discover in it any attempt or design to deprive the city of Portland of its autonomy. The city had, as I understand, no right to establish water-works. The act undertakes to do that, and give the city the benefit of it. It places the enterprise under the management of wealthy and prominent citizens of the town, and, to remove all suspicion of a job in the affair, requires them to serve without compensation. The sole object appears to be for the benefit of the city and country at large.

It is claimed upon the part of the respondents that the benefit can only be local; that other sections of the state are not interested in it. This does not appear from the complaint, and we have the right to assume that it is not so as a matter of fact, as every intendment must be given in favor of the legality of the act. The court, I think, has a right to take judicial notice that the city of Portland is the metropolis of the state; that its commercial relations extend to every section of the state; that citizens from every part of it go there to dispose of the products of the country, and to purchase supplies in return; that the country depends upon it as a mart, and that it depends upon the country for its trade, and that the advantages are mutual; that as it thrives and increases in population it affords a better market, and insures reductions on the price of merchandise, and in addition contributes largely towards the revenue of the state. The latter is directly interested in its advancement. The people from every part of the state are drawn there through business or for pleasure; and it is absurd to contend that they would not be inconvenienced,

nor the state at large injured, if the town were stinted in its supply, or furnished with a bad quality, of a primary and essential element of life. From any view, it seems to me that the measure which is attempted to be enforced by means of the act is a public advantage, and we must presume that it was necessary to adopt the act in order to insure its accomplishment. It evidently is not a scheme to advance the interests of any private individual, but an enterprise that aims to benefit an entire community, and I must regard it as public in its character. If I am correct in this conclusion, then the legislative assembly had an undoubted right to appoint agents to enforce its provisions, and to authorize the issuance of the bonds in the name of the city. I concede that it bears a semblance of arbitrariness, and that I would have been better satisfied with it if the city authorities had been allowed to have issued the bonds; but they appear to acquiesce in it, and, so far as we can observe, are endeavoring to maintain the act, and this court might, by intermeddling with the affair, do the city a great damage.

A question has been raised as to the right of the respondents to maintain the suit,—as to whether they have any standing in court. My impressions are adverse to the right; but, in view of the importance of the case, we have concluded not to consider it.

The decree appealed from must be reversed, and the respondents' complaint dismissed.

(14 Or. 77)

LAWRENCE v. LAWRENCE.

(*Supreme Court of Oregon. November 3, 1886.*)

1. HUSBAND AND WIFE—CONTRACTS BETWEEN—LAW OF OREGON IN 1864.

A contract between a husband and wife living in Oregon in 1864, under which certain land was to be purchased by the husband, and the deed taken in the wife's name, is null and void, as under the laws of that state at that time, a husband and wife could not contract with each other except with respect to the wife's separate estate.¹

2. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—PARENT AND CHILD.

The possession of a step-mother of land deeded by the father to his infant son, after the abandonment of the family by the husband, is not adverse to that of the son, who continued to live in the family.²

3. EQUITY—QUIETING TITLE—ADVERSE POSSESSION—ESTOPPEL.

A step-mother who, having the management of real estate owned by her stepson, gives receipts for rent thereof in his name, lists the property for taxation in the same way, and by repeated declarations admits that the title is in him, will not be heard to set up a claim of adverse possession in a suit brought by him to quiet title.

Appeal from Multnomah county.

Emmett B. Williams and *O. P. Mason*, for appellant. *M. C. George* and *B. Killin*, for respondent.

STRAHAN, J. This suit was brought to quiet the title to certain real property situate in the city of Portland. The complaint alleges that the plaintiff is the owner in fee of said premises, and that, through himself and his tenants, he has been in the actual possession of said premises ever since July 6, 1864. The complaint then sets up various acts and claims of the defendant whereby she attempts to assert some right to said property, and alleges the same to be wrongful. The answer denies the material allegations of the complaint. By way of further defense the answer then alleges that J. R. Lawrence, the plaintiff's father, was, on the sixth day of July, 1864, and is now, the husband of the defendant, and that on said day, and for many years there-

¹See *Valensin v. Valensin*, 28 Fed. Rep. 599, and note; *Edwards v. McEnhill*, (Mich.) 16 N. W. Rep. 322.

²As to what is such adverse possession as will create a good title by prescription, see *Jaques v. Lester*, (Ill.) 8 N. E. Rep. 795, and note.

after, he and the defendant lived and cohabited together as husband and wife; that about said day said lots were purchased as a home for, and as the separate property of, the defendant, by agreement and understanding between J. R. Lawrence and defendant,—this defendant paying a part of the purchase price, and relying upon the said J. R. Lawrence to have said property deeded to the defendant, and believing that said property was her sole and separate estate; that pursuant to said understanding and agreement, so made by the said J. R. Lawrence with this defendant, she took possession thereof, and by her own labor earned divers large sums of money which she in good faith turned over to her said husband in payment of the purchase price, and that she in good faith made valuable improvements, built houses and fences, graded the streets, and improved the same, and paid the taxes and street assessments, and thereby expended large sums of money upon said property, and bestowed care, labor, and attention, all of which was and is of the value of several thousand dollars, an exact account of which the defendant cannot give, and that much of the paper evidence thereof is now in the possession of the plaintiff, and that said J. R. Lawrence wrongfully, unlawfully, fraudulently, and without the knowledge of this defendant, and for the purpose of cheating and defrauding her out of her just rights, and out of her property and home and her estate in the said lots, procured the said lots to be deeded by J. H. Hayden and wife to the plaintiff herein, who was then an infant less than two years and a half old, having no estate whatever, and who did not pay anything whatever therefor; that since said purchase, as aforesaid, plaintiff has not made, or caused to be made, any improvements thereon, nor made any himself, nor paid any taxes; that said J. R. Lawrence and plaintiff have allowed defendant to expend her labor and money upon the said property, believing that she had a legal and equitable interest therein as aforesaid. The answer then contains a plea of the statute of limitations. And, for a further defense, the answer then pleads that the legal title to said property is in J. R. Lawrence, the husband of defendant, and that in 1873 he acquired title, in trust for the defendant, of one Charles M. Carter, who was then the legal owner of said property, and that said J. R. Lawrence fraudulently, and with the intent to cheat this defendant, and to defraud her of her just rights, procured the legal title to be deeded to himself, and thereby became the trustee of defendant; that the defendant is the owner of said property; that she has been in the exclusive possession of the same, claiming to own it, and holding it adversely to the plaintiff for more than 18 years last past.

The reply presented proper issues on the new matter in the answer. A supplemental answer was afterwards filed, alleging, in substance, that the defendant had procured a decree of divorce against J. R. Lawrence, and that the court had by the same decree vested in the defendant all the title of J. R. Lawrence in the premises in controversy. The evidence was taken by deposition, and this cause is now before us to be tried anew upon the transcript and evidence accompanying it.

The plaintiff is entitled to the relief prayed for, unless his right thereto is defeated by the matters alleged in the answer, or some of them. It is true, his right is contested by the defendant on a further ground, insisted upon at the trial, that his predecessor had no title, and therefore the deed to the plaintiff gave him none. However that may be, it is too late to call it in question. Joseph R. Lawrence, as well as the defendant and the plaintiff, entered under the deed from Hayden made in 1864; and, without stopping to discuss the character of their possession as between themselves, at this time, it is sufficient to say that that possession was adverse and hostile to every other title or interest, and extinguished them all long before the commencement of this suit.

The defense mainly relies upon two facts: (1) The alleged contract respecting the purchase of the property, in 1864, between Joseph R. Lawrence

and the defendant, who was then his wife; and (2) the statute of limitations. We will examine these defenses briefly as they are presented by the evidence.

And, first, as to the contract alleged. It was substantially that "Jos. R. Lawrence said to the defendant that this piece of property was for sale. Hayden had it. We didn't have enough money to pay for it all, so he went and borrowed \$150 or \$200 of the priests that was at the sister's school at the time, and bought it. 'Now,' he says, 'if you will economize, we can pay that note off.' I was working then for different parties. It was to be my home,—to get away from that old Catholic bell, all the time a- ringing. That's what he said. I managed it, and collected the rent all the time, from the time the first house was put up." Lawrence caused the deed from Hayden to be made to the plaintiff, which deed was duly recorded in Multnomah county soon after its execution. These two lots were unimproved at the time of the purchase, but soon thereafter Joseph R. Lawrence commenced to improve them, and we entertain no doubt whatever that all the improvements placed on said property, up to the time Joseph R. Lawrence left Oregon, were made and paid for by him. Lawrence's possession, therefore, was the possession of the plaintiff, who was then an infant. Besides, the alleged agreement between Lawrence and his wife touching the property at the time of its purchase from Hayden is denied by Lawrence, and we think the circumstances surrounding the transaction at the time, as well as the defendant's conduct and admissions thereafter, show most conclusively that her present claim is an after-thought. Taking the defendant's statement of this contract in its strongest terms, and it could be the foundation of no claim to this property. She paid nothing to Lawrence; there was no writing,—no possession; and the money paid for improvements was not hers. It appears that the money was all paid and advanced by Lawrence, both for the purchase of the property and for the improvements. In addition to these objections, a husband and wife could not contract with each other in Oregon at the time it is claimed this contract was made, unless it was respecting the wife's separate property, and this property was not of that character.

Nor is the plea of that statute of limitation sustained by the evidence. It satisfactorily appears from the evidence that the defendant moved upon the land in question with her husband, Joseph R. Lawrence, soon after the first house was built. This was within a year or two after the property was purchased. Lawrence testifies that he was in possession himself constantly, from the time he purchased up to the time he left Oregon, and that his possession was under the plaintiff's title, and that he held the possession for the plaintiff up to that time; and, when he went away, he left the defendant on said premises, with whom the plaintiff then resided. The defendant's entry was therefore not hostile to the plaintiff's title, but in strict subordination thereto, and it never became adverse. This view of the character of the defendant's possession harmonizes with the defendant's conduct respecting the same after Lawrence left Oregon, as well as with her own declarations on that subject. On the first day of February, 1885, the defendant and one J. S. Coulter, a tenant, had a settlement respecting the rent of one of the houses on said premises, at which time she gave Coulter a receipt for \$30 in full for rent till March 1, 1885, and signed to said receipt, not her name, but the plaintiff's. In the year 1883 the defendant visited the county assessor's office of Multnomah county for the purpose of listing the property in dispute for taxation for that year. The assessor furnished her the usual blank for that purpose, and she instructed him to fill said blank with the name of Albert J. Lawrence, the plaintiff, which he did, and she then, with her own hand, signed his name at the bottom thereof as owner. In addition to these acts, which cannot be reconciled consistently with her present theory, her daughter Susie Stevenson and James Rankin, Mrs. Wasserman, Joseph R. Lawrence, James W. King, William Winter, Mr. Shulze, Mrs. Shane, Mrs. Coulter, and several

other witnesses, all testified fully and clearly to the declarations of the said defendant admitting in the most explicit manner that the plaintiff was the owner, and on none of those occasions setting up or claiming title in herself. And these declarations were continued till after the plaintiff's return from Australia, when she introduced him to some of the tenants as their future landlord. Under such circumstances the statute of limitations never commenced to run, for the reason that the defendant's possession was not adverse in its inception, and it never became so.

Having reached these conclusions, it is unnecessary to notice the other points argued. It follows that the decree of the court below must be affirmed.

(The other judges concurring.)

(*9 Colo. 306*)

TERPENING v. HOLTON.

(*Supreme Court of Colorado. October 19, 1886.*)

1. REFERENCE—AUTHORITY OF COURT TO REFER—CONSENT—WAIVER OF OBJECTION.

In an action in which the circumstances authorizing a compulsory reference under the Colorado Code of Civil Procedure do not exist, where the order fails to show that the reference was of consent, and it appears from the transcript that the appellant did not object to the validity of the order or the jurisdiction of the referee, either before the referee, or in court before the entry of judgment upon his report, and that he appeared before the referee, and proceeded to the trial of the matters submitted, the appellant's conduct will operate as a waiver of his right to object, and the reference will be upheld on appeal.

2. SAME—ENTRY OF JUDGMENT—AUTHORITY OF CLERK—NOTICE.

Where a reference covers the whole issue before the court, the clerk may enter judgment upon his report without any order of the court; and previous to the Colorado act of April 10, 1885, no notice was required before doing so.

3. EVIDENCE—CONTENTS OF LOST DEED—PROOF OF LOSS.

Evidence of the contents of a deed is not admissible until the fact of its loss has been established.

4. SAME—SALE OF MINING CLAIM—WRITTEN INSTRUMENT—PAROL SALE.

Where the proof already offered has revealed that the sale of a mining claim relied upon was evidenced by a written instrument, the party relying upon the sale must produce the writing, or account for its absence, and evidence of a parol sale is not admissible.

5. CONSTITUTIONAL LAW—JUDICIAL POWER—REFEREE'S REPORT—ENTRY OF JUDGMENT BY CLERK—CODE CIVIL PROG. COLO. § 192.

That part of section 192 of the Colorado Code of Civil Procedure authorizing the clerk to enter judgment upon a referee's report is not, as an attempt to make the finding of the referee the finding of the court without its submission to the court, a violation of article 6, § 1, of the Colorado constitution, relative to the judicial power.

Appeal from district court, Ouray county.

The relief sought by the complaint was to quiet title to a mining claim. The defendant, Holton, was alleged to be one of the original discoverers, and to have been possessed of an undivided one-half interest therein. The plaintiff, who is appellant here, alleges a sale and conveyance by Holton of his interest to one Morgan, and a conveyance by Morgan to the plaintiff. The complaint further states that the deed from Holton to Morgan was transmitted for record, and lost *in transitu*. Holton's answer denies the sale, the execution, and existence of the deed, and the fact of its loss. The cause was referred to a referee for trial of the issues, and the testimony was closed without proof of the loss of the deed. The remaining facts are stated in the opinion.

Caldwell & Yeaman, for appellant, Terpening. *Chas. H. Toll*, for appellee, Holton.

BECK, C. J. The first error assigned, and the first proposition discussed, by counsel for appellant, is that the court erred in referring this cause to a referee. Counsel assumes that the reference was made by the court on its

own motion, and that it was made in violation of the statute, since the circumstances which authorized a compulsory reference under the Code of Civil Procedure did not exist. No long account was to be examined on either side; the taking of an account was not necessary for the information of the court; no question of fact arose, otherwise than upon the pleadings; and the action was not of the character denominated a special proceeding. Code, § 186. Whether the order, therefore, be construed as directing the referee to try the issues and report a judgment, or to report a finding of facts which would have the effect of a special verdict, viewed as a compulsory order, it was issued without lawful authority for either purpose; and in such case a valid judgment could not be rendered or entered upon the report. *Bonner v. McPhail*, 31 Barb. 106, 116; *Scudder v. Snow*, 29 How. Pr. 95.

But in support of the judgment it is argued, as a legal inference arising upon the record, that the order of reference was not compulsory, but it was made upon consent of the parties litigant. In support of this proposition we are referred to the fact, appearing of record, that both parties appeared before the referee, and submitted their testimony on the issues presented by the pleadings without raising any objection as to the regularity of the appointment of the referee, or the validity of the order of reference. As a question of practice, the order should state whether it was made on the agreement of the parties upon the application of one party, or on the motion of the court; but a failure to preserve in the record proper, as is the case here, the circumstances and manner under which the order was made, while amounting to an irregularity, does not, according to the current of authority, afford grounds of reversal on appeal, where both parties, without objection or exception in this behalf, appear before the referee, and submit to a trial upon the merits. It is true that the power of referring causes to a referee for trial is a statutory power, and, in order to invest the referee with jurisdiction, must be exercised in the manner provided by the statute. When so exercised, the referee is vested with jurisdiction to act for both judge and jury in the trial of legal actions, and to act for and in place of the court in the trial of equitable actions. If the court assume, of its own motion, to refer for trial to a referee a cause requiring the consent of the parties, no obligation is thereby imposed upon either party to observe the order, or to attend before the referee, and the rights of a party who declines to attend are not prejudiced. In such a case the jurisdiction of the referee must affirmatively appear.

The principle involved is analogous to acquiring jurisdiction of a party by service of process. But in such a case, if the record be silent as to consent, the subsequent conduct of the parties may supply evidence tending to show that they in fact consented to the reference. As appearing to the action without objection when not served with process will waive the right to raise that objection afterwards, so appearing before a referee, and tacitly consenting to his jurisdiction over the subject-matter and of the parties, will waive the right to question his jurisdiction after judgment, on the ground above mentioned. *Wells, Jur.* 51, 74. See, also, as to irregular references, *Bucklin v. Chapin*, 35 How. Pr. 155.

In the present case there is nothing in the record before us showing whether the consent of the parties was obtained before the reference was ordered or not. The order of reference is silent upon the point, and the transcript does not purport to give all the record entries, nor does it purport to contain copies of all papers filed in the case, but those only which are mentioned in appellant's *præcipe*. Upon this record we cannot say that the court, of its own motion, referred the issues to a referee for trial, and that it did not act upon the consent of the litigants in making the order. For anything appearing in the record, or stated in the clerk's certificate attached thereto, the reference may have been ordered, in the language of section 185, "upon the agreement of the parties filed with the clerk."

The following conduct and acts of the appellant tend strongly to indicate that he consented to the order of reference: He appeared before the referee in person and by attorney, without objection, and submitted the proofs of his claim for relief. He excepted to the rulings of the referee which were unfavorable to him, including his report and his findings of fact and conclusions of law. After the report was filed in the district court appellant filed specific exceptions thereto, and he afterwards filed a motion to set aside the report, setting out in detail the reasons why it should be set aside. This motion, and the exceptions mentioned, were overruled by the court, when the appellant filed a motion to vacate the judgment, assigning several grounds of error; but in all the exceptions reserved to the rulings and findings of the referee, and in all the grounds assigned in support of the application to set aside the referee's report, and to vacate the judgment, not a single objection was raised to the validity of the order of reference, or to the jurisdiction of the referee. It is well settled that a party may waive a constitutional or statutory right existing in his favor; and we must hold that the conduct of the appellant in this case, and his failure to question the jurisdiction of the referee in the court below, must operate as a waiver of such questions on appeal from the judgment. The presumptions of law are in favor of the regularity of the proceedings of the district court.

The second proposition laid down and discussed by counsel for appellant is: "The referee should have made his report to the court, in obedience to the order, and the court should have affirmed it, and ordered judgment to be entered, the clerk having no authority to enter judgment on the referee's report, for the reason that the referee was not authorized to enter judgment by order of reference, but simply to report to the court." If this proposition be correct, then the second and third grounds of error are well assigned, viz.: *Second*, the court below erred in overruling the plaintiff's motion to set aside the report of the referee; *third*, the court below erred in overruling plaintiff's motion to vacate the judgment, and for a new trial.

The mode of procedure indicated in the second proposition would be a good rule of practice in all cases where the rulings and decisions of a referee are objected to, and exceptions to the report and findings filed, as contemplated by section 190. The rule would include the case at bar, since the rulings and decisions of the referee were objected to on the hearing, and no opportunity was afforded, as the statute then stood, to file exceptions to the report and findings prior to the entry of judgment. But it does not necessarily follow that a different mode of procedure would invalidate the judgment. In the absence of statutory provisions or rules of court to the contrary, the current of authority is to the effect that, under similar Code provisions, a confirmation of the report is not requisite to the authority of the clerk to enter up judgment.

Section 272 of the New York Code, as amended in 1857, provided that "the trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the court. * * * They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed, in like manner, but not otherwise, and they may, in like manner, settle a case or exceptions. The report of the referees upon the whole issue shall stand as a decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report facts, the report shall have the effect of a special verdict." Under this section the New York courts held, prior to an amendment of the act in 1870, that the report of the referee was to be filed like a decision of a judge, and that it was the duty of the clerk to enter up judgment thereon at once; that, as a rule, the report did not require confirmation, except where it was intended to be the foundation of a future discretionary act of the court. It was also held to be no ground for vacating

a judgment that it was entered without leave of the court, and without notice. *Heinemann v. Waterbury*, 5 Bosw. 686; *Griffing v. Slate*, 5 How. Pr. 205; *Bouton v. Bouton*, 42 How. Pr. 11; *Currie v. Cowles*, 7 Rob. (N.Y.) 3.

In California, under a similar code provision, it was held that a report of a referee upon the whole issue stands as the decision of the court, and that upon filing the record the clerk enters judgment thereon as of course. *Sloan v. Smith*, 3 Cal. 406; *Peabody v. Phelps*, 9 Cal. 224.

Was the referee authorized to render judgment by the order of reference? It may be conceded that the order of reference was informal, but we think it must be construed as referring to the referee, for trial, all the issues in the action, whether of fact or of law, as contemplated by the first subdivision of section 187, being now section 185. It was so construed by the referee, by the parties, and by the court below. The referee tried the issues raised by the pleadings, determined the rights of the parties, and then, in conformity with the order of reference and with the statutes, reported to the court his findings of fact and conclusions of law; also the testimony taken, and objections thereto. No objections were raised or exceptions reserved, in the court below, to the validity of the reference, or to the jurisdiction of the referee to try the issues; and the order of reference being, in our judgment, broad enough to cover the action taken under it, the authority of the referee must be sustained. It follows, therefore, that the objection to the clerk's authority to enter up the judgment on the report filed is groundless.

Respecting the complaint that the judgment was entered immediately upon the filing of the report, and without previous notice to the appellant, it is to be observed that, as the law then stood,¹ notice was not required. The entry of judgment, however, did not deprive appellant of any substantial objections which he may have reserved to the proceedings. Objections could have been and were presented on a motion to vacate the judgment and for new trial. This is the doctrine of the authorities to which we have referred.

As regards the several objections raised in behalf of the appellant in the court below, we have examined them, and find none of them to be of a substantial character.

In respect to the exclusion of parol proof of the contents of the deed alleged to have been executed by defendant, Holton, to Morgan, the appellant's grantor, the ruling is sustained by well-settled principles of law. One of the modes of acquiring title to mining claims is by deed from the owner, which is the mode stated in the complaint whereby the appellant acquired the title in controversy. It is further stated therein that Morgan acquired his title by deed from Holton, who was one of the original locators, and that this deed was lost while being transmitted for record. The answer denies the sale to Morgan, and that such a deed as that alleged to have been lost was executed, or ever existed. Appellant having introduced witnesses who testified that such deed was executed and delivered, evidence of its contents was not admissible until the fact of its loss had been first established. *Brunsv. Clase*, 11 Pac. Rep. 79.

Appellant also offered to prove a parol sale of the claim by Holton to Morgan, and his counsel now cites us to the doctrine laid down in *Patterson v. Keystone M. Co.*, 30 Cal. 360, holding that, where a written conveyance of a mining claim is pleaded, a verbal conveyance may be proven. This case, however, proves too much, since it holds that, if the sale be in writing, it must be proven by producing the writing, or by proof of its contents, after first establishing the fact of its loss.

As to the motion made by the appellant, on the next day after the closing of the testimony, for leave to amend the pleadings to conform to the proof, we

¹ Previous to the act of April 10, 1885.

perceive no abuse of discretion in the denial thereof. This motion, which was in writing, did not state what amendments appellant desired to make in the pleadings. If he proposed to strike out the averment of the written sale, and to substitute therefor an averment of a parol sale, the amendment would have availed him nothing under the authority cited. Appellant had already proven by witnesses that the sale relied upon was evidenced by a written instrument, and the rule which requires the production of the best evidence would have required him to produce the writing, or to account for its absence. He failed to do either on the trial. Leaving out of view, therefore, the testimony of the appellee, which was to the effect that no sale, either written or parol, was ever made to Morgan, the character of the appellant's testimony would not have entitled him to recover by a mere amendment to the pleadings.

Appellant's third proposition is: "If section 192 of the Code¹ attempts to make the finding of the referee the finding of the court, without its submission to the court, and authorizes the clerk to enter judgment on such finding without its being first submitted to the court, such part of the section is unconstitutional."

The constitutional provision supposed to be violated is section 1 of article 6: "The judicial power of the state, as to matters of law and equity, except in this constitution otherwise provided, shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts as may be created by law for cities and incorporated towns."

This is a usual provision of state constitutions, and has not been held to interfere with statutory regulations prescribing the mode, manner, and time for the performance of judicial acts, and the entry of judgments. When a statute authorizes proceedings to be prosecuted to final judgment upon consent of parties in a mode which, but for such consent, would be liable to constitutional objections,—as the trial of the issues before a referee,—the consent of the parties operates as a waiver of objections. The same principle was invoked, before the adoption of the Code, to sustain summary proceedings. Thus, in a judgment by confession, the entire proceedings, from the filing of the complaint to the entry of judgment, might occur in vacation, if the statute so provided. So of the proceeding by arbitration, wherein the parties litigant consent to submit their differences to certain persons not in judicial authority, whose adjudication shall be filed in court, and judgment entered thereon. Analogous in principle to the foregoing examples is that of judgment by default. In this instance no express consent is given. The court acquires jurisdiction of the subject-matter, and of the person of the defendant, by the filing of the declaration or complaint, and by the service of its process. Ample time and opportunity being afforded the defendant to appear and interpose a defense to the action, his neglect to do so was construed as a waiver of his rights, and as an implied consent to the entry of judgment.

The decisions of this court, to which we are referred by counsel, holding that valid judgments could not be entered in vacation, are based upon the

¹Section 192 of the Colorado Code of Civil Procedure 1877 is in these terms: "The referees shall report their findings, together with all the evidence and objections thereto, in writing, to the court, within ten days (or within such further time as may be allowed by the court) after the testimony shall have been closed and the facts found, and the conclusions of law shall be separately stated therein. The finding of the referees upon the whole issue shall stand as the finding of the court, unless excepted to by either party, and received [reviewed] by the court, and, upon filing the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. The finding of the referees may be excepted to and reviewed by the court, on the filing of exceptions to the report and findings by either party. When the reference is to report the facts, the finding reported shall have the effect of a special verdict."

absence of statutory authority; all having occurred prior to the adoption of the Civil Code. The doctrine of these cases is that consent alone, in the absence of statutory authority, will not confer jurisdiction. Thus, in *Filley v. Cody*, 4 Colo. 110, wherein the parties had stipulated that the motion for a new trial should be heard and determined in vacation, and, if denied, judgment should be rendered as of the trial term, the court held, on principle and on the authority of *Cooper v. American Ins. Co.*, 3 Colo. 318, that, in the absence of statutory authority, a judgment rendered in vacation was void. In *Kirtley v. Marshall Silver Min. Co.*, 4 Colo. 111, a demurrer to the bill was, by stipulation of the parties, heard and decided in vacation; and, the demur-
rer being sustained, a decree was entered up dismissing the bill. The court say: "This was error. In vacation, under the old system of practice, the judge had no authority to render the decree. The court alone had power to hear and determine the issue raised by the demur-
rer. To hold that the decree is valid would be to assert that parties may confer jurisdiction by consent, which cannot be admitted." Other cases are to the same effect.

But the present case arises under a different system of practice,—a system which provides statutory authority for the acts performed. And, in addition to such authority, the proceedings here were sanctioned by the consent of the parties. It is a feature of the Code system that much judicial work may be performed in vacation; and, if we were compelled to rule in this case in the manner insisted upon by appellant's counsel, it would seriously embarrass the courts in their practice under this system. The Code authorizes the entry of judgments, in certain cases, without the actual presence of either the court or judge. It is true, as shown by Chief Justice DIXON in *Wells v. Morton*, 10 Wis. 423, that this has always been done; but it was done covertly, and cloaked over by a fiction whereby it appeared as if it had been done at the preceding term.

The opinion of this court in *Phelan v. Ganebin*, 5 Colo. 14, contrasted with the prior decisions referred to, illustrates the effect of statutory regulations upon the course of judicial proceedings. Section 150 of the Code, as originally enacted, authorized judgments to be entered up by the clerk in vacation, in the cases therein specified, on failure of the defendants to appear and demur or answer. The opinion adverts to the fact that the courts of many of the states have acted under similar statutory provisions for many years, and that the validity of the judgments so entered have been upheld by the decisions of the highest courts of the code states. The learned justice further says that the theory upon which judgments in such cases are founded, is that the judgment is the sentence which the law pronounces as the sequence of statutory conditions; that the statute directs the judgment; and that the clerk acts as the agent of the statute in entering it upon the records of the court.

In the present case the issues were referred to a referee for trial, by consent. He was ordered to report his findings and conclusions in vacation. The statute required the clerk to enter judgment thereon, upon the filing of the report. This, however, did not operate to deprive appellant of his right to have all the proceedings fully reviewed by the court. *Hattenback v. Hoskins*, 12 Iowa, 109; *Roberts v. Cass*, 27 Iowa, 225.

These views do not conflict with those announced in *Haverly I. M. Co. v. Houcutt*, 6 Colo. 574, wherein it was held that a judge of a court cannot, even by consent of parties, vacate his seat upon the bench, and authorize a member of the bar to administer the judicial office in the trial of a cause. In one case the testimony is reported to the court, together with the rulings of the referee and exceptions thereto, while the court, retaining its jurisdiction over the cause, may reverse such rulings and findings, and render a wholly different judgment from that reported by the referee; but in the other case the powers of the court itself would be usurped by a citizen who has not been chosen to the judicial office in the manner provided by the constitution, and

who may not possess the constitutional qualifications therefor. In one case the court maintains its constitutional organization, and its jurisdiction over the cause as well, while in the other the proceeding would be outside of any legally constituted authority.

Being of opinion that no substantial errors have intervened, the judgment will be affirmed.

(9 Colo. 348)

KASSON v. FOLLETT.

(*Supreme Court of Colorado. November 12, 1886.*)

APPEAL—PROCEEDINGS ABOVE—DISMISSAL—TIME OF FILING TRANSCRIPT.

An appeal to a district court is rightly dismissed for failure of the appellant to cause a transcript of the proceedings below to be filed in the district court within the time required by a rule of the said court, notwithstanding that the statute authorizing the appeal prescribes no time within which the transcript shall be transmitted to the appellate court.

Error to district court, Chaffee county.

McDonald & Norris, for plaintiff in error, Kasson. *J. B. Bissell*, for defendant in error, Follett.

BECK, C. J. This action was originally instituted in the county court of Chaffee county, by Follett, the defendant in error, who obtained judgment therein against Kasson, the plaintiff in error. The latter prayed an appeal to the district court, and perfected the same by the filing of an appeal-bond. The appeal was afterwards dismissed for failure of Kasson to cause a transcript of the proceedings below to be filed in the district court within 20 days after the perfection of his appeal, as was required by rule 12 of said court. This action of the district court is assigned for error, and, in support of the assignment, we are referred to the case of *Swenson v. Girard F. & M. Ins. Co.*, 4 Colo. 475, wherein the court say that the making of a transcript of the record, and transmitting it, with the necessary papers, to the appellate court, is a ministerial duty to be performed by the proper officers of the court appealed from, and that any delay or default in the discharge of such duty ought not to work injury to an appellant who has filed the requisite appeal-bond.

The statute referred to, which authorized an appeal from the county to the district courts, prescribed no time within which a transcript of the record should be transmitted to the appellate court. In order, therefore, that parties interested in cases legally pending in a district court might not be hindered in the determination of their rights, by appeals taken merely for delay, it was entirely proper for the district judge to require, by a standing rule of court, parties appealing from judgments to the county court to lodge the papers and record on appeal in the appellate court within a reasonable time after the perfection of their appeals. Upon this point we said, in *Cates v. Mack*, 6 Colo. 405: "This duty devolves upon the officers of the inferior court; but, if they neglect it, the appellant should take steps to have the papers sent up, either by applying to the appellate court for a rule to that effect, as suggested in *Little v. Smith*, 4 Scam. 402, or otherwise, as may be prescribed by the appellate court."

We think 20 days was a reasonable time, in the present case, to procure and file in the district court the transcript of the proceedings had below; and, in absence of a showing by the appellant that he made any effort to comply with the rule of the district court, the judgment must be affirmed.

(9 Colo. 201)

FARRAND v. BESHOAR.

(Supreme Court of Colorado. October 19, 1886.)

1. STATUTE OF FRAUDS—CONSTRUCTIVE TRUST—CONVEYANCE TO WIFE.

Defendant's husband, while indebted to plaintiff, conveyed to her and her minor son, in equal shares, certain real estate, by an absolute deed, as part of an agreement for a permanent separation. Afterwards the defendant and her son executed their joint promissory note in favor of plaintiff; the consideration being partly the indebtedness of the husband and partly an advance by plaintiff to the son. There was no reference to the husband's debts in the deed, and no reference to any trust for plaintiff in writing. No fraud was alleged with reference to the conveyance. An answer of the defendant in another cause was put in evidence, but it was not signed by her, nor by any agent authorized by her in writing to sign her name to it. Held, plaintiff's claim, as a creditor of the husband, to a trust in the real estate conveyed to defendant failed by reason of the statute of frauds. Gen. St. Colo. § 1515.

2. HUSBAND AND WIFE—WIFE'S RIGHTS IN COLORADO BEFORE 1872—PROMISSORY NOTE.

A *feme covert* living apart from her husband, who has executed a promissory note for her husband's debts prior to the territorial acts of 1872 and 1874 of Colorado, on the subject of married women, cannot be sued upon the note, as the note was not a binding contract at that time.¹

3. SAME—SEPARATE ESTATE—IMPLIED CHARGE—EQUITABLE DOCTRINE.

Where a married woman having a separate estate executes a promissory note of which others are to receive the benefit, she herself being a surety in effect, she will not be held in equity to have created a charge upon her separate estate, unless the contract itself includes an express provision to that effect.²

Error to district court, Las Animas county.

Action to declare a trust in the real estate of plaintiff in error.

In the year 1871 plaintiff in error was a married woman, living with her husband, Charles M. Farrand. Owing to domestic trouble, they concluded to and did separate. On or about June 21 of that year, in connection with such permanent separation, and as a part of the agreement therefor, Charles M. Farrand conveyed to plaintiff in error, and to C. H. Farrand, their minor son, in equal undivided parts, by absolute deed, certain real estate in Trinidad, of the value of \$5,000. At that time the said Charles M. Farrand was indebted to a number of persons, including defendant in error. On September 13 of the said year, (1871,) plaintiff in error and the said C. H. Farrand executed to defendant in error their promissory note for \$493.95, payable three months after date; \$393.95 of the amount representing the said indebtedness of Charles M. Farrand to defendant in error, the remaining \$100 being a loan of cash to the said minor son, C. H. Farrand.

In 1877, the said note being unpaid, in whole or in part, defendant in error brought suit thereon against plaintiff in error. In his complaint he alleged the infancy of the said C. H. Farrand, the coverture of the plaintiff in error at the time the note was made, and the other facts above narrated; also that plaintiff in error had succeeded, by deed of conveyance, to the moiety of the estate mentioned, held by the said C. H. Farrand. The complaint further alleged that the said conveyance by Charles M. Farrand was made subject to the agreement upon the part of plaintiff in error and C. H. Farrand to assume and pay the debts of the said Charles M. Farrand, including that of defendant in error; also that the note aforesaid, save as to the \$100 loaned as aforesaid, was executed in pursuance of an accounting and determination of the aggregate amount due from the said Charles M. Farrand to defendant in error, and likewise in pursuance of the trust agreement above mentioned. A final decree was entered on the twenty-second of March, 1880, recognizing a

¹ As to the validity of contracts of married women, and especially those binding their separate estates for the payment of their husband's debts, see *Sellmeyer v. Welch*, (Ark.) 1 S. W. Rep. 777, and note.

² See *Condon v. Barr*, (N. J.) 6 Atl. Rep. 614.

trust in the property in favor of defendant in error. To reverse that decree this writ of error was sued out.

Section 1515 of the General Statutes, referred to in the opinion, reads as follows: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing."

Yeaman & John and *Benedict & Phelps*, for plaintiff in error. *Wells, Smith & Macon*, for defendant in error.

HELM, J. All the facts connected with this suit existed during the year 1871. Hence we are obliged to consider the questions presented with reference to the *status* and rights of plaintiff in error, as a *feme covert*, previous to the territorial acts of 1872 and 1874 on the subject of married women. The suit was commenced early in the year 1877, and before the present Code of Procedure became a law. We are therefore also to consider this case under the practice as it existed prior to the adoption of that instrument. The record discloses a consideration for the note offered in evidence. Regarding it, so far as the obligation of defendant's husband is represented therein, as simply a promise to pay the antecedent debt of another, we find sufficient consideration to support the promise. There was the new loan of \$100 to her son, and the extension of three months on her husband's indebtedness. We do not think that, under the circumstances disclosed in this case, had the law then been as it now is, she could escape a personal judgment for the amount of the note. But being a married woman at the time she executed the promise, although living separate and apart from her husband, the note itself was not a binding contract at law. The statute then enacted with reference to married women left the common law unchanged in this respect. Against her objection, a legal action could not be maintained upon the note, personal judgment could not be obtained against her, and no execution could issue to be levied upon her property generally.

The decree cannot be sustained upon the ground that Beshoar, as a creditor of defendant's husband, was the beneficiary of a trust in the realty described therein. The property, upon the separation from her husband, was conveyed to her by an absolute deed. No agreement to pay the husband's debts is referred to in this deed, nor is there any pretense that the conditions of the trust were in any other manner reduced to writing. *Adams v. Adams*, 79 Ill. 517; *Learned v. Tritch*, 6 Colo. 433.

No actual fraud in connection with the conveyance is alleged or proven.

The answer filed in another cause, which was received in evidence against defendant, cannot be said to avoid the foregoing objection taken under the statute of frauds. Section 1515, Gen. St. This answer was not signed by defendant, nor was her name attached thereto by another as agent; and had defendant's name been signed to the instrument by her attorney, there is nothing to show that any such authority in the premises, as the statute requires, existed in writing. The trust theory must therefore be abandoned.

But plaintiff's counsel invoke the equitable doctrine that where a married woman, having a separate estate, contracts a debt on her own account, she will be held in equity to have created a charge upon such estate, even though the intention to do so is not expressly stated in the contract. 1 Bish. Mar. Wom. §§ 862, 863, and cases cited; 3 Pom. Eq. Jur. §§ 1124, 1126, and cases cited. It will be noted, however, that this accepted doctrine limits the liability of her separate estate to cases where the debt is contracted for her own benefit, or for the benefit of the estate itself, and, while there is considerable

conflict in the decisions on the subject, we are of opinion that the decided weight of authority is in favor of the proposition that, if she is merely a surety, other persons, as in this case, receiving the entire benefit of the transaction, the liability of her separate estate does not attach unless the contract itself includes an express provision on the subject. 3 Pom. Eq. Jur. § 1126, *supra*, and cases cited.

Applying these principles to the case at bar, we find that the averments of the complaint do not state the cause of action to which counsel appeal, nor does the evidence relied on support any such cause of action. The promissory note upon which plaintiff sues contains no reference whatever to defendant's separate estate, nor does it embody any expression which could possibly be construed as evincing an intention to charge her estate. The whole theory of the case, as shown by the complaint, the trial, and the findings and decree of the court, was that a trust existed in the estate in plaintiff's favor.

The decree will be reversed, and the cause remanded, with directions that the district court dismiss the complaint.

(9 Colo. 349)

KENDALL and others v. SAN JUAN SILVER MIN. CO.

(*Supreme Court of Colorado*. November 12, 1886.)

1. TRIAL—BY COURT—STIPULATION—JUDICIAL NOTICE.

Where pleadings are contradictory, and the issues are narrowed by a stipulation to issues of facts of which the court can take judicial notice, it is proper for the court to decide the case upon a motion for judgment upon the pleadings and stipulation, and it is unnecessary to assign the case for trial. The facts left in issue, being facts of which the court could take judicial notice, are deemed part of the pleadings, and not matter for evidence.

2. MINES AND MINING CLAIMS—INDIAN RESERVATION—TORTIOUS LOCATION.

A mining location made tortiously upon an Indian reservation before the Indian title is extinguished, will not avail against a location made after the land is opened for settlement.

Appeal from district court, San Juan county.

Action of ejectment. Judgment for defendant. Plaintiffs appeal.

It appears from the record that about the month of October, 1880, the appellee made its application in the United States land-office in Lake City, Colorado, for patent to the Titusville lode claim, situated in San Juan county, and that the appellants, on the twenty-third of October, 1880, filed in said office their adverse claim, alleging that a certain portion of the premises sought to be patented by the appellee was covered by the Bear lode claim, a prior location owned by the appellants. The present action was afterwards instituted by the appellants in the district court of San Juan county in support of their adverse claim.

The complaint avers the location of the Bear lode by the appellants on the third day of September, 1872, by the sinking of a discovery shaft, the discovery of mineral, and the due performance of all the various acts necessary to perfect a mining location under the congressional and statutory laws and the local rules and customs; also that the claim was then open to entry as mineral land, and was unoccupied and unclaimed by any person. The performance of annual labor, and all other acts necessary to preserve said Bear lode from forfeiture, are likewise averred. The complaint states, further, that the Bear lode claim, as originally located, extended 1,500 feet in length, and 100 feet in width, on each side of the center of the vein, and so remained until the fourteenth day of October, 1876, when the owners filed an additional certificate of locations in the office of the recorder of San Juan county, claiming 150 feet on each side of the center of the vein. It alleges that the Titusville lode is a junior location, and includes within its boundaries a portion of the territory embraced in the Bear location. From the description given in the pleadings of the portions of said claims which are in conflict, it appears

that the Titusville location includes 1,200 feet in length of the Bear surface ground, and in width covers more than the south half of said surface ground for said entire 1,200 feet. The plaintiffs further allege that they have expended the sum of \$150 in the preparation and filing of their adverse claim, and they pray judgment for the possession of the premises, for the recovery of said sum of \$150, and for costs of suit.

The appellee's answer denies all the material allegations of the complaint, and denies that the ground in controversy comprised a part of the unappropriated public domain of the United States, and that it was open to location on the third day of September, 1872. It alleges that at that date it comprised a portion of a certain tract of land, which, by treaty between the United States and certain confederated bands of Ute Indians, in Colorado, duly approved, and afterwards, on November 6, 1868, duly proclaimed by the president of the United States, had been set apart to the use and occupation of said Indians, and that the Indian title to said tract of land was not extinguished until March, 1874. The answer further alleges that, if plaintiffs were entitled to make a location on said tract of land at the date mentioned, they were not entitled to a location exceeding 50 feet in width. And, for further answer and cross-complaint, the appellee alleges the location of the Titusville lode claim on the twenty-ninth day of August, 1874, together with the existence of all conditions and the performance of all acts necessary to constitute a valid location of the vein and territory described in the location certificate, including the premises in controversy, and prays judgment for the possession thereof, and for costs.

To this pleading of the appellee the appellants filed a replication, traversing all its material allegations, and denying, among other things, that, at the date of the appellants' location, the ground in controversy comprised a portion of the Ute Indian reservation, and that at the date of the appellee's location the ground in dispute was part and parcel of the unappropriated public domain.

Subsequently, a stipulation, signed by the attorneys of the contesting parties, was filed in the cause, conceding the truth of the allegations of the respective pleadings, and that both parties had complied with all the requirements of the law in respect to the location and development of their said claims, as set forth in their pleadings, save only the allegations that, at the time of their respective locations, the ground in controversy was a part of the unappropriated public domain open to location: and excepting, further, the right of the appellants, if entitled to locate a claim at all on said tract of land on the third day of September, 1872, to locate a claim of a greater width than 50 feet.

The next step in the cause was the filing of a motion, by the appellee, for judgment upon the pleadings, the stipulation of facts, and a disclaimer of the appellee filed upon the hearing of said motion. In the latter document the defendant disclaimed all right or title to that portion of the premises in controversy which comprised the center 50 feet, or 25 feet on either side of the center line, of the Bear lode location. Upon the hearing of this motion it was sustained by the court, and the action of the appellants dismissed. Judgment was also entered in favor of the appellee for the premises then remaining in controversy between the parties, and for the costs of suit; to all of which rulings the appellants duly excepted.

C. H. Toll and Henry Ford, for appellants, Kendall and others. *M. B. Carpenter and Hudson & Slaymaker*, for appellee, San Juan Silver Min. Co.

BECK, C. J. The appellants assigned for error the allowance of the motion for judgment on the pleadings, stipulation of facts, and disclaimer; also that the court erred in rendering judgment in favor of the appellee. The grounds of error alleged are that the stipulation of facts and the disclaimer were not

instruments in the nature of pleadings, but matters only cognizable as evidence; hence that they could not be properly considered upon a motion, but only on a trial of the issues joined.

We are of the opinion that this proposition is unsound. One of the most important objects of the present system of pleading is to compel the parties to make their issues cover the real facts in dispute, so that neither party shall be subjected to the trouble and expense of proving what is not in fact disputed. It requires that the real matter in controversy shall be brought clearly before the court, and that the precise points, both of fact and of law, involved, shall be disclosed before the trial is entered upon. Another advantage claimed is that it may be known, from an inspection of the respective statements of the parties, whether, if duly proven, they warrant any relief upon the complaint or cross-complaint, and whether there be a legal defense to the action. It is true, by the original pleadings in this case, the objects sought to be attained by the Code provisions were defeated; for the pleadings of each party denied every allegation of the other, regardless of truth, with one or two immaterial exceptions. But the filing of the stipulation of facts operated as a waiver of the numerous traverses, and narrowed the issues to three questions of law and fact. These questions were: *First*. Was the territory in dispute open to location as mineral land, under the laws of the United States, on the third day of September, 1872? *Second*. If it was open to location at that date, were the plaintiffs then entitled, under the law, to locate a claim exceeding 50 feet in width? *Third*. Were the premises, on the twenty-ninth day of August, 1874, when the defendant's location was made, a part of the unappropriated public domain, open to location as mineral land?

The position assumed by appellants' counsel is that the issues were not modified by the filing of these papers, but remained for trial as originally framed; that the courts could not take judicial notice of instruments or papers of this character, waiving legal rights, although executed by the parties themselves, and duly filed in the cause, but that the issues thus attempted to be waived should have been disposed of on trial of the cause, by producing the said stipulations in evidence. The fallacy of these propositions is apparent. The filing of the stipulation and disclaimer wholly withdrew the matters therein mentioned, as being conceded or waived, from the consideration of the trial court. These matters were no longer in the case. Thereafter all the allegations concerning the location of the Bear and Titusville lode claims, the dates of locations, the expenditures made, the work done, and the various acts performed in compliance with the mining laws, and with the local rules and regulations, stood untraversed. There remained no issues for trial requiring the production of evidence; and it would have been an idle ceremony to have impaneled a jury to witness the disposition of the case by the presiding judge upon considerations of law and fact whereof he was bound to take judicial notice.

It is true the complaint alleged that at the date of the location of the Bear lode, September 3, 1872, the premises in controversy were unoccupied and unclaimed mineral lands of the public domain; that the answer alleged that the premises, at that time, comprised a part of a certain tract of land set apart as a reservation for the confederated bands of the Ute Indian Nation by virtue of a treaty made and concluded between the United States and said Indian tribes, duly accepted and ratified and confirmed by a proclamation of the president of the United States issued on the sixth day of November, 1868; that the Indian title to said reservation, including the premises in controversy, was not extinguished until the month of March, 1874; and that on the twenty-ninth day of August, 1874, the date of the appellee's location of the premises in controversy as part of the Titusville lode claim, the same was then a part of the unoccupied and unappropriated mineral domain of the United States; also that the replication denied these averments of the answer.

It is likewise true that the issuable facts just mentioned were not in any manner affected by the making and filing of the stipulations. But all the facts involved in these issues were of that character, the existence of which courts are bound to take judicial cognizance. The ultimate rights of the parties, therefore, depended upon judicial conclusions to be drawn from a consideration of all truthful allegations of fact, whether traversed or untraversed, in connection with the implied propositions of law necessarily arising out of these several propositions of fact.

For example, although the plaintiffs, in the location of the Bear lode, performed every act necessary to constitute a valid location of a mining claim, yet, if the territory upon which these acts were performed did not comprise a portion of the unappropriated public domain open to location as mineral land, the work done and expenditures made secured no rights to the locators thereof. The question of right depended upon the truth of the allegations concerning the existence, date, boundaries, and terms of the original treaty with the Indians, and the truth of the allegations concerning the alleged relinquishment of the Indian title to that portion thereof which included the premises in controversy, considered with reference to the law arising upon such facts. As before stated, these were matters concerning which the courts take judicial notice. The treaties mentioned were incorporated, with the laws enacted by congress, in the Statutes at Large of the United States. See St. at Large U. S. 1868, tit. "Treaties," p. 119; also 18 St. at Large, pt. 3, p. 36. The accepted doctrine is that the constitution and laws of the United States, and all treaties made under the authority of the United States, constitute the supreme laws of the land; and the judges in every state are bound thereby, and will take judicial notice of their provisions. Article 6, § 2, Const. U. S.; 1 Greenl. Ev. §§ 5, 490; Bliss, Code Pl. § 185. Courts also take judicial cognizance of the civil divisions within a state; of counties, townships, and towns; and of the existence and general location of places referred to in the pleadings, and, if within the jurisdiction of the court, the county to which they belong. Bliss, Code Pl. §§ 186-189. Exercising such cognizance, the court had judicial knowledge that the contested facts were as alleged in the defendant's answer; that is to say, at the time of the plaintiffs' location of the Bear lode claim the ground claimed was within the Indian reservation, but that the Indian title thereto had been extinguished prior to the location of the Titusville lode by the defendant. All propositions of fact bearing upon the case were therefore legitimately before the court on the motion for judgment, and it only remained for the court to construe the propositions of law arising thereon in order to pronounce judgment. The real issues, then, or questions to be decided, being purely legal, it was unnecessary to assign the case for trial, and they were properly decided on the defendant's motion for judgment.

Was the plaintiff entitled to judgment for any portion of the premises in controversy? It is clear that, unless a valid location of a mining claim can be made upon territory while it constitutes part of a reservation set apart by treaty for the exclusive use of an Indian nation, the plaintiff acquired no rights whatever by his location of September 3, 1872; and this is the only location asserted by him.

By the treaty proclaimed November 6, 1868, the United States solemnly agreed that the district of country therein described "shall be, and the same is hereby, set apart for the absolute and undisturbed use and occupation of the Indians herein named; * * * and the United States now solemnly agree that no persons except those herein authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, except as in this article herein otherwise provided."

There is no provision excepting any part of the territory included within the bounds of the reservation for occupation or location for agricultural or mining purposes by white persons.

It has been decided by the supreme court of the United States that, in the prosecution of an adverse claim to a mineral location, the plaintiff must show such a location as entitles him to possession of the ground claimed as against the United States, as well as against the other claimant; that, if it is not valid as against the one, it is not as against the other; and that he must establish a possessory title in himself, good as against everybody. *Gwillim v. Donnelan*, 115 U. S. 45; S. C. 5 Sup. Ct. Rep. 1110.

The effect of the treaty was to withdraw the whole of the land embraced within the reservation from private entry or appropriation, and during its existence the government could not have authorized the plaintiffs to enter upon the ground in controversy for the purposes of discovering and locating a mining claim. On the contrary, the government stood pledged to prevent its citizens from entering upon the reservation for any such purposes. The right to locate mineral lands of the United States is declared to be a privilege granted by congress. No such grant including the premises in controversy existed at the time of the plaintiffs' location. It is also held that a location, to be effective, must be good at the time it was made, and that it cannot be good when made if there is then an outstanding grant of the exclusive right of possession to another. The possession of the plaintiffs, at the time of their location of the Bear lode, was tortious. Such being the character of their possession, and assuming to locate a claim not only without legal authority, but in violation of law, the attempted location was a nullity. It was just as if it had never been made. *U. S. v. Carpenter*, 111 U. S. 347; S. C. 4 Sup. Ct. Rep. 435; *Belk v. Meagher*, 104 U. S. 279.

The foregoing objections do not attach to the defendant's location of the Titusville lode. This location, made after the Indian title was extinguished, was conceded to be regular in all respects, save as to the defendant's allegation that the premises comprised a part of the unappropriated public domain open to location as mineral land. This allegation was traversed merely, the only effect of which was to assert priority of appropriation by the plaintiffs. The plaintiffs' claims having failed, the judgment of the court was correct. Judgment affirmed.

(9 Colo. 358)

SWEM v. GREEN.

(*Supreme Court of Colorado*. November 12, 1886.)

1. EXCEPTIONS—SIGNING AND FILING BILL—TIME LIMITED BY ORDER OF COURT.

Where an appellant tenders his bill of exceptions to the judge within the time limited by the order of the court for its preparation, it is a sufficient compliance with the order, although the judge does not sign it within the specified time.

2. APPEAL—RECORD—BILL OF EXCEPTIONS—FILE-MARK.

The file-mark on a bill of exceptions, showing the date of its presentation to the judge, is a part of the record.

3. WAREHOUSEMAN—GOODS STOLEN FROM—CLAIM FOR VALUE—COMPROMISE.

Where goods deposited with a warehouseman were stolen, and the depositor demanded payment for them from him, and he finally agreed to pay a less sum than that claimed, in settlement, but paid only a part of it, and suit was brought for the balance, *held*, that it was immaterial to the issue that he was not originally liable as warehouseman, the suit being brought upon the compromise agreement.¹

4. SETTLEMENT—CONSIDERATION—DOUBTFUL RIGHT.

A compromise of a doubtful right is sufficient foundation for an agreement, and it is no defense to say that it was without consideration.¹

¹See *Northern Liberty M. Co. v. Kelly*, 5 Sup. Ct. Rep. 422; *Scully v. Delamater*, 28 Fed. Rep. 114; *Hanley v. Noyes*, (Minn.) 28 N. W. Rep. 189.
See, also, *Zimmer v. Becker*, (Wis.) 29 N. W. Rep. 228, and note.

Appeal from county court, Arapahoe county.

The appellee, Jennie Green, who was plaintiff below, caused to be deposited with the appellant, who was a warehouseman, a box containing various articles of clothing and household goods. While the box remained in appellant's custody his warehouse was entered by thieves, and the box rifled of its contents. Mrs. Green demanded of the appellant, as payment for the loss of her goods, the sum of \$250, which she testifies was their value. After considerable negotiation and delay, according to the preponderance of the testimony, the appellant agreed to pay her, in settlement of the claim, the sum of \$168, which she agreed to accept. He paid her small sums, at different dates, amounting in the aggregate to the sum of \$60; and, after frequent demands for the payment of the balance of the sum agreed upon, the appellee brought suit before a justice of the peace, demanding judgment for the sum of \$100. Judgment for the amount of the demand was awarded her by the justice, and afterwards by the county court, on an appeal from the justice's judgment.

Prior to the entry of the judgment in the county court the defendant moved for a new trial, which was overruled, the court assigning in writing the following reasons therefor: "First, the court found from the testimony that a settlement had been arrived at between the parties, there being a dispute between them as to whether defendant was liable, and, upon defendant's promise to pay in pursuance of such settlement, found for the plaintiff; and, second, the settlement having been made in this way, the court did hold that in this suit it was immaterial whether or not the defendant had been guilty of negligence by which the goods were lost, holding that the settlement by the parties of the dispute between them as to the defendant's liability for the loss was a sufficient consideration for the defendant's promise to pay for the goods a sum much less than plaintiff claimed to be their value."

The appellant testified that plaintiff came to his office for her goods, and that her box had been robbed just before her visit. That she called again, and presented him an itemized account of the lost goods, amounting in value to the sum of \$185.45; that he never admitted his liability, either to the plaintiff or any one else, to pay anything on account of said loss, but contended from first to last that he was not legally responsible. He said he had employed a man at night to guard the warehouse; that he has taken as good care of the plaintiff's property as of his own; and that he was not liable, under the law, to pay her anything. He had told the plaintiff, however, that if he succeeded in collecting a certain claim against the railroad company he would pay her something as a present. He also admitted that he had paid her fifty or sixty dollars. He also admitted that he had been frequently pressed for payment of the claim, both by plaintiff and by her attorneys.

Respecting the compromise agreement so stoutly denied by the appellant on the trial below, the testimony of Mrs. Green is fully corroborated by her attorney, E. B. Sleeth, Esq., who testified that it was made in his office, and in his presence.

J. W. Horner, for appellant. *O. B. Liddell*, for appellee.

BECK, C. J. Preliminary to the consideration of this case upon the errors assigned, we will pass upon a motion to strike the bill of exceptions from the files, which was reserved until the case should be reached for final consideration. Upon looking into the motion, we are of opinion that the ground thereof is not well assigned. It is that the bill of exceptions was not filed within the time prescribed by the court below. The order of the court was that the appellant have "*fifty days in which to prepare his bill of exceptions.*" To comply with this order, it was only necessary, under the adjudications upon this subject, for the appellant to prepare his bill of exceptions, and tender it to the judge within the fifty days. This duty the appellant performed, but the judge did not sign the bill for several months afterwards.

This brings the case within the rule laid down in *City of Denver v. Capelli*, 3 Colo. 236. It was there held that when a party has tendered his bill of exceptions to the judge in apt time, under the order of the court, he has so far complied with the rule as not to be prejudiced by the failure of the judge to actually sign it within the time prescribed. That this bill was presented in apt time is shown by the indorsement or file-mark of the judge thereon, over his official signature, thus: "Presented for signature," etc., "this third day of June, A. D. 1882. BENJ. F. HARRINGTON, County Judge"

But counsel for appellee affirm that this filing is no part of the bill of exceptions, and consequently no part of the record; hence that this court cannot notice the same. This bill, certified and signed by the judge, and bearing the aforesaid file-mark thereon, was filed among the papers of the case in the office of the clerk of the court below, and thus became a part of the record. This record, with its indorsements, is now regularly before us by transcript; and while the file-mark in question is not, strictly speaking, a part of the bill of exceptions, yet it performs one of the purposes that a file-mark indorsed on any other law paper performs, viz., it shows the date of its presentation to the proper officer, and necessarily becomes a part of the record. It is an official certificate of the above fact, and therefore competent evidence that the bill was tendered for the signature of the judge within the time allowed.

It has been held that evidence on this point furnished by the record will be considered by appellate courts; also that, in a case where the judge has signed the bill of exceptions, in the absence of evidence that it was not presented in the time prescribed, it will be presumed that it was done in apt time, in furtherance of the principle that where a party has complied with the rule of court, so far as it was in his power to do so, he is not to be prejudiced because the judge did not sign the bill until after the time fixed has expired.

In *Underwood v. Hossack*, 40 Ill. 98, three days were allowed within which the plaintiff in error might file his bill of exceptions. It was not actually filed within that period, and there was nothing to show when it was presented to the judge. The court said: "The judge having signed this bill of exceptions, we will presume that he would not have done so unless it had been presented to him in proper time."

In affirming the above principle, the same court in *Village of Hyde Park v. Dunham*, 85 Ill. 569, said: "If the bill of exceptions was in fact made or filed under circumstances not authorized by law, motion should have been made in the court below to strike it out of the record; and, that not having been done, we cannot do otherwise than regard it as rightfully a part of the record."

When a judge certified that a bill was not presented to him in proper time, it was held to have been properly stricken out. *Magill v. Brown*, 98 Ill. 285.

It follows, from the foregoing adjudications, that if it appears affirmatively from the certificate or indorsement of the judge, as in this case, that the bill was presented within the time prescribed, it properly constitutes a part of the record, although not actually signed until some time afterwards. The motion to strike out must be denied.

Referring, now, to the errors assigned to the findings and judgment of the court below, we observe that one of the points raised and discussed by appellant's counsel is that appellant was not originally liable under the law, as a warehouseman, for the loss of the goods; the evidence produced in the trial having shown that he was not guilty of any negligence in connection therewith. It is only necessary to say, in answer to this proposition, that the action is not based on the original liability of the appellant, but upon the alleged compromise agreement, whereby he promised the appellee to pay her a certain sum of money, less than the real value of the goods stolen, in liquidation of her claim.

The first assignment of error alleges that the appellant made no promise to pay for the loss sustained by the appellee, and that, if he did, it was a promise without consideration, and therefore not binding. The decided preponderance of the evidence is to the effect that appellant promised to pay the appellee \$168 in liquidation of her claim, which was \$250. It is no excuse for failing to comply with this promise, to say that it was made without consideration. Where a claim of this nature is settled by the parties, the validity of the agreement does not depend upon the question whether there was, in fact, an original liability to pay for the loss or not. It is not necessary, in the compromise of a doubtful right, that the parties have settled the controversy as the law would have done. *Fisher v. May's Heirs*, 2 Bibb, 448. It is a well-settled principle of law that the compromise of a doubtful right, though it afterwards turns out that the right is on the other side, where the parties act in good faith, and with a full knowledge of the facts, is valid and binding. The cases announcing this doctrine generally quote approvingly the terse and logical remarks of Lord HARDWICKE upon the subject, made in *Stapilton v. Stapilton*, 1 Atk. 10, to-wit: "An agreement entered into upon a supposition of a right, or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right, is a sufficient foundation of an agreement." *Honeyman v. Jarvis*, 79 Ill. 322; *Mill's Heirs v. Lee*, 6 T. B. Mon. 97. It is held in *Curry v. Davis*, 44 Ala. 281, that where a creditor and his debtor entertain doubts of the validity of the debt, and make an honest compromise of it, a note given by the debtor for the compromise sum agreed upon cannot be contested as lacking consideration. And in *Scott v. Warner*, 2 Lans. 49, it was said that, if a disputed claim for damages be compromised, the settlement is a sufficient consideration for the note given thereon.

In another assignment counsel for appellant argues that the court below erred in finding that there was a *dispute* between the parties concerning the liability of the appellant, and that the settlement of this dispute was a consideration for the promise. It is true, according to the testimony of the appellee and her witnesses, the appellant never disputed his liability to pay for the goods lost. It is equally true, according to the testimony of appellant, that he never *admitted* his liability, but contended, from first to last, that he was not legally responsible. To hold that there was no dispute between the parties concerning the liability of the appellant, we must reject his statements as unworthy of belief. The testimony of both parties, however, shows that the appellee and her attorneys were insisting upon payment; that she made out an itemized account, amounting to more than the amount finally agreed upon, and presented it to the appellant for payment. It is not important whether the appellant disputed the claim or not. If his testimony that he did dispute it is not true, he may have thought himself liable, or he may have entertained doubts as to his liability, or he may have made the promise to avoid litigation; but whatever his motive may have been, since the testimony shows that he agreed to pay a portion of the claim, and that the appellee agreed to accept such portion in satisfaction of the whole demand, and since the appellant afterwards made sundry payments on account of the claim, he was justly held liable to pay the balance of the amount agreed upon.

Judgment affirmed.

(9 Colo. 323)

YATES v. GRANSBURY.

(Supreme Court of Colorado. November 12, 1886.)

SHERIFF—LEVY ON EXEMPT PROPERTY—FRAUDULENT CONCEALMENT OF PROPERTY—LIABILITY UNDER SECTION 34, GEN. ST. COLO. PAGE 602.

If a judgment debtor having two wagons, one of which he is entitled to exempt from execution, conceals one, and claims the other as exempt, his selection and claim of the other is fraudulent, and a levy thereon by the sheriff is no ground for recovery under section 34, Gen. St. Colo., p. 602, making an officer who levies on exempt property liable in three times the value of the property.

Appeal from county court, Boulder county.

This action was brought by the plaintiff to recover three times the value of certain personal property seized by the defendant as deputy-sheriff on execution. Section 34, Gen. St. p. 602, is as follows: "If any officer or other person, by virtue of any execution or other process, or by any right of distress, shall take or seize any of the articles of property hereinbefore exempted from levy and sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit." Section 32 of the same statute exempts from execution, *inter alia*, "one wagon," the property of the head of a family. Trial to the court, and finding as follows: "That the defendant did, on the thirtieth day of June, A. D. 1882, unlawfully take possession of a certain wagon belonging to plaintiff, of the value of \$100; and the court orders that judgment be entered herein for \$300, being three times the value of said wagon." Judgment against the defendant for \$300, and costs. Appeal. The remaining facts sufficiently appear from the opinion.

George Rogers, for appellant, Yates. *Wright & Giffin*, for appellee, Gransbury.

ELBERT, J. The plaintiff, Gransbury, at the time of the levy of the execution by the defendant, was the owner of two wagons. The statute exempted but one. He had a right to select which of the two he would retain as exempt from execution; but, having selected the one levied upon by the officer, it was his duty, so far as lay in his power, to surrender the other wagon, that the sheriff might levy upon it. *Freem. Ex'ns*, § 212; *Smothers v. Holly*, 47 Ill. 331; *Bonnell v. Bowman*, 53 Ill. 460; *Robinson v. Myers*, 3 Dana, 441; *Keybers v. McComber*, 7 Pac. Rep. 838. There is no doubt, on the testimony, that the effort of the plaintiff, at the time of the levy, was to retain both wagons by concealing the one, and by claiming the other as exempt under the statute. He refused to give the officer any satisfactory information respecting the whereabouts of the wagon not levied upon. He admitted its ownership, and made no claim that it was not within his reach and entirely under his control. The statute was beneficially intended to protect the judgment debtor in the use and enjoyment of certain specified property, not to protect him in a fraud against the judgment creditor. The plaintiff had a right to select and retain one of the wagons as exempt, but he had no right, either directly or indirectly, to select and retain both. Having concealed one, his selection and demand of the other was fraudulent, and the refusal of the officer to regard it affords no ground for recovery under the statute.

The judgment of the court below is reversed.

(9 Colo. 339)

PELICAN & DIVES MIN. CO v. SNODGRASS.

(Supreme Court of Colorado. November 12, 1886.)

1. MINES AND MINING CLAIMS—FAILURE TO COMPLETE LOCATION—INTERVENING RIGHTS.

L., a prospector, who failed to follow up his discovery of mineral by any effort towards completing the statutory location of a mining claim, cannot, as against intervening rights, post his discovery notice four years afterwards, and have the inception of his claim date from the discovery.

2. SAME—FAILURE TO COMMUNICATE A DISCOVERED MISTAKE—ESTOPPEL.

The fact that L. and S. believed that S.'s claim covered the apex of the vein, and accordingly S. obtained a patent without opposition from L., imposed no duty on S., when he discovered that his claim did not cover the apex of the vein, to inform L. of the fact.

3. SAME—NEW LOCATION NOT RELOCATION.

In this case a new location made by S. to cover the apex of the vein was not a relocation, since there had never been a location on the ground in controversy.

Appeal from district court, Clear Creek county.

During the years 1875-76, what is known in the record as the "Ontario Tunnel" was run by one Lewis. The tunnel was about 100 feet in length, and disclosed a vein of mineral at its breast. The last 50 feet, and the vein found, were in territory which at the time was unappropriated. About 100 feet of drifting was also done by Lewis at or near the inner end of the tunnel. He then took no further steps towards perfecting a mining location. Appellee, Snodgrass, located a claim near the Ontario tunnel, called the "Nadenbusch," and it appears that both Snodgrass and Lewis were under the impression that the Nadenbusch claim covered the apex of the lode disclosed in the tunnel. Snodgrass made his application, and secured a patent for the Nadenbusch claim; Lewis failing to oppose the proceeding by adverse possession or protest. In February, 1881, Snodgrass went into the drift leading from the Ontario tunnel, and did a little work. He also leased the vein existing therein to other parties, but the lease was soon after thrown up. At this time he still believed the apex of the vein to be covered by the Nadenbusch patent; but, upon making surveys with a view to sinking a shaft from the surface down to the drift, he discovered that the apex was outside the Nadenbusch side line, and upon vacant ground. In March following he ran an open cut from the surface, and on the 24th, at the breast thereof, intersected the vein which was shown in the Ontario tunnel. On the same day he posted his discovery notice, and staked a claim as the Cross lode. He then sunk a discovery shaft, and June 3d filed his location certificate. He also took peaceable possession of the tunnel, and thereafter placed a door across the same where the vacant territory began, and 50 feet from the entrance. Several days after Snodgrass commenced his open cut, Lewis began sinking a shaft from the surface, and on the day succeeding Snodgrass' discovery of mineral he also reached the vein. He then posted a discovery notice, and proceeded to complete his location of the Contention lode. His location certificate was filed prior to that of Snodgrass, but it was dated March 25th, and fixed the date of discovery as December 14, 1876, when he disclosed mineral in the Ontario tunnel, instead of March 25th, 1881, when he reached the vein in his shaft. The next day, March 26th, Lewis conveyed by deed to the appellant company. Thereafter the company applied for a patent to the Contention lode. Snodgrass filed an adverse claim, and brought this suit in pursuance thereof. Upon trial, verdict and judgment were given for Snodgrass, and the company prosecuted this appeal. The remaining essential facts are sufficiently stated in the opinion.

Morrison & Fillius, for appellant, Pelican & Dives Min. Co. *Luke Palmer*, for appellee, Snodgrass.

HELM, J. The Ontario tunnel was not located in pursuance of the law relating to tunnel-sites. Lewis failed to follow up his discovery of mineral therein with any effort whatever towards completing the statutory location of a mining claim. With the possible exception of one day's work, he performed no labor in the tunnel for a period of nearly four years, although he sometimes used it as a store-house for mining tools. Under these facts we are of opinion that, as against intervening rights, he acquired no interest whatever in the disputed ground by virtue of the tunnel in question. He could not, four years after discovering the vein in this tunnel, post his dis-

covery notice, erect boundary stakes, file his location certificate, and have the inception of his claim, there being intervening rights, relate back to December 14, 1876, the date of such discovery.

The negotiations of Snodgrass with either Lewis or Seddon for the privilege of using the Ontario tunnel in working the Nadenbusch, a patented mine belonging to Snodgrass, are matters of no consequence in this litigation.

Neither does the mistake, which seems to have been mutual on the part of Snodgrass and Lewis, in supposing that the apex of the vein disclosed in the Ontario tunnel was covered by the Nadenbusch patent, affect the case.

We do not agree with counsel for appellant in their position that it was the duty of Snodgrass, upon discovering this mistake, to inform Lewis, and give him an opportunity to first locate the ground in controversy. As suggested by counsel for appellee, under the evidence, there is no more reason for holding that Snodgrass was estopped from locating the Cross lode without notice to Lewis, than there would be for saying that, had Lewis first ascertained the mutual mistake, it would have been his duty to inform Snodgrass, and give the latter precedence in securing the coveted vein. We therefore discard the Ontario tunnel, and the other matters connected therewith, above mentioned, from further consideration in the case.

Snodgrass first disclosed a vein of mineral upon the ground in controversy by excavating from the surface. He immediately posted his discovery notice, marked the boundaries, and, in the course of seven or eight days, completed his discovery shaft. Within three months from the date of discovery he filed his location certificate for record in the proper office. It is true that Lewis completed his discovery shaft, and recorded his location certificate, at earlier dates than did Snodgrass. But these acts did not overcome the advantage obtained by Snodgrass through his prior discovery.

It is earnestly argued by counsel for appellant that the claim of Snodgrass was a relocation, and that the statute fixing 60 days and three months for sinking the discovery shaft and filing the location certificate, respectively, did not apply to the same. The learned counsel insist that these acts, in connection with relocation, must be performed within a reasonable time; and that, under the circumstances disclosed in this case, 70 days, the period existing between Snodgrass' discovery and the filing of his certificate for record, was not a reasonable time. In response to the foregoing argument, we have this to say: that, in the *first* place, there never having been a location of the ground in controversy, it cannot be treated as an abandoned claim; hence the location of Snodgrass should be regarded as original and not a relocation. But, *secondly*, counsel are mistaken in their view of the law regarding relocations. Construing the relocation provision in connection with the other location statutes, we are satisfied that the legislature intended to place the original discoverer and the relocator, so far as possible, upon precisely the same footing. That body doubtless desired to give the latter 60 days, after finding the vein (technically, perhaps, there could not be a *second discovery* thereof) and erecting his "new location stake," to sink a discovery shaft, and three months within which to record his certificate. Such is the construction of the law already announced by this court. *Armstrong v. Lower*, 6 Colo. 393.

It follows from the foregoing conclusions concerning the facts and the law that the rights of Snodgrass, by virtue of his location of the ground in controversy, must be held superior to those of appellant acquired through the attempted location of Lewis. It is not necessary for us to separately discuss the specific assignments of error, as the questions presented thereon by appellant have been fully answered.

The judgment will be affirmed.

(9 Colo. 365)

BAILEY and another v. JOHNSON, Sheriff, etc.

(Supreme Court of Colorado. November 12, 1886.)

**FRAUDULENT CONVEYANCES—PARTIAL ASSIGNMENT—DELIVERY—ASSIGNOR IN POSSESSION
—REPLEVIN—TRIAL—GEN. ST. COLO. § 1523.**

A voluntary transfer by a debtor to one of his creditors of certain horses and mules and wagons used by him at his saw-mill, in trust to sell the same, and to apply the proceeds in payment of certain preferred creditors, the balance being accepted by the assignee in settlement of his own claim, is not void as to other creditors, under Gen. St. Colo. § 1523, where a bill of sale of the property was executed by the debtor, and delivered to the assignee, and formal possession of the property surrendered to him one day, and the property removed by the assignee from the mill the next. In replevin by such assignee against creditors who attached the property after it had been removed from the mill, it is error to take the case from the jury.

Error to superior court of Denver.

Replevin.

The plaintiffs, Bailey & Allen, kept a feed-stable and *corrals* in Denver, in 1882. One Alexander Kemp, who was engaged in the lumber business on Buffalo creek, in Jefferson county, at a point about 35 miles from Denver, became indebted to the plaintiffs for hay in the sum of about \$241. On the twenty-ninth of May, 1882, Allen, one of the plaintiffs, went up to Buffalo creek for the purpose of collecting this bill. Kemp appears to have had a store, a saw-mill, and a blacksmith shop on Buffalo creek, but the saw-mill had stopped running some days before Allen's arrival, and the business of lumber-making had been discontinued. The teams, harness, and wagons previously used in the business were found in Kemp's stables and *corrals*, and the men who had been employed as drivers and otherwise were still in the lumber camp, but out of employment. Kemp owed them various sums for wages earned, and had executed to them bills of sale of portions of the above-mentioned stock by way of security. No delivery of any portion of the stock appears to have been made under any of them. Allen, upon his arrival in the lumber camp, entered upon negotiations for the payment of the claim due his firm. Kemp informed him that he had no money, and all he could do would be to sell him the stock, (horses, mules, harness, wagons, etc.) Allen replied that his firm could handle the stock, but he did not know that they could get for Kemp what it was actually worth, or any given amount of money; that they could sell it for him, and pay themselves out of the money realized. Kemp said he had given bills of sale to men in his employ driving teams and working for him; and, if he sold the stock to plaintiffs, they must secure these men. The precise sums due these men had not been ascertained; but it was estimated at \$705 to the laborers, and \$700 jointly to the foreman, Morrell, and the book-keeper, Adgate; making the total indebtedness to be satisfied out of the property about \$1,646. Allen estimates the property to have been worth about \$2,000. It was finally agreed that the property should be sold and delivered to the plaintiffs on the following terms: It was to be taken in liquidation of the plaintiffs' claim. The plaintiffs were to pay the teamsters and laborers on the following day, in Denver, the several amounts called for by their time-checks, which were to be made out that evening; the balance to be realized from the sale to be made by the plaintiffs was to be paid to the foreman and book-keeper on account of their demands, and for this balance Allen gave them an open acceptance on the spot. He says he would have paid the laborers at the same time if the sums due them had been ascertained; but it was arranged that they should bring the stock down next day, and get their money then. These negotiations were conducted in the presence and hearing of the men holding the liens, and without objections from any of them. An inventory was then taken of the horses, mules, harness, and wagons. A bill of sale thereof was executed by Kemp, and delivered to Mr.

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Allen, and formal possession of the property surrendered to him. Allen then constituted the book-keeper, Adgate, his agent to assume and hold possession of the property for the plaintiffs until the next day, when he was to send it to Denver by the men to whom the time-checks were to be issued; written instructions to this effect being given the agent. Included in these negotiations was some necessary shoeing of horses, and necessary repairs to the wagons, which were to be done before starting the stock upon the road.

The business having been completed to the satisfaction of all concerned, Mr. Allen returned to Denver, and early next morning, in accordance with agreements and instructions, the teams were put in motion for Denver. When they had reached a point on the highway about five miles out from camp, they were overtaken and the property seized by the defendant, Johnson, sheriff of Jefferson county, upon a writ of attachment issued out of the district court of Arapahoe county, in an action wherein David C. Dodge and Allen C. Fuller were plaintiffs, and said Kemp and one E. Bowen were defendants. The plaintiffs brought the present action in the district court of Jefferson county to recover possession of the property attached, and, by stipulation of parties, the venue was changed to the superior court of the city of Denver. At the close of the testimony upon the trial, counsel for the defendant moved the court to instruct the jury to return a verdict for the defendant, on the ground that the statute declares that a bill of sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by an immediate delivery, shall be assumed to be fraudulent and void; and this, being a presumption of law, is a question for the court, and not the jury. The court sustained the motion, and dismissed the action, to which ruling the plaintiffs duly excepted.

L. C. Rockwell, for plaintiff in error. *E. O. Wolcott*, for defendant in error.

BECK, C. J. The principal error assigned relates to the withdrawal of the case from the consideration of the jury, when upon the trial on the merits in the superior court, by an instruction to return a verdict for the defendants. It is inferable from this action that, in the judgment of the court, the plaintiffs, Bailey & Allen, had failed to establish a legal ownership or right of possession of the property described in this writ of replevin. The ground of the motion was that the requirements of the statute of frauds had not been complied with in the sale and delivery of the property to the plaintiffs. It was not claimed that the transaction was fraudulent in fact, but that immediate delivery of possession not having been made upon execution of the bill of sale, as required by the statute, the law presumed the transaction to be fraudulent and void.

The statutory provisions referred to, being the fourteenth section of the statute of frauds, are as follows: "Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and this presumption shall be conclusive." Gen. St. 1528.

Addressing our attention to the question of the sufficiency of the delivery and change of possession, it is proper, in the first instance, to consider the nature of the transaction, as the same appears from the testimony of both parties. While the form of the transaction was a sale to Bailey & Allen, the testimony clearly shows it to have been a transfer of the property to them, in the nature of an assignment, charged with certain trusts. The trusts were that the property should be sold by Bailey & Allen, to whom it was transferred by bill of sale, and that the proceeds of sale should be appropriated

to the payment of the following debts of the vendor or assignor, viz.: The debt due Bailey & Allen, the debts due the teamsters and workmen, and the debts due the foreman and bookkeeper. It would seem, from the testimony, that the property was in fact taken in liquidation of the claim of the plaintiffs, and that the claims of the teamsters and laborers would also have been paid at the time of the transfer if the amounts due them had been then known. But the plaintiffs were not bound, by their agreement with Kemp, to pay Morrell and Adgate any definite sum. These men appear to have been deferred creditors in the transaction, and were to receive, as per their acceptance, whatever balance there might be of the proceeds of sale to be made by plaintiffs over and above the amounts due the other creditors mentioned.

In support of the proposition that there was not a sufficient delivery of the property, nor such a continued change of possession as the statute requires, we are referred to that portion of the testimony which discloses that Kenip's employes held bills of sale of the property, and that the stock, as counsel allege, was in their possession when it was seized in attachment by the defendant. A review of the testimony fails to show any delivery whatever of the property by Kemp to his employes, as purchasers, under the bills of sale, or that the latter had ever demanded a delivery. The employes do not appear to have claimed as purchasers, nor to have construed their bills of sale as evidence of purchase, but as *liens* held to secure payment of the wages due them, respectively. The delivery, therefore, to Allen at the camp was good as to all the parties present and consenting to it, and he and his partner took the property charged with the several trust specified.

Had the sheriff arrived in camp that day, and executed his writ of attachment while the animals and other property remained on the grounds, and in the stables and *corrals* of Mr. Kemp, the case would have presented a very different feature. But no levy of the writ was made until some time next morning, when the stock was *en route* for Denver, and distant about five miles from camp. Both the title and the possession was then in the plaintiffs. Their agent, Adgate, in obedience to written instructions from Allen, had placed these men, who held time-checks from Kemp, in charge of the property for a special purpose,—that of removing it to the stables of the plaintiffs in Denver. Having accepted the charge, they became, for the purpose mentioned, the agents of the plaintiffs. The property was therefore legally in the possession of the plaintiffs at the time of the levy of defendant's writ. The requirements of the statute in question were, in our judgment, duly satisfied. On the day previous to the seizure Kemp had these goods and chattels in his possession and under his control. While so possessed of them, he conveyed the title, and surrendered the possession thereof, to the plaintiffs, for lawful purposes, and for a sufficient consideration. The plaintiffs, through their agents, had assumed the full dominion and control of the property. The formal delivery at the camp became, as to all persons, a valid delivery by the removal of the property, from the premises of the former owner, by those who constituted themselves agents of the plaintiffs for that purpose. There was nothing in these circumstances to mislead the defendant, but much to put him on the inquiry as to the ownership of the property at the time of the seizure. The saw-mill had been shut down, and the lumber business discontinued, several days before. The men and teams were not engaged in their usual employments. It would seem that these facts were known to the defendant, for he admitted upon the trial that he knew the teams were going away on that morning, and that he had arisen early, and followed and overtaken them.

But if we assign to the transaction its true legal character, that of a partial assignment for the benefit of creditors, it is equally supported by the evidence. It was a voluntary transfer by Kemp, the debtor, without compulsion of law, to Bailey & Allen, in trust to sell the same, and to apply the

proceeds in payment of certain preferred creditors. And, as before stated, those interested in the property by virtue of liens stood by and consented to the transfer. That partial assignments of this nature are valid under our statute was decided by this court at the last December term, in the case of *Campbell v. Colorado Coal & Iron Co.*, 10 Pac. Rep. 248.

The court erred in withdrawing the case from the consideration of the jury upon the facts and the law, and in directing a verdict for the defendant in error, for which error the judgment is reversed, and the cause remanded.

(8 Colo. 343)

CONSOLIDATED REPUBLICAN MOUNTAIN MIN. CO. v. LEBANON MIN. CO.

(*Supreme Court of Colorado. November 12, 1886.*)

1. MINES AND MINING CLAIMS—AGENT—CONVEYANCE BY—TITLE ACQUIRED AFTER AGENCY CEASED.

One acting as the agent of another in perfecting title to a mining lode, who paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty, is not estopped, after his agency ceased, from conveying any other or different title which he thereafter acquired to the premises in controversy, as a part of conflicting claims.

2. SAME—LOCATION OF CLAIMS—MINERS' RULES AND CUSTOMS—LAW IN COLORADO IN 1865—DEVELOPMENT WORK.

In 1865 the manner of locating lode claims in Colorado was governed by miners' rules and customs; and, to locate and hold a claim, development work, after posting the discovery notice, was requisite.

Appeal from district court, Clear Creek county.

Morrison & Fillius and *L. C. Rockwell*, for appellant, Consolidated Republican Mountain Min. Co. *Hugh Butler* and *John A. Coulter*, for appellee, Lebanon Mountain Min. Co.

HELM, J. Brown acted as the agent of the Lebanon Company in perfecting title to the Powell lode. He paid no part of the purchase price, owned no individual interest, and conveyed with no covenant of warranty. He appears to have discharged his duties in perfect good faith. Therefore he was not estopped, after his agency ceased, from conveying to the Republican Company any other or different title which he thereafter acquired to the premises in controversy as a part of conflicting claims. The so-called "Powell location," upon which appellee relies, was made in July, 1865. The Dryden and Rocky Mountain Mammoth locations, through which appellant claims, were made in September of the same year. The Powell was located simply by posting a notice, and recording a certificate. No work of any kind whatever was done thereon at the time of posting the notice, or, so far as the record discloses, for at least six years thereafter. A shaft from two to three feet deep was sunk upon the Dryden, and one from eight to ten feet deep upon the Rocky Mountain lode, in the month of September, when their respective notices were posted, and certificates filed for record. During the same fall the depth of the Dryden shaft was increased to six or seven feet.

In 1865 the manner of locating lode claims in Colorado was governed by miners' rules and customs; and, in order to constitute a valid location, compliance therewith was necessary. *Sullivan v. Hense*, 2 Colo. 424.

No objection was made or exception reserved, at the trial, by either party, to the method of proving these rules or customs. Two witnesses testify that no work was then required, either to locate or to hold a claim; but one of them says, "As a general thing, we sunk a hole on every lode we recorded." Three witnesses swear that, under the prevailing customs, it was necessary (one says within 30, another within 60, days after discovery) to do some work in order to hold the lode.

Mr. Justice FIELD, speaking the unanimous view of the supreme court of the United States in *Jennison v. Kirk*, 98 U. S. 453, with reference to

these miners' regulations and customs in California, uses the following language: "They all recognized discovery, followed by appropriation, as the foundation of the discoverer's title, and development by working as the condition of its retention." We think this remark equally true of the rules and customs existing in Colorado prior to statutory enactment on the subject. It is hardly possible that a custom ever prevailed with miners which recognized the right to possession of a lode or lode claim, for an indefinite period, without actual occupancy or some kind of development work. To say that merely posting a discovery notice on the crevice, and recording a certificate stating metes and bounds, constituted such an appropriation as, for a considerable period, prevented another from taking possession and developing the lode, is to recognize a custom that can hardly be considered reasonable.—a custom contrary to the usual experience and practice in appropriations of the public domain, and incompatible with ordinary sagacity and appreciation of justice among miners themselves.

The statute of 1861 relating to lode claims, which was still in force, in effect recognizes the fact that development work was required by the existing customs; for section 11 thereof protects the locations of soldiers in the army from forfeiture, because not "represented," (*i. e.*, occupied or developed,) till the expiration of nine months after the date of their discharge from the service.

We are of the opinion that in 1865, to locate and hold a mining claim in Griffith mining district, development work, after posting the discovery notice, was requisite. No annual labor was required by statute for a number of years subsequent to that date, and we are not apprised by the record that an abandonment of either the Dryden or Rocky Mountain lodes at any time took place.

It is unnecessary to indulge in a further consideration of the points presented. The judgment of the district court will be reversed, and the cause remanded.

(9 Colo. 327)

ROMINGER *v.* SQUIRES.

(*Supreme Court of Colorado.* November 12, 1886.)

WATERS AND WATER-COURSES—IRRIGATING DITCH—WATER-RIGHTS—PRIORITIES—AGREEMENT.

Where the several owners of two irrigating ditches entered into an agreement to construct a new ditch to supersede the old ditches, and, upon the trial of the question what proportion of water carried through the new ditch each one was entitled to, it appeared by the weight of evidence that nothing was said in the agreement about the division of the water, *held*, that the decree of the court adjudging that each party to the agreement was entitled to the same share of the water conveyed through the ditch as he owned of the new ditch itself was erroneous, as being against the weight of evidence. *Held, further*, that the finding of the court that the appropriations of water by the different parties were to be referred to the date of the contract respecting the new ditch, was erroneous, it not appearing that priorities had been waived by the contract respecting the new ditch.

Appeal from district court, Saguache county.

Arthur & Vosburg, for appellant, Rominger. *E. F. & C. A. Allen*, for appellee, Squires.

ELBERT, J. We have carefully examined and considered the evidence in this case, and are of the opinion that it does not warrant the decree rendered. The three owners of what is called the "Saalfeldt Ditch," and the four owners of what is called the "Wittmayer Ditch," entered into a contract in 1874 to construct what is called the "New Ditch," which was to supersede, either in whole or in part, the two old ditches as a water-way, by means of which their respective lands were to be irrigated. The terms and extent of this contract were the leading questions in the trial below. The court found, in substance,

that it was an agreement that each of the parties to the contract (except Zeibig) was to own one-seventh of the ditch, and one-seventh of the water to be conveyed through it. Zeibig, as representing two water-rights in the old ditches, was to have two-sevenths in the new ditch, and two-sevenths of the water. This view of the agreement was the basis of the decree adjusting the rights of the plaintiff and defendant, who held as grantees of parties to the agreement. This finding is undoubtedly correct as to the rights the respective parties were to have in the new *ditch*, as a water-way. With respect to the division of water, however, we think it plainly against the weight of evidence. The weight of evidence is to the effect that nothing was said, *in the agreement to construct the new ditch, about the division of the water*; that each party was to bring through the new ditch the water which he claimed to have theretofore appropriated and used in the old ditches; that, while the agreement provided for a change of the water-way, it in nowise contemplated or provided for a change of water-rights. Having reference to their rights in the old ditches, the evidence shows priority of appropriation on the part of several of the original constructors of the new ditch, and, among others, Saalfeldt, the grantor of the defendant, Rominger. Water-rights in this state, where agriculture is almost exclusively carried on by means of irrigation, are valuable properties. In this case the stream from which the water was taken was small, and a scarcity of water therein for the purpose of irrigation was by no means an improbable contingency. It is not reasonable to suppose that priority of right to water, where water is scarce, or likely to become so, will be lightly sacrificed or surrendered by its owner. Nor should the owner of such a right be held to have surrendered it or merged it except upon reasonably clear and satisfactory evidence. The evidence in this case, in our opinion, is not such as to warrant the finding of the court upon this point, in view of the testimony of nearly all the original constructors of the new ditch, to the effect that *nothing whatever was said about the water* in the agreement concerning the new ditch.

The finding of the court that the appropriations of water by the different parties were to be referred to the same date could only have been based upon the proposition that priorities had been waived by the contract respecting the new ditch. The evidence, as before said, shows a prior right, by "diversion and conversion to a beneficial use," in several parties to the contract. The finding of the court upon this point is unsupported.

It follows that the decree, based upon these two erroneous findings, did not properly adjust and determine the respective rights and equities of the plaintiff and defendant in this case. (1) In the view we have taken of the evidence, one-seventh is not the measure of the quantity of water to which each one is entitled. (2) If it be conceded that the water-right of Zeibig, owned by the plaintiff, is of equal date with the water-right of Saalfeldt, owned by the defendant, we think it clear, as the evidence now stands, that the water-right which the plaintiff claims in connection with the Volk ranch was a later appropriation of water, and must be postponed in favor of defendant's earlier appropriation.

There is nothing in the claim made by counsel for appellee that the plaintiff, Squires, was entitled by reason of five years' adverse possession. There is no such claim set up by the pleadings, nor did the testimony show any adverse possession such as is contemplated by the rule which counsel invoke.

The evidence before us is not sufficiently full and explicit to enable us to direct a decree determining the priorities of the parties, and the amount of water to which each one is entitled, either in this case, or in the case of *Rominger v. Bugh*, post, 215, which, by agreement, is to be considered and determined upon the same evidence.

The decree of the court below will be reversed, and the cause remanded for a new trial upon the issues made by the pleadings.

(9 Colo. 330)

ROMINGER v. BUGH.

(Supreme Court of Colorado. November 12, 1886.)

WATERS AND WATER-COURSES—IRRIGATING DITCH—WATER-RIGHTS—PRIORITIES—AGREEMENT.

The evidence considered, and held not sufficient to warrant the decree rendered; following *Rominger v. Squires*, ante, 213.

Appeal from district court, Saguache county.

Arthur & Vosburg, for appellant, *Rominger*. *E. F. & C. A. Allen*, for appellee, *Bugh*.

ELBERT, J. By agreement of parties this case is heard and determined upon the same evidence as the case of *Rominger v. Squires*, ante, 213, just decided. The same errors exist in this case as in that, and the judgment must be the same. The decree of the court below will be reversed, and the cause remanded for a new trial upon the issues made by the pleadings.

(9 Colo. 346)

G. B. & L. RY. CO. v. HAGGART and others.

(Supreme Court of Colorado. November 12, 1886.)

1. RAILROAD COMPANIES—CONDEMNATION PROCEEDINGS—PLEADING.

In proceedings to condemn a right of way for a railroad the title of one named in the petition as respondent to the land sought to be taken is admitted unless it is expressly denied, and the averment by respondent of title to property not covered by the petition will entitle him to damages in respect thereto, if such averment is not denied.

2. SAME—EXCESSIVE AWARD—MILLS—MINES.

Eight hundred dollars held not an excessive award against a railroad company for taking a strip of land, about 900 feet in length, across two patented mill-sites, and a right of way over a lode claim.

Appeal from county court, Clear Creek county.

Condemnation proceedings.

Teller & Orahool, for appellant, G. B. & L. Ry. Co. *W. T. Hughes*, for appellees, *Haggart and others*.

HELM, J. Petitioner sought to condemn, for the use of its railway, a strip of land about 900 feet in length, across two patented mill-sites; also the right of way over a certain lode claim. Its line touched the stream upon which the mill-sites are located, and, according to the evidence, its embankment would materially increase the expense of constructing dams necessary to operate machinery thereon. In view of these facts, we are not prepared to say that \$800 was an excessive award for the land actually taken, and the damages inflicted upon the remaining property.

The foregoing conclusion disposes of one proposition argued by counsel for appellant, leaving but a single question to be considered, viz., did the court err in refusing to charge the jury that, unless they found the title to a certain tunnel in respondents, they should assess no damages for injuries thereto?

Respondents Teal and Foster were made parties on motion of petitioner. In their answer filed, they first disclaim any interest in the mill-sites, and then admitted ownership of half the lode described by the petition. They also averred title to one-half of a certain tunnel and other workings. From the pleadings and evidence we may justly infer that the tunnel and workings mentioned were simply improvements upon the lode location described. In such case, injuries to them might be regarded as injuries to the realty. The jury either took this view, or they awarded nothing on account of interference with the usefulness of the tunnel; for, while the verdict itemizes the damages, and separately specifies the respective amounts allowed, it contains no reference to the tunnel. If the jury allowed nothing for interference with work upon the claim by means of the tunnel, the error, if error there were, in refusing the instruction, was without prejudice, and appellant cannot complain. If, on the other hand, the jury considered the inconvenience and ex-

tra expense occasioned by the railroad embankment, in prosecuting development through the tunnel, when estimating \$100 as "damages resulting to the remainder of the lode claim," no error was committed; for the claim was described in the petition, and a right of way over the same was therein demanded.

We are of the opinion that when one files his petition naming a respondent, and seeking the condemnation of certain specified property, the petitioner thereby, in the absence of special averment to the contrary, admits such title in the respondent named as authorizes the assessment of full compensation for the taking of the premises described, or the injury thereto.

There is no doubt but that the question of ownership may become an issue in these proceedings. Such issue, however, must be properly presented by the pleadings. Respondents' averment of title to the tunnel was not denied, and for this reason also, even were the tunnel regarded as property not covered by the petition, we should hold that the court did not err in refusing the instruction asked.

The judgment is affirmed.

(9 Colo. 325)

POLK v. BUTTERFIELD.

(*Supreme Court of Colorado. November 12, 1886.*)

1. ERROR—MATTERS SUBSEQUENT TO JUDGMENT.

Upon writ of error, error cannot be assigned on an order made after judgment.

2. STATUTE OF LIMITATIONS—NEW PROMISE—PLEADING.

It is not necessary that a new promise relied on to avoid the bar of the statute of limitations should be declared on in the complaint. It is sufficient to reply the new promise, after the defense of the statute is interposed.

3. EVIDENCE—JUDICIAL NOTICE—STATUTES OF OTHER STATES.

Courts do not take judicial notice of the statutes of other states. They must be set out in the pleadings, and proved like other facts.

Error to district court, Arapahoe county.

This was an action brought by the defendant in error against the plaintiff in error and others on certain bills of exchange. The defendant below pleaded the statute of limitations, and the plaintiff replied a new promise. Trial by the court, and judgment against the defendant in the sum of \$1,480. Afterwards, and at the same term, the defendant, Polk, interposed a motion, supported by affidavits, to vacate the judgment under the provisions of section 78 of the Amended Code, p. 23. The section, so far as applicable to the case at bar, is as follows: "The court may, on motion, in furtherance of justice, * * * upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect." The motion to vacate the judgment was overruled, and the defendant sued out a writ of error.

Stallcup, Leethe & Shaffroth, for plaintiff in error, Polk. *Owen McGarr*, for defendant in error, Butterfield.

ELBERT, J. The decision of the district court overruling the motion of the plaintiff in error to vacate the judgment in the court below cannot be reviewed on this writ. At common law, no writ of error could be brought but on a judgment, or an award in the nature of a judgment. 2 Tidd, Pr. *1141. The whole proceedings to final judgment, inclusive, were entered of record, and the writ went to errors of fact and law appearing in the proceedings as recorded. Steph. Pl. 142. The review was of the record upon which judgment was given. 2 Tidd, Pr. *1134. It appears, also, that the writ would lie to the "execution of a suit" where error was "supposed to be, as well in giving the judgment as in awarding execution thereon;" but in such case the writ ran, "*tam in redditio*n*e judicii quam in adjudicatio*n*e executionis.*"

2 Tidd, Pr. *1134, *1143. Practically, the writ brought up the entire record. The motion to vacate the judgment in this case is statutory, and based on statutory grounds. It was unknown to the common law, and the writ of error had no use respecting it. The act of February 24, 1879, provided for "appeals from," and "writs of error to," the final judgments and decrees of the district and county courts. Sess. Laws 1879, 226, 227. This is the writ of error as known to the common law. The view that, under our practice, it brings up the entire record, and that error can be assigned on an order after judgment, is not admissible. The fact that the act of 1879 repealed the provisions of the Code of 1877 respecting appeals to this court, which provided, *inter alia*, for an appeal "from any special order after judgment," makes it difficult to say that the legislature intended, by appeals from *final* judgments and by writs of error to *final* judgments, to still provide for the review of orders *after* judgment by either of the modes prescribed. We are of the opinion that the repeal of the special provision named, without more, precludes us from saying that there was such an intention. This view is strengthened by reference to sections 24 and 25 of the act of 1879 prescribing what may be assigned for error. Orders after judgment are not enumerated.

To the objection that the complaint does not state a cause of action, it is sufficient to say that it was not necessary that the plaintiff should, in the first instance, declare on the new promise. The practice in most of the states is to declare on the original indebtedness, and, if the statute of limitations be interposed, to reply the new promise. Wood, Lim. 201. The effect of the decision in the case of *Buckingham v. Orr*, 6 Colo. 590, is not to exclude such a practice, but to give preference to the practice which declares upon the new promise in the first instance. It may be further answered, upon this point, that the objection to the complaint should have been taken by the defendant by special demurser. *Buckingham v. Orr, supra*.

The objections based upon the provisions of the statutes of Mississippi and Missouri cannot be considered. Courts do not take judicial notice of the statutes of other states. They should have been set out in the pleadings, and proved like other facts. 1 Phil. Ev. *624, note 11; Bliss, Code Pl. § 183.

The judgment of the court below must be affirmed.

(9 Colo. 320)

OPPENHEIMER v. DENVER & R. G. R. Co.

(*Supreme Court of Colorado*. November 12, 1886.)

1. APPEAL—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The jury are the judges of the credibility of witnesses, and the court will not review their findings upon questions of fact unless they are palpably against the weight of the evidence.

2. SAME—INSTRUCTIONS—MEASURE OF DAMAGES—VERDICT FOR DEFENDANT.

In an action to recover damages for the wrongful act of the defendant, where the jury return a verdict for the defendant, objections to the instructions of the court relative to the measure of damages in case the jury should find for the plaintiff will not be considered upon appeal.

3. EVIDENCE—CONTENTS OF LOST WRITING—SECONDARY TESTIMONY.

Parol evidence of the contents of a writing is admissible upon proof of the loss of the writing.

4. SAME—COMPETENCY—SALE OF MILEAGE TICKET—SIMILAR SALES.

Where the plaintiff sues for damages for wrongful ejectment from a train upon which he was traveling by virtue of a mileage ticket, and the defendant pleads that the ticket was issued upon the condition, of which defendant had notice, that it was not available over that portion of the road upon which he was traveling, evidence that the defendant had sold the same kind of ticket to another person about the time of the sale to plaintiff, and that such ticket was used without objection by the company, is inadmissible.

Error to district court, Arapahoe county.

This was an action brought by the plaintiff in error against the defendant railway company to recover damages for an alleged ejection from one of the defendant's trains. The main issue in the trial of the case in the court below was whether the plaintiff, at the time he purchased his mileage tickets, was notified by the agents of the defendant company that they would not be accepted for fare over that portion of the company's road between Salida and Leadville. Verdict for the defendant, and judgment thereon. The points decided do not require any more extended statement of the facts.

Geo. H. Kohn, for plaintiff in error, Oppenheimer. *E. O. Wolcott*, for defendant in error, Denver & R. G. R. Co.

ELBERT, J. 1. There is no ground for saying that the verdict in this case is so palpably against the weight of evidence as to call for the interference of this court. The witnesses Eccles and Sheppard both testified that they notified the plaintiff that the mileage tickets which he purchased were not good over that portion of the defendant's road between Salida and Leadville. The jury accepted their testimony as against that of the plaintiff, who testified affirmatively that there was no such notification, and the witness Eppstein, who testified negatively that he heard no conversation on the subject. The jury are the judges of the credibility of witnesses, and we see no reason to question their finding in this case.

2. The objections taken to the instructions of the court need not be considered. That portion of the charge to which they are taken, concerns the measure of damages, and was for the guidance of the jury only in case they should find that the plaintiff was entitled to recover. The jury having found upon the main issue that the plaintiff, by reason of his notice that the ticket was not good for fare between Salida and Leadville, was not entitled to recover, that portion of the charge objected to had no use or office to fulfill. For a like reason, the objection that the plaintiff was not allowed to testify in rebuttal of the testimony given by the conductor and brakeman need not be considered. The jury having found against the plaintiff upon the main issue, the testimony of the conductor and brakeman upon the point sought to be rebutted was of no importance.

3. The tickets purchased by the plaintiff, concerning which the controversy arises, contained a condition that they should be good only on those portions of the defendant company's railroad where the defendant company's regulations warranted their acceptance. The plaintiff had notice of this condition at the time he purchased the tickets. The testimony shows that the defendant company had a verbal agreement with the Denver, South Park & Pacific Railway Company to the effect, *inter alia*, that the defendant should issue no mileage tickets applicable to that portion of its line between Salida and Leadville. The reference on the ticket was to this regulation or verbal agreement. It further appears that, in pursuance of this agreement, Mr. Nims, the general passenger agent of the defendant, had issued orders, both verbally and in writing, to the proper agents and conductors of the company, not to sell or receive mileage tickets for that portion of the defendant's road. Mr. Nims testifies that, when this instruction was in writing, it consisted of a notice written on the bottom of the tariff sheet, stating that the mileage tickets were not good west of Salida. He testifies that he made every effort to find one of these tariff sheets by a thorough search at his office and everywhere else, and was unable to find one. This left it entirely proper for the court to admit oral testimony as to the purport of the instruction, which appears to have been, according to the testimony of the conductor Tammeny, the simple direction, "Mileage tickets will not be honored by conductors." A like objection taken to the testimony of the witness Sheppard is also untenable, for the reason that it does not appear with any cer-

tainty that the instructions given to him as agent of the company were otherwise than verbal.

4. The offer to show by Mr. Eppstein that the defendant company had sold the same kind of a ticket to him about the time of the sale to plaintiff, and that such ticket was used without restriction upon the defendant's road, was properly rejected. The real question at issue was whether the plaintiff was notified, at the time of the purchase of the ticket, that it was not good, and would not be received, for fare between Salida and Leadville; and the offer to prove that the defendant company had sold a mileage ticket to another party with a different limitation, or with no limitation, or that they had in one or more instances waived the limitation, was not pertinent to the issue. These mileage tickets were issued by the defendant company to large shippers and commercial travelers, and not to the general public. They were at a lower rate than the regular fare, and issued *ex mera gratia* to parties doing a greater or less amount of business upon their line. With respect to such tickets, no question of unjust discrimination can arise.

The foregoing embraces all the points argued by counsel for plaintiff in error, and all the assignments that are regarded as requiring notice. The judgment of the court below is affirmed.

(9 Colo. 333)

CLIFFORD v. DENVER, S. P. & P. R. Co.

(*Supreme Court of Colorado. November 12, 1886.*)

MASTER AND SERVANT—RAILROAD LABORER—FAILURE TO SUPPLY SUITABLE LODGING—SUFFICIENCY OF COMPLAINT.

In an action by a laborer engaged in the construction of a road, against his employer, a railroad company, for damages for breach of contract, and negligence, in that defendant failed to supply him with good and suitable board and lodging, a complaint alleging that plaintiff "was compelled to sleep on the cold, wet, and frozen ground, without anything under him except damp branches of pine or spruce trees, and without sufficient blankets or bedclothes to cover him, and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure," is good upon demurrer, as the sickness referred to is not too remote to support an action.

Error to district court, Arapahoe county.

Plaintiff was hired as a day-laborer on the construction of defendant's road. His contract provided that defendant should furnish him with "good and suitable board and lodging." The amended complaint contains the following among other averments:

"That some time after plaintiff commenced said work the camp of defendant, which was constructed by said defendant for the purpose of boarding and lodging plaintiff, and the force of hands employed by defendant company in building said wagon road, was moved further westward by said defendant, and further into the mountains on the line of said road, and to a great altitude, where the weather was cold and damp, and where plaintiff, and the whole force of hands and laborers with him, were greatly exposed, and their health greatly endangered from said exposure; and plaintiff charges and alleges that the defendant company, through its officers, agents, and managers aforesaid, wholly neglected and refused to furnish proper shelter or houses, cabins, or tents, or the necessary blankets or bedding, to protect plaintiff, and others with him, from the cold, damp, and inclement weather of said mountains and said altitude, and especially failed and neglected to provide comfortable beds and bedding to protect plaintiff and his co-employees of nights from cold, damp weather, and from the snows and cold rains then prevailing in said mountains and at said camp.

"That plaintiff and his co-employees, immediately and without delay, protested against such treatment to the said agents and officers and managers of

defendant company, and notified them that plaintiff and his co-employees would at once quit work and abandon said employment unless they were immediately, or as soon as possible, furnished with comfortable lodging and protection from such weather, and proper beds and bedding to keep them warm and comfortable at night; and that said officers, agents, and managers of the said defendant then and there agreed with plaintiff and his co-employees that if they would not leave and abandon said work, but remain at the same, that defendant, through its said officers, managers, and agents, would provide suitable and comfortable lodging and bedding and blankets for them, and that said officers, managers, and agents so promised and assured plaintiff and his co-employees, from day to day, for several days; and that plaintiff, relying on such promises and assurances, and believing that the same would be complied with by defendant, did remain in the employment of defendant, as aforesaid, and that during such time, and while plaintiff was relying on such promises and assurances of said defendant, and for two or three consecutive nights, plaintiff was compelled to sleep on the cold, wet, and frozen ground, without anything under him except damp branches of pine or spruce trees, and without sufficient blankets or bedclothes to cover him and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure, and became wholly paralyzed in his whole body, and in all of his limbs, and became wholly unconscious, and so remained for several months, whereby his whole health was permanently ruined and destroyed for life, and his constitution shattered and so broken down that he has never recovered from the same, and never will.

"That plaintiff received all of said injuries, and has endured all of said sufferings, through the carelessness, neglect, and want of proper care and diligence on the part of said defendant, through its duly-appointed and authorized officers, agents, and managers, as aforesaid, in not exercising due and proper precaution, and in violating their said promises and assurances aforesaid, in regard to furnishing the said plaintiff and his co-employees with proper lodging and beds and bedding to protect him and them from the exposure aforesaid; and plaintiff states that he could not, by any degree of care and diligence on his part, have prevented said exposure and subsequent sickness and suffering, and would have left said employment if he could have done so, and returned back to a settlement or place of shelter immediately; and but for the said promises and assurances of said defendant that proper protection should be furnished without delay.

"That said defendant wrongfully and carelessly moved plaintiff and other laborers from the first camp on the line of said road to the summit of said mountains, on the Alpine pass, a point of great altitude, and where snowstorms prevailed almost continually, and where, at best, the exposure was very great, and where the health and lives of said men and employes were continually exposed to great danger; and the said officers, agents, and managers of defendant company well knew this, but wholly failed, neglected, and refused to prepare such suitable and proper cabins, tents, and bunks and bedding for said new camp, and for the protection of plaintiff and others, before moving into said new camp, which was from twenty-five to thirty miles ahead of the first camp; and that plaintiff did not know of such gross neglect and carelessness until he reached said new camp, at the said Alpine pass, at the summit of said mountains, and was compelled to submit to such exposure for a time, or incur still greater dangers by attempting to return to a settlement or place of shelter; and plaintiff states that it was during the time he was thus compelled to submit to such exposure, as aforesaid, that he was injured in his health, as aforesaid, by the wrong and negligence above alleged."

Demurrer by the defendant, which the court sustained. Plaintiff electing to stand by his complaint, judgment was duly entered dismissing his action. To reverse this judgment the present writ of error was sued out.

H. B. Johnson, for plaintiff in error. *Teller & Orahood*, for defendant in error.

HELM, J. To sustain the judgment of the district court, counsel for defendant in error urge a single proposition, viz., that the amended complaint does not state facts sufficient to constitute a cause of action. The wording of this complaint might have been better, but we do not deem it fatally obnoxious to the foregoing objection. The action is based upon defendant's negligence, and the rules of pleading applicable did not require a statement of the exact number, quality, weight, and condition of the blankets or other covering provided. The averment that plaintiff "was compelled to sleep on the cold, wet, and frozen ground, without anything under him except damp branches of pine or spruce trees, and without sufficient blankets or bedclothes to cover him, and protect him from the cold, whereby plaintiff was taken dangerously sick from such exposure, * * *" is, in our judgment, the allegation of a material ultimate fact. It is considerably strengthened by other averments of the complaint. But, from the language of this allegation alone, it appears that no bunk or bed of *any kind* was furnished; while, under that part of it which relates to covering, evidence of such primary facts as the number and quality of the blankets provided would be admissible.

It was not necessary to allege plaintiff's want of knowledge concerning the kind of weather he encountered at the time of contracting the illness. Under the circumstances disclosed, this became an immaterial matter. There was here no acquiescence in the alleged wrongful omission. When plaintiff reached the camp on Alpine pass, he, of course, became aware of the condition of the weather. He then, also, for the first time, learned the character of the accommodations furnished. But the complaint shows that immediately upon obtaining this information he protested, and would have quit work, had not defendant promised to have the supply of beds and bedding at once made sufficient. There was thus a clear admission by defendant that the provision made in this direction was inadequate. But notwithstanding this admission, and defendant's duty in the premises, the promise which induced plaintiff to remain was not kept, nor was anything else done to increase his protection from the dangers naturally incident to the exposure.

But it is asserted that the damages or injuries referred to in the complaint are too remote. We accept the rule on this subject as stated by the authorities cited. The damages suffered must be "the actual, natural, and proximate result of the wrong committed." *Streeter v. Marshall*, 4 Colo. 535. "They must be the legitimate sequence of the thing amiss." Cooley, *Torts*, 68.

That sickness and paralysis may actually, naturally, and proximately result, and be a legitimate sequence, from sleeping several consecutive nights at the summit of Alpine pass, where "snow-storms prevailed almost continuously," on wet and frozen ground, with nothing but damp pine or spruce branches for a bed, and insufficient blankets or other covering, seems to be a reasonable proposition. We certainly cannot, purely as a matter of law, hold the contrary.

Counsel's suggestion that people frequently incur such exposure, and that neither these nor any other serious consequences follow, may be correct. But this fact, if it be a fact, is far from decisive as to the question of liability in cases like the one at bar. The principle above stated does not declare that the damage or injury must have resulted, or even that it must have been anticipated, in the particular case under consideration. On the contrary, it has been well said "that the consequences of negligence are almost invariably surprises." The expression "reasonable expectation," frequently used in this connection, is said to mean "an expectation that some such disaster as that

under investigation will occur *on the long run* from a series of such negligences as those with which the defendant is charged." Whart. Neg. §§ 77, 78, and cases cited.

The foregoing suggestions answer all of the points specifically made in argument against the complaint by counsel for defendant in error, and we discover no other objection thereto which is fatal. The judgment of the district court is accordingly reversed, and the cause remanded.

(2 Cal. Unrep. 672)

PEOPLE ex rel. VAN VALER and others v. JACOB and others. (No. 11,360.)

(*Supreme Court of California. July 15, 1886.*)

1. PUBLIC LANDS—CALIFORNIA SWAMP LANDS—PATENTS—ACTION FOR CANCELLATION—ATTORNEY GENERAL—DISMISSAL.

When a suit is instituted, in the name of the state, by the permission of the attorney general, upon the relation of the real party in interest, seeking the cancellation of a patent for state swamp lands, and the state has no direct interest in the event of the suit, the attorney general is not authorized to move to dismiss, or to withdraw his consent to the use of the name of the people, to the prejudice of the relator.

2. APPEAL—TRANSCRIPT—MISSING PAPERS—IMPROPER CERTIFICATE—MOTION TO DISMISS.

Where respondent, in his brief, suggests imperfections in the transcript because of the absence of necessary papers, and because the transcript is not properly certified, and appellant, at the hearing, files the requisite papers with the proper certificate, the motion to dismiss will be denied.

Department 1. Appeal from superior court, Tulare county.

Action brought by the attorney general, January 19, 1884, to cancel a patent issued by the state of California to the defendants, November 23, 1883, for a tract of swamp and overflowed land in Tulare county. On motion of the attorney general the action was dismissed July 11, 1885. The relators appealed to the supreme court.

The motion to dismiss the appeal was based on the fact that the clerk had not properly certified the transcript, as required by rule 4 of the supreme court, and that certain papers had been omitted; and was made under rule 13, which is as follows: "Exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing, at least five days before the hearing, or they will not be regarded; and, when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail."

The following is rule 4: "On a motion to dismiss an appeal for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of filing and undertaking on appeal, and that the same is in due form; the fact and the time of settlement of the bill of exceptions and the statement on appeal, if there be any; and also that the appellant has received a duly-certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded."

Frederick P. Stratton, Latimer & Morrow, and Wm. M. Pierson, for appellants. *Brown & Daggett*, for respondents.

BY THE COURT. The certificate of the clerk of the court below, filed at the hearing, is sufficient, and the motion to dismiss is denied.

On the authority of *People v. North San Francisco H. & R. R. Ass'n*, 38 Cal. 564, the judgment is reversed, and cause remanded.

(71 Cal. 307)

BATES v. BATES. (No. 9,586.)

(*Supreme Court of California*. November 20, 1886.)

PARTITION—NEW TRIAL—PLAINTIFF'S MOTION TO SET ASIDE DECREE IN HER FAVOR.

Where plaintiff in partition proceedings has obtained the decree asked for in her complaint, based upon and in accordance with all the facts alleged therein, and admitted by the answer, she is not entitled to a new trial upon affidavits setting forth facts tending to prove that she was mistaken in her rights when she commenced her action, and which, if they exist, are contradictory to the averments of the complaint.

Department 1. Appeal from superior court, Alameda county.

Bill for partition. Decree. Motion for new trial denied. Plaintiff appeals.

The plaintiff and appellee was the widow of A. S. Bates, deceased, her second husband; she and the defendant, Otis Bates, being the only heirs. After the husband's death, the widow, besides being unacquainted with her husband's investments, was prostrated with grief, and unable properly to instruct her counsel, who, having to make the best of her imperfect instructions, brought this action for partition in her name, assuming the property left by the husband was common property of the widow and the heir. After a preliminary decree of partition had been made in accordance with her complaint, affidavits were obtained in British Columbia tending to show that she had inherited a fortune from a first husband, and that the deceased Bates had invested part of the same in the property sought to be partitioned by her. A motion for a new trial by plaintiff, based on such affidavits, was denied.

Philip G. Galpin, for appellant.

The mistake of fact was not made known until after a preliminary decree for partition had been made. Before any notice was given of the making of that or any other decision, the error was discovered, and a motion was made for a new trial. Had it been granted, the plaintiff would have amended her complaint so as to ask partition of the common property only, and a new decree could have been made to conform to the truth. The appellant asks for a new trial on the ground of subsequently discovered evidence, and insists that the court below did not lose jurisdiction to correct the evident mistake of fact so long as a motion for a new trial was pending. The appeals are from the judgment, and from the order denying a new trial. The court had power to grant a new trial on the ground of subsequently discovered evidence, and no necessity exists to file a new complaint to set aside the judgment.

A. M. Rosborough, for respondent.

MCKINSTRY, J. The record brought here contains no matter which would justify the reversal of the final judgment. There are many reasons why the order denying a new trial should not be disturbed. It is enough to say, however, that a plaintiff who has obtained exactly the decree to secure which the action was brought and prosecuted, and which is based upon, and is in accord with, all the facts alleged in the complaint and admitted by the answer, is not entitled to demand a new trial, upon affidavits setting forth matters which may tend to prove that she was mistaken in her rights when she commenced her action. It is perfectly apparent that a new trial of the issues

must result in the same decision and interlocutory judgment. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision, etc. Code Civil Proc. 656. The former decision may be vacated, and a new trial granted, on the application of the party "aggrieved," for certain causes, (specified in section 657.)

Here the affidavits of the plaintiff do not tend to prove (1) irregularity in the proceedings of the court or opposite party; or (2) "accident or surprise," within the meaning of the third subdivision of section 657, Code Civil Proc.; or (3) newly-discovered evidence, which could have been given under the pleadings; or (4) insufficiency of the evidence; or (5) error in law occurring at the trial. The real purpose of the plaintiff here, as clearly appears, was to have the decision and judgment set aside, that she might amend her complaint, and thus be enabled to prove facts which, if they exist, are contradictory of the averments of the complaint on which the trial was had. She certainly was not entitled to a new trial of the issues made by the pleadings on which the judgment was based.

Judgment and order affirmed.

We concur: MYRICK, J.; THORNTON, J.

(71 Cal. 310)

BOARD OF COM'R'S OF FUNDED DEBT SINKING FUND v. BOARD OF TRUSTEES OF CITY OF SACRAMENTO. (No. 11,560.)

(*Supreme Court of California. November 26, 1886.*)

CONSTITUTIONAL LAW—RETROACTIVE OPERATION—MUNICIPAL CORPORATION—COMMISSION
—CONST. CAL. 1879, ART. 11, § 13; ART. 22, § 1.

The prohibition of Const. Cal. 1879, § 13, art. 11, providing that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever," is not retrospective, and, notwithstanding section 1, art. 22, providing that "the provisions of all laws inconsistent with this constitution shall cease upon the adoption thereof," a law establishing such a commission prior to 1879 is not repealed, nor are proceedings by such board thereafter prohibited.

In bank. Appeal from superior court, Sacramento county.

Application of the board of commissioners of the funded debt sinking fund to compel the board of trustees of Sacramento city, by mandate, to levy a certain tax, under an act of the legislature of 1872. The court below issued the writ, and the trustees appealed. The facts are sufficiently stated in the opinion.

W. A. Anderson and E. C. Hart, for appellants. *H. O. & W. H. Beatty*, for respondents.

MCKINSTRY, J. This is an application of the board of commissioners of the funded debt sinking fund to compel the board of trustees of Sacramento city, by mandate, to levy a certain tax which is ordered to be levied by an act of the legislature passed in 1872. The court below issued an alternative writ, and the city trustees made a response, not denying any fact set up in the petition and affidavit, but setting up matters of law only as a response to the alternative writ. The court overruled the legal objections raised, and made the writ absolute. From this the trustees appealed.

Appellants contend the petition is fatally defective, in that it does not appear therefrom that petitioners have not a plain, speedy, and adequate remedy at law, and in that it does not appear therefrom that defendants have any municipal function to perform. The facts alleged in the petition show that there is no other plain, speedy, or adequate remedy. The powers and

duties of the defendants are declared and determined by a public statute, of which we take notice.

Appellants further contend that petitioners have no legal capacity to maintain this action. The petitioners are parties "beneficially interested," within the meaning of section 1086 of the Code of Civil Procedure. *County of Contra Costa v. Board of Sup'rs*, 26 Cal. 641.

The main contention of appellants is that the act of March 25, 1872, (St. 1871-72, p. 546,) was repealed on the adoption of the constitution of 1879, by reason of the clause in section 1, art. 22, of that instrument, which reads: "The provisions of all laws inconsistent with this constitution shall cease upon the adoption thereof." It is said that the provisions of the act of 1872 are "inconsistent" with section 13, art. 11, of the constitution. That section reads: "The legislature shall not delegate to any special commission, private corporation, company, association, or individual any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."

That the prohibition is prospective, and applies to the legislature created by the constitution in which the prohibition is found, seems too clear for argument. The prohibition became operative with the rest of the constitution, and could only limit the power of the legislature provided for in the constitution. Its language does not purport anything more or different. This much being conceded, is necessarily follows that the act of 1872 is not inconsistent with the section of the constitution above quoted. It is not pretended that it is inconsistent with any other provision of the constitution.

The prohibition of future enactments, of a particular character, by houses of the legislature brought into existence by the same constitution which contains the prohibition, cannot be held to annul past legislation without violating the plain meaning of the language. It may be that some provisions of the constitution prohibit future action, authorized in the past by a statute in force prior to the adoption of the constitution. In such cases, the prohibition (it might be argued) is pointed at such future action, and is not a repeal of the statute which originally authorized it. Thus, "no county-seat shall be removed unless two-thirds of the qualified electors shall vote in favor of such removal." Section 2, art. 11. This may not only prohibit any legislation attempting to authorize a removal, without the two-third vote, but may prohibit also the removal itself. Other examples might perhaps be put to illustrate the distinction. But, in each case, the meaning of the prohibitory clause must be ascertained by reference to its subject-matter, and to the other provisions of the constitution. There is no clause of the constitution which can be construed to prohibit proceedings, under the prior law, by the board of commissioners established by the act of 1872, or by other like boards.

In their original points counsel for appellant say: "It is contended by respondents that sections 12 and 13 of article 11 are not retrospective. Standing alone, *this would be true*, and there are numerous authorities sustaining that construction; but the plain intent to make them retroactive is disclosed by section 1 of article 22 of the constitution of California." In their brief in reply, however, counsel seem to contend that section 13, art. 11, of itself, and independent of section 1, art. 22, of the constitution, repealed the act of 1872. For the reasons above set forth, this view cannot be upheld.

Our conclusion is that the act of 1872 is not inconsistent with the constitution, and that it will remain in full force until altered or repealed by the legislature. Const. art. 11, § 1.

Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.; SHARPSTEIN, J.
v.12p.no.7—15

(71 Cal. 351)

PEOPLE v. LAVELLE. (No. 20,203.)*(Supreme Court of California. December 2, 1886.)***CRIMINAL LAW—EVIDENCE—OPINION—APPEARANCE AS TO BEING RATIONAL.**

In the trial of a defendant charged with felony, a question propounded to a witness, who was present at the time of the arrest, "What was the appearance of this man [the defendant] at that time, with reference to his being rational or irrational?" is admissible, on the ground that the evidence sought to be elicited thereby is as to a fact,—namely, his appearance at the time,—and not the opinion of the witness as to the sanity of the defendant, based upon an acquaintance with him.

In bank. Appeal from superior court, Tulare county.

Information for an assault with intent to commit murder. Judgment for defendant. The people appealed. The facts are sufficiently stated in the opinion.

Oregon Samlers, for appellant. *W. B. Wallace*, Dist. Atty., for respondent.

MYRICK, J. The defendant was accused by information of the crime of an assault with an intent to commit murder. Testimony had been given concerning the circumstances of the alleged assault. One Keener, a deputy sheriff, who was present at the time of the arrest, which immediately followed the alleged assault, was asked the question: "What was the appearance of this man [the defendant] at that time, with reference to his being rational or irrational?" This was objected to on the ground that it did not appear that the witness was competent to testify, from appearances, as to whether the man was rational or irrational. It is urged on this appeal that the court erred in overruling the objection, because the witness had not shown himself to be competent within subdivision 10, § 1870, Code Civil Proc. The evidence sought to be elicited was not the opinion of the witness as to the mental sanity of the defendant, based on an acquaintance with him, but was rather as to a fact, namely, his appearance at the time. The appearance of a person at a given time is one thing; the opinion of a witness as to the mental condition of that person, based on an acquaintance with him, is quite another.

No error appearing, the judgment is affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.

(72 Cal. 17)

ROWLAND v. MADDEN and others. (No. 11,220.)*(Supreme Court of California. November 29, 1886.)***EXECUTORS AND ADMINISTRATORS—ACTIONS AGAINST—PLEADING ISSUE—PRESENTATION OF CLAIM—DENIAL—CODE CIVIL PROC. CAL. § 475.**

Where, in a suit against executors upon a claim against decedent, plaintiff alleges in his complaint that on the ninth day of December, 1881, his claim, duly verified, was duly presented to defendants, as executors, for allowance, and defendants in their answer "deny that on the ninth day of December, at said city and county, or elsewhere, the claim of the plaintiff for \$36,000. * * * or the claim as in plaintiff's complaint set forth, or the claim upon which this action is founded, or any claim whatever, was duly presented to these defendants for allowance," the allegation of presentation of the claim to the executors is material to plaintiff's complaint, and the denial of it in the answer, though open to criticism, is sufficient to raise an issue under Code Civil Proc. Cal. § 475.

In bank. Appeal from superior court, San Francisco.

Action against executors. Judgment for defendants. Plaintiff appeals.

Moses G. Cobb, for appellant. *A. N. Drown* and *W. H. Fifield*, for respondents.

SHARPSTEIN, J. The plaintiff sues the defendants as executors of the last will and testament of Jane Rowland, deceased, to recover the sum of \$36,-

000, which he alleges was justly due to him from said testate at the time of her decease; and he further alleges that on the ninth day of December, 1881, said claim, duly verified by the oath of plaintiff, was duly presented to the defendants as executors of the will of said Jane Rowland, deceased, for allowance. The defendants in their answer deny that on the ninth day of December, 1881, the claim of plaintiff for said sum, or any claim whatever, was duly presented to these defendants for allowance, or that any proper or legal claim, or any of the matters or things in the plaintiff's complaint alleged, has been at any time duly or otherwise presented to these defendants for allowance. Upon this issue the court finds that the alleged claim of plaintiff was not, nor was any claim verified by the oath of plaintiff, duly or otherwise, presented to defendants, as executors as aforesaid or otherwise, for allowance on the ninth day of December, 1881, or at any other time.

The finding is not against the evidence, and appellant does not attack it on that ground. He contends that the pleadings do not raise any such issue; that the allegations of the complaint as to that matter, are wholly immaterial; but, if material, they are not sufficiently denied to raise an issue.

As to the materiality of the allegations we entertain no doubt. The case differs but little, if at all, in principle, from *Lathop v. Bampton*, 31 Cal. 17, in which it was held that the due presentation of the claim, in that case, to the executors, was a prerequisite of the right to maintain an action against him.

Treating the allegation as a material one, was it sufficiently denied to raise an issue? The defendants in their answers "deny that on the ninth day of December, at said city and county, or elsewhere, the claim of the plaintiff for the sum of \$36,000, * * * or the claim as in plaintiff's complaint set forth, or the claim upon which this action is founded, or any claim whatever, was duly presented to these defendants for allowance." It appears by the record that this was treated as a denial, sufficient to raise an issue upon the plaintiff's allegation of a presentation of his claim to the defendants. It is doubtless obnoxious to criticism, but, under section 475, Code Civil Proc., the defect must now be disregarded.

Other questions are discussed by counsel upon which it is unnecessary to express any opinion at this time.

Judgment and order affirmed.

We concur: MORRISON, C. J.; MCKINSTY, J.; MYRICK, J.; THORNTON, J.

(71 Cal. 330)

LARKIN v. LARKIN. (No. 11,348.)

(*Supreme Court of California. November 29, 1888.*)

HUSBAND AND WIFE—DIVORCE—APPEAL—WIFE'S COSTS.

Where, in an action by a husband for divorce, judgment is given against the defendant, and a motion by her for a new trial is denied, and she appeals from the judgment and the order, on motion for new trial, the court may, in its discretion, by special order made after final judgment, order plaintiff to pay the attorney of defendant a sum for costs of her appeal.

In bank. Appeal from superior court, Alameda county.

Appeal from special order, after decree of divorce, allowing wife's costs.

Thos. H. Smith and Mastic, Belcher & Mastic, for appellant. *Charles F. Hanlon*, for respondent.

SHARPSTEIN, J. This is an appeal from an order made after final judgment in an action of divorce. The judgment was in favor of the plaintiff, and the defendant appealed from it, and the order denying her motion for a new trial, to this court. After taking such appeal she applied to the court below for an order that the plaintiff pay to her (defendant) a reasonable sum

for costs and counsel fees with which to prosecute her said appeal. The motion was heard on the affidavits of the respective parties, and an order made that the plaintiff pay the attorney of the defendant \$175 as costs of her said appeal. From that order this appeal is taken.

In *Ex parte Winter*, 11 Pac. Rep. 630, it was held that the superior court had the power to make such an order, and to enforce compliance with it. Appellant, on this appeal, insists that the facts before the court were insufficient to justify the order. As we view it, there is sufficient in the record to sustain the action of the court. Order affirmed.

We concur: MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.

(71 Cal. 829)

GRANT v. LAMORI. (No. 11,712.)

(*Supreme Court of California. November 29, 1886.*)

APPEAL—FILING TRANSCRIPT—EXTENSION OF TIME.

Where a party who has taken an appeal obtains the signatures of four of the justices to an order extending the time, before the day on which the time expired for filing a transcript of the record, but this order was not filed with the clerk, through inadvertence, until after the time expired, and after a notice of motion to dismiss the appeal was given, a motion to dismiss will be denied.

In bank. Appeal from superior court, Los Angeles county.

Motion to dismiss under rule 2, subd. 3.

H. Allen, for appellant. *Howard & Scott*, for respondent.

BY THE COURT. Motion to dismiss appeal. The 40 days within which to file the transcript expired on the seventeenth of June, 1886. On the nineteenth of June, no transcript having been filed, and no order of record extending the time, the respondent moved to dismiss the appeal. Before the seventeenth of June the appellant obtained the signatures of four of the justices to an order extending the time, but this order was not filed until after the notice of motion to dismiss was given; it was filed, however, on June 21st. We are satisfied that the omission of the appellant to file the order of extension with the clerk was through inadvertence; and, under such circumstances, we do not think the ends of justice would be subserved by enforcing a strict rule, and dismissing his appeal.

The motion is denied.

(71 Cal. 831)

HITCHCOCK v. HASSETT, Assignee, etc. (No. 8,403.)

(*Supreme Court of California. November 29, 1886.*)

LANDLORD AND TENANT—RENT—LIEN.

A landlord, in California, has no lien for rent reserved, or for the value of the use and occupation of the property leased; and an agreement made by a lessee of land and sheep, to deliver or ship wool to his lessor in payment of or as security for rent, creates no interest in or lien upon wool not shipped as against the lessee's assignee in insolvency. THORNTON, J., dissenting.

Commissioners' decision.

In bank. Appeal from superior court, Sonoma county.

James W. Oates, for appellant. *J. H. McGee*, for respondent.

SEARLS, C. This is an action to recover possession of personal property. A demurrer was interposed to the complaint, which was sustained by the court; and, plaintiff declining to amend, final judgment was entered in favor of defendant, from which plaintiff prosecutes this appeal.

The complaint shows that in 1878 plaintiff leased to one Arthur Thing, for a term of five years, certain premises in the county of Sonoma, with 1,300

sheep and other stock and property, at an annual rental of \$1,540, payable one-half on the fifteenth of June in each year, and the remaining half on the first of November in each year. The lease provided that the wool sheared from the sheep should be delivered at Cloverdale by the lessee in the name of the lessor, plaintiff, to be sold by the latter, and the rent to be retained and the balance to be paid to the lessee.

In August, 1879, plaintiff, by a separate lease, let to Thing for three years, from May, 1879, 2,700 sheep additional, at an annual rental of \$516, payable in May and November of each year. This last lease provided that the lessee should not remove the sheep from the ranch, and that the wool arising from the sheep should be marked on the ranch in the name of the lessor and shipped to him at Cloverdale or Healdsburg, as the lessee might elect.

The rent due plaintiff on the first of November, 1881, was \$1,028. The lessee, Thing, sheared, and had on the ranch ready to deliver to plaintiff, 5,500 pounds of wool, when, on the twenty-ninth day of October, 1881, he (Thing) filed his petition in insolvency, and was duly adjudged an insolvent by the court. Defendant was appointed assignee in insolvency, took possession of all the property, and refused to deliver the wool to plaintiff upon demand, or to pay the rent due. The wool is of the value of \$1,500. Plaintiff demanded judgment for possession of the wool, or the value thereof if possession could not be had; and, *second*, if not entitled to possession of the wool, that a lien be established thereon in his favor for the rent due, and that defendant, as assignee, be ordered to pay the sum of \$1,208, and interest, out of the proceeds of the sale of the wool.

It is apparent from the foregoing statement that the sheep and other property were leased for a rent reserved or covenanting to be paid in cash, at stated intervals. No interest was retained by the lessor in the wool, but it was made a medium through which, when delivered to the lessor, payment of the rent was to be made. Under one of the leases the wool was to be sold by the lessor, and the rent to be retained out of the proceeds of the sale, and the balance to be paid to the lessee. The other lease is silent as to what disposition is to be made of the wool; but as the rent is fixed, and is payable in cash, it must be presumed it was to be delivered either in payment at its cash value, or as security for the payment of the rent due.

A landlord in this state has no lien for rent reserved, or for the value of the use and occupation of property. The plaintiff, under his lease, had no property in the wool, as such, until it was sheared from the sheep, and delivered to him, under one of the leases, and under the other until marked and shipped to him. The property was not of the character specified in section 2955 of the Civil Code as that upon which a valid mortgage, usually termed a chattel mortgage, could be made, without delivery of possession; and, had it been, there was no attempt to execute such a mortgage. It was not pledged, and could not have been pledged without delivery of possession to the pledgee or a pledge-holder. Civil Code, § 2988.

If we treat it as an agreement to pledge, and assume the complaint to be broad enough in its allegations to warrant a decree enforcing it as such, the case is not altered. An agreement to pledge, as distinguished from an actual pledge, creates no lien as against a creditor of the intended pledgeor, or as against his assignee in bankruptcy or insolvency.

Equity will not regard as done that which one has agreed to do, when to so regard it would be to the injury of third persons who have acquired rights before the execution of the agreement. Jones, Pledges, § 28. "An agreement to deliver property in pledge amounts to nothing as security. The pledgees acquires no right of property until delivery is actually made." "A delivery cannot be dispensed with by a written agreement that the party making the pledge will hold it as the bailee of the pledgee." Jones, Pledges, § 29, and cases cited.

It follows that the plaintiff had no such interest in the wool, or lien thereon, as entitled him to a recovery, or to a judgment establishing a lien thereon in his favor, against the defendant, as assignee in insolvency of Arthur Thing, the lessee, and the order sustaining the demurrer was proper, and the judgment appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

MCKEE, J., concurring in the judgment. THORNTON, J., dissenting.

(71 Cal. 300)

In re Estate of CROWLEY, Deceased. (No. 9,574.)

(Supreme Court of California. November, 1886.)

1. HOMESTEAD—RIGHTS OF WIDOW TO—CALIFORNIA—LEASE OF HOMESTEAD.

In proceedings by a widow to have homestead set apart to her out of her deceased husband's estate under the California law, it appeared as follows: During the husband's life-time the husband and wife recorded their joint homestead declaration, claiming a tract of land, and two houses thereon, as a homestead. Of this tract the larger part was at that time rented to a tenant, who farmed it, and occupied the farm-house under a lease from the husband's ancestor, the term of which was unexpired at decedent's death. The husband, till his decease, occupied the other house, with five acres of land adjoining it. Held, the widow was entitled to have set aside to her as a homestead, only the house in which she and her husband lived, together with the five acres on which it was situated.¹

2. APPEAL—REVIEWING EVIDENCE—SETTING ASIDE WIDOW'S HOMESTEAD.

The supreme court of California will review the evidence upon an appeal from a judgment confirming the appraiser's report in proceedings to set aside a widow's homestead.

Department 1. Appeal from superior court, Napa county.

Proceedings by widow to have a homestead set aside. Order confirming appraisers' report. Heirs appeal.

One G. W. Crowley, by his will, devised a farm of 185.73 acres to his son William H. Crowley, (the decedent in the case,) subject to the proviso that no part of his estate (which included other property) should be distributed until five years from his death; the income during that period to be applied to the support of his wife and children, and the payment of taxes and expenses. Before his death he erected a dwelling-house on a portion of said land for the use of said W. H. Crowley and his wife, Mattie, (the widow,) and permitted them to take up their residence therein. On October 13, 1882, said G. W. Crowley leased said farm, "excepting the house now occupied by William H. Crowley, with five acres of land adjoining said house," to one J. C. Meredith for the term of one year. This lease was in writing, and signed by G. W. Crowley and W. H. Crowley, and did not expire till after the death of W. H. Crowley. Under it Meredith farmed the land, and occupied the farm-house, till after the death of W. H. Crowley. In the same month said G. W. Crowley died. On the twenty-fourth March, 1883, W. H. and Mattie Crowley, while living in the new house before mentioned, selected said farm as their homestead, and recorded their joint homestead declaration. On the seventh June, 1883, while residing in the said house upon said land, said W. H. Crowley died. The widow obtained a judgment of the superior court affirming the appraiser's report, setting aside to her as a homestead the house in which she and her husband lived, and 125 acres out of the land above described, from which judgment Jane Crowley, widow of said G. W. Crowley, appeals.

¹ See King v. Goetz, (Cal.) 11 Pac. Rep. 656, and note.

F. E. Johnston and Thos. P. Stoney, for appellant. *Freeman, Bates & Rankin and Joy & Ham*, for respondent.

McKINSTRY, J. The appeal is from a judgment confirming the report of appraisers setting apart a homestead, and was taken within 60 days. We can review the evidence. Code Civil Proc. 939.

W. H. and Mattie Crowey, when they filed their declaration of homestead, did not reside in a dwelling-house "situated" on any other than the five-acre tract mentioned in the findings and evidence, within the meaning of section 1237 of the Civil Code. The adjoining 180-acre tract had been leased by the ancestor of W. H. Crowey for an unexpired term, and was in the exclusive possession of Meredith, the lessee, who resided in the dwelling-house on the demised premises.

It is urged by respondent that, when land is occupied as a homestead, the fact that a part is rented out, or is used for business purposes, does not vitiate the homestead, nor limit the area of land protected by it. The 180-acre tract was never occupied by the homestead claimants, and it is not necessary here to decide what would be the effect of leasing a part of the actual homestead after the homestead should be declared.

Two California cases are cited as supporting the judgment of the court below. Of these, *Ackley v. Chamberlain*, 16 Cal. 181, was a case where the homestead claimant resided on a tract of 160 acres, using the whole, with the barns and outhouses, for farming purposes. The principal occupation of the claimant being the working of the farm on which he resided with his family, it was held that the mere fact that he also kept a tavern at his residence did not deprive him of his right to claim as a homestead the property occupied by himself and family before he used it as a hotel. Under the circumstances, the accommodation of travelers by a farmer was said not to be inconsistent with the main purpose of taking up the 160 acres, and the erection of the dwelling-house. In *Ornbaum v. His Creditors*, 61 Cal. 457, it was held by a majority of the justices of this court that the claimant had sufficient possession and user of all the land described in his homestead declaration when he filed it.

Section 1237 of the Civil Code defines the homestead as consisting of "the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." The homestead is selected by a declaration in which the claimant is required to state that he or she "is residing on the premises [described,] and claims them as a homestead." Civil Code, 1263. The act of 1860 exempted from forced sale, etc., "the homestead, consisting of a quantity of land, together with the dwelling-house thereon, * * * to be selected by the husband and wife, or either of them," etc. The selection was made by a declaration, in which the claimant was required to state that "he is, at the time of making such declaration, residing with his family on the premises, and that it is his intention to use and claim the same as a homestead."

In *Gregg v. Bostwick*, 33 Cal. 221, it was held, in accordance with all the decisions, that the word "homestead," in the statute of 1860, was used in its ordinary and popular sense. "Whatever is used, being either necessary or convenient, as a place of residence for the family, as contradistinguished from a place of business, constitutes the homestead." The use or occupation of the land must be by those residing in the house, and must be appropriate to and connected with the occupation of the dwelling-house. It is impossible to conceive of land constituting part of a "homestead" (as the term is commonly employed) of a family residing in a certain dwelling-house, which is not used at all by those living in the dwelling-house, and the right to use or occupy which is in no manner annexed to or connected with the occupancy of the house, but which, to the contrary, is used and possessed by the occupants

of another dwelling-house, who alone have the right to the use and possession of the land, and is part of the "home" of those residing in *that* house.

As was said in *Gregg v. Bostwick*: "The written declaration for which the statute provides does not of itself impress upon the land the quality of a homestead. It was not intended for any such purpose, but merely for the purpose of a public record of what is in fact the homestead. The premises to be described in the declaration are such, and only such, as the parties are residing on and using as a homestead." And in *Mann v. Rogers*, 35 Cal. 319, it is said that, when part only of the land described in the homestead declaration is actually used and appropriated as the "home" of the family, the remainder, not so used and appropriated, constitutes no part of the homestead claim. To the same effect is *Estate of Delaney*, 37 Cal. 179.

It is urged that cases decided while former homestead acts were operative are not authority since the last provisions of the Code relating to the subject took effect. But the differences of the language of the various statutes are not such, in our view, as to affect the decision of the question we have been considering.

In *Aucker v. McCoy*, 56 Cal. 527, it was held that, under section 1263 of the Civil Code, to constitute a valid homestead, the claimant must actually reside on the premises when the declaration is filed; that is, as applied to the facts of that case, his "residence," in the popular signification of the word, must extend to the land claimed to constitute part of the homestead. We say that a man resides on a *farm*, or on a *lot*, by which is meant a farm or lot which has a relation, well understood, to the house in which he makes his home. In *Tiernan v. His Creditors*, 62 Cal. 289, it was decided that where one lived in half of a double house, the other half having been always occupied by his tenants, the half so occupied was no part of his homestead. *Dorn v. Howe*, 52 Cal. 635, seems to have recognized the rule that a claimant must "reside" on the "premises" claimed as a homestead.

None of the cases heretofore decided in this state go to the point of holding that one can claim, as part of his homestead, land entirely disconnected from and having no relation, as to its use or possession, with the occupancy of the dwelling-house. If the question were entirely a new one, we would have no difficulty in construing the sections of the Code as excluding from the homestead, land which was not in the possession nor under the control of the claimant when the declaration was filed, but was then actually possessed and controlled by another, claiming a right to the exclusive possession and control of it, and which was appurtenant to *his* dwelling-house.

There should have been set aside to Mattie Crowey, as a homestead, the house in which she and her husband resided when their declaration was filed, together with the tract of about five acres on which the house is situated.

Judgment reversed, with direction to the court below to enter a judgment in accordance with the foregoing opinion.

We concur: MYRICK, J.; THORNTON, J.

(71 Cal. 349)
HEYWOOD, Ex'r, etc., v. BERKELEY LAND & TOWN IMP. ASS'N and others.
(No. 8,296.)

(*Supreme Court of California*. December 1, 1886.)

FERRY—LEASE—FORFEITURE—CONTINUOUS USE.

In an action for forfeiture of a lease of a wharf for covenant broken, a finding that "the leased premises have been used, in good faith continuously, for the usual and ordinary business of a ferry to and from San Francisco," will not be set aside, where it appears that the defendant's ferry-boat, being levied upon by a United States marshal under execution against defendants, failed to run for a month, and that in the interval a schooner ran irregularly, and carried all the freight that was brought for ferriage, and that the money paid as rent was nominal; the object of the lease being to enhance the value of neighboring lands of lessor and lessee.

In bank. Appeal from superior court, Alameda county. On rehearing.
See S. C. 11 Pac. Rep. 246.

Action of *assumpsit*. Judgment for plaintiff. Defendant appeals.

The plaintiff seeks to enforce the forfeiture of a lease for breach of covenant by the lessee. The lease is of a wharf or landing-place at Berkeley. The lessor and lessee are both owners of lands around the demised premises. The lease contained a covenant that "the leased premises shall be used in good faith, continuously, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and shall not be used for any other purpose whatever." The consideration was one dollar; the object of the lease being to establish a ferry which would enhance the value of the neighboring property of the parties. At the time of the leasing, the lessee had been using the leased premises in connection with a ferry established by it, and was under a continuous contract with the defendant the Standard Soap Company to land, at the wharf, goods of that company. The Standard Soap Company has its factory near the wharf, and is doing business to the extent of nearly \$300,000 per annum. At the time of the leasing, April 4, 1877, the lessee had expended \$15,000 upon the leased premises, and the service of the ferry was performed by the lessee with a steamer which had cost the lessee \$45,000. The lease is for a term of 10 years, with covenant of renewal for another term of 10 years. On April 1, 1880, the steamer of the lessee, after having made one trip, was seized by the United States marshal under process from the United States district court, and was retained in the custody of the marshal. During this interval she made no trip. April 29, 1880, she was sold to defendant Thomas, the president of the Standard Soap Company. She resumed her trips on the same day, and has ever since regularly performed the ferry service. On the same twenty-ninth day of April the lease was assigned to the president of the Standard Soap Company. While the steamer was in the hands of the marshal, a schooner, Nicotine, ran to the wharf in question, whenever weather permitted,—was sometimes gone a week, sometimes half a day, according to the wind and weather. She made seven or eight trips in all. She carried no passengers, and only freight from the Berkeley side; she had no regular place to run from on the San Francisco side. Her master had no contract to do the ferry business while the steamer was tied, but ran to that wharf of his own free will, and as a matter of money; doing other business, and going off to other landings. As soon as the steamer resumed her trips all the regular freight business returned to it, and from that time "this business has improved." Under these circumstances the court below found, as an ultimate fact, that "the leased premises" had "been used, in good faith, continuously, for the usual and ordinary business of a ferry."

Selden S. & Geo. T. Wright, for appellant. *Edward J. Pringle*, for respondent.

BY THE COURT. The court below found "the leased premises in the complaint described have, since the first day of April, 1880, been used, in good faith, continuously, for the usual and ordinary business of a ferry to and from the city and county of San Francisco, and for no period since the first day of April, 1880, were the leased premises not used for the business or the purpose of a ferry;" and, as conclusion of law, the court found that the said lease was not and is not forfeited; that the defendants do not unlawfully withhold or detain the said leased premises from the plaintiff. We are of opinion that the finding of fact is justified by the evidence, and that no forfeiture was incurred. Judgment and order affirmed.

(14 Or. 165)

MARTIN v. MARTIN. Defendant, and another, Receiver.

(Supreme Court of Oregon. November 15, 1886.)

1. RECEIVER—COMPENSATION—REDUCED ON APPEAL.

A receiver appointed by the court in a partnership suit, shortly after his appointment sold the business to a firm to which the partnership was indebted, and agreed to run the business for the new firm at a salary of \$200 a month. Such firm furnished his bonds, and paid his traveling expenses, and all he had to do as receiver was to collect the debts of the old firm when traveling for the new firm. *Held*, that an allowance of \$50 a month was sufficient for such services, and the allowance by the court of \$2,400 for eight months was excessive.

2. SAME—EQUITY—APPEAL—ORDER AFTER DECREE—FACTS ON APPEAL—RULE 14, OCTOBER TERM, 1885—CIVIL CODE OR. § 393.

Proceedings on the application of a receiver for compensation, brought after decree in a partnership suit, are not affected by Civil Code Or. § 393, as amended in 1885, as to excepting to the court's finding of facts, but are governed by rule 14, October term, 1885, of the supreme court, Oregon; and, under this rule, if the questions of fact have been made a record in the form of a bill of exceptions, the appellate court will review the order fixing the receiver's allowance.

Appeal from circuit court, county of Multnomah.

Partnership suit. Appeal from order for receiver's allowance.

W. B. Gilbert, for appellant. Emmett B. Williams, for respondent.

THAYER, J. This appeal is from an order of allowance made by said circuit court in favor of the respondent, Taggart, as receiver of partnership property in the case of *E. Martin v. Thomas Martin*. Said last-named persons were partners in the wholesale liquor business at Portland, under the firm name of E. Martin & Co. E. Martin commenced a suit in said circuit court against said Thomas to dissolve the partnership, and to appoint a receiver to wind up its affairs. A decree for its dissolution was obtained, and the respondent was appointed such receiver, and he afterwards entered upon the discharge of his duties, taking charge of the assets of the concern, which consisted of a stock of liquors on hand at the time of the dissolution, and accounts and bills receivable in favor of the firm, and other property. The respondent had, prior to his appointment, been residing at San Francisco, California, and he came to Portland at the instance of E. Martin & Co., of San Francisco, composed of D. V. B. Henarie and P. J. Martin, for the purpose of taking charge of the business of E. Martin & Co., of Portland; said last company being in a condition of insolvency, and being indebted to the San Francisco company in the sum of about \$50,000. But the Portland company could not agree in regard to turning over its business to him, and the suit for the dissolution was commenced. Immediately after the respondent's appointment as such receiver, he sold the whole stock of merchandise belonging to the Portland firm to the San Francisco firm for \$20,000, which was credited on the indebtedness from the former firm to the latter, and the business was turned over to the latter firm, and continued in the name of E. Martin & Co., and the respondent was employed to manage the same at a salary of \$200 a month, and a promise of a share of the profits of the business; the said respondent continuing also as receiver. After the period of some 28 months the respondent filed his final report, showing a balance in his hands of \$801.20, and asked the court to fix his compensation for his services. The appellant thereupon filed objections to his being allowed anything, and alleged that during the said time he had been receiver of the old firm of E. Martin & Co., of Portland, he was also acting as manager of the new firm of E. Martin & Co., and that by a special agreement between him and the last firm he was to accept the appointment of receiver, and discharge the duties thereof, for the compensation they were to pay him on account of his employment with them, and was to make no charge for any service he should perform as receiver,

and that the most of his duties as receiver had been discharged by their other employes. This was denied by the respondent, and thereupon testimony was taken in regard to the matter, which was put in the form of a bill of exceptions, and duly certified to this court, after having been allowed by the judge of the court who tried the matter. The circuit court heard the case upon the objections, allegations, denials, and testimony, and on the eighteenth day of January, 1886, decided and allowed to the respondent, as such compensation, the sum of \$2,400, from which allowance this appeal is taken.

A receiver, under the laws of this state, is a person appointed by a court or judicial officer to take charge of property during the pendency of a civil action, suit, or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct. Section 1028, Civil Code. There is no compensation fixed by the statute, and, in the absence thereof, we think the court has the right to allow a reasonable compensation; and, as the receiver is directly under the control of the court that appoints him, such court is in a better condition to judge as to the amount which would be reasonable, in such a case, than an appellate court. Still we believe that this court has a supervisory jurisdiction over the circuit court in such matters, and should exercise it when the justice of the case demands. Otherwise an estate might be frittered away, and the creditors receive no benefits therefrom. The allowance to the respondent in this case was a final order, affecting a substantial right, and made in a proceeding after decree, and must therefore, for the purpose of being reviewed, be deemed a decree. Section 525, Civil Code.

But we are met with a difficulty at this point, arising from a neglect upon the part of the appellant to except to the court's finding of facts, as required by section 393 of the Civil Code, as amended in 1885. The respondent's counsel claims that the findings have, in accordance with the amendment, the conclusiveness of a verdict of a jury, and not having been excepted to, cannot now be questioned. The amendment of 1885 changed the practice materially respecting the trial of equity cases before the court,—has made it conform very much to the trial of an action. I judge that the mode of procedure now is to serve exceptions to the ruling of the court at the trial upon the points of law, and to make up a regular bill of exceptions as in a law case, and which must also include any exceptions a party may desire to save to the finding of facts by the court. This course will save the necessity of bringing to this court any more of the testimony than that upon which the finding was made that is excepted to. If this practice is observed it will relieve the case of a great mass of testimony relating to findings of fact not excepted to. But we have concluded that the matter before us is not affected by the amendment; that the amendment was only intended to apply to ordinary suits in equity, and not to cases where the trial court is merely called upon to inquire into and adjust a collateral matter in nowise affecting the merits of the suit in court.

This was merely a question as to the amount of compensation the court should allow to its officer, like the adjustment of a bill of costs and disbursements; and that is special in its character. It is true that, for the purpose of a review, it is to be deemed a decree; but the Code made no provision as to the manner of getting the facts or evidence before this court in case of a review of the order complained of. In order to establish the practice in such cases, this court, at the October term, 1885, adopted a rule upon the subject, which is published among the rules then made, and which provides as follows: "Rule 14. The mode of revision of final decisions of the circuit court, where the course of proceeding is not specifically pointed out by the Civil Code, shall be by appeal, as in case of appeals from judgments at law; and questions of fact shall not be considered upon such appeal unless made a record in the form of a bill of exceptions."

The appellant in this appeal has, either by accident or design, substantially complied with that rule, and we are of opinion that we may properly review the question in the case in accordance therewith, and that the course and practice established by the rule should obtain in this class of cases. They are usually disposed of summarily, involve a mere inquiry regarding a single matter, and, if a review of the decision upon the question is desired, the proofs before the lower court can be included in a statement, and the matter reviewed here. It is a simple mode of reviewing that class of orders, and we do not think that said section 398, originally or as amended, was intended to include such matters.

The matter, upon its merits, presents a delicate question to determine. We dislike very much to interfere with the determination of the circuit court regarding it, yet we recognize the fact that the parties interested in the estate of which the respondent was appointed receiver have rights that should have been observed. The money paid the receiver belongs to those parties, and any reckless or extravagant allowance to the receiver deprives them of a fund in which they are interested pecuniarily. We have examined the testimony included in the statement allowed by the judge, and are of the opinion that the allowance made by the court to the respondent as compensation for his services as receiver was too much, in view of the facts and circumstances of the case. He was, during all the time for which he claims compensation as receiver, in the employ of the new firm of E. Martin & Co., receiving from that firm a salary of \$200 a month. They furnished his bondsmen, a part of his work, and paid his traveling expenses; and all he did as receiver was merely incidental to his employment with that company. We attach no importance to the agreement claimed to have been made by the company with the respondent that he should charge no compensation as receiver,—do not believe that such an agreement would be recognized by the court; but the facts and circumstances under which he performed his duties as receiver should be taken into consideration. I do not see that the respondent, after he sold the stock to the new firm of E. Martin & Co., had much to do. His employment with the company required him to travel over the country, and the collection of the debts due the old company included about all the services he was required to perform as receiver. I think \$50 a month would have been ample compensation as receiver, under the circumstances; and, if the matter were before this court as an original question, I would not consent to any greater payment than that. At that rate his compensation would have amounted to \$1,400, and I think it would have been ample, judging from the facts before this court; but, as before suggested, the circuit court had a better opportunity to know the extent and value of the services; and, in view of that phase of the case, we have concluded that we might do the respondent an injustice by reducing the amount of his allowance to the extent indicated; and, in order to guard against such consequences, have concluded to add a gross sum to the amount we would otherwise deem adequate. We think \$1,800 is the extent that should have been allowed the respondent, and that that amount will cover the value of his services under any possible view of the case. The sum fixed by the circuit court will therefore be reduced from \$2,400 to \$1,800, and the order appealed from will be modified accordingly. Neither party will recover costs of appeal.

(14 Or. 174).

SCHNEIDER v. HAAS and another.

(Supreme Court of Oregon. November 15, 1886.

TRIAL—WITNESS—EXCLUSION OF DEFENDANT FROM COURT-ROOM.

The exclusion of a defendant from the court-room, on the ground of his being a witness, during the taking of the testimony, though a co-defendant is allowed to remain, is ground for a new trial.

Appeal from Multnomah county.

W. Scott Beebe and Geo. W. Yocom, for appellants. *Frank V. Drake*, for respondent.

STRAHAN, J. This is an action founded on a promissory note. There was an issue of fact formed by the pleadings, and a jury impaneled to try the same. The bill of exceptions shows that at this point the court, on the application of the plaintiff's attorney, made an order excluding from the court-room all of the witnesses of both plaintiff and defendants during the examination of the witnesses and taking of the evidence; that at that time the plaintiff and both of the defendants were present in court, and the court inquired if both the defendants would testify, and, being informed by the defendants' counsel that they would, ordered that one of the defendants be excluded under the order, and that the other defendant could remain, and that defendants' counsel could elect which defendant would be present during the trial. Counsel for the defendants declined to elect, but suggested to the court that the defendant J. Haas knew more about the facts than his co-defendant. The court then ordered that the defendant S. E. Haas be excluded from the court-room during the taking of the evidence on both sides; to which ruling and action of the court the defendants objected, but the objection was overruled, and the defendants excepted. It further appears from the bill of exceptions that at said time neither of the defendants was guilty of any contempt of court, but that their conduct was in every way exemplary, and there was no reason for the exclusion of the defendant S. E. Haas except that she was expected to testify upon the trial of the action. And this ruling of the court presents the only question in the record for our consideration.

The provision of law under which the court made the order in question is as follows: "Sec. 821. If either party require it, the judge may exclude from the court-room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses." Civil Code, p. 273, § 821. Does this section authorize the exclusion from the court-room of a party to a suit during the time the witnesses of the adverse party are testifying, at any time during the trial of his cause? It seems to me that it does not. The very right to prosecute a suit in court, and to appear therein as a party, carries with it, and as a necessary incident, the further right to be present during the trial, and, since parties are rendered competent, to testify as a witness if necessary; and the like right attaches to a defendant who is summoned into court to answer the complaint of his adversary. The rights of both parties are equal in this respect. This is a right that the parties may and do waive by omitting or neglecting to attend upon the sitting of the court at the proper time; but they cannot be deprived of it by the court, against their will, when they are present endeavoring to maintain it.

In *Tift v. Jones*, 52 Ga. 538, the supreme court of that state considered the question. In that state the statute provided that "in all cases either party has the right to have the witnesses of the other examined out of hearing of each other. The court will take proper care to effect this object as far as practicable and convenient, but any irregularity shall not exclude the witness." The court said: "When the court, under the provision of law, directs a separate examination of the witnesses, and the party intends to be a witness for himself, it would be a proper rule that such party should be first examined, unless there be reasons to the contrary, in the absence of his other witnesses. This would preserve his right to be present in the court during the whole trial of his case. His testimony might be with reference to some point, or of such character, that it would not be fairly intelligible to the jury unless other evidence with which it was connected had been heard." This authority recognizes the right of a party to be present in the court during the whole trial of his case.

In *Crowe, Adm'r, v. Peters*, 63 Mo. 429, the right of a party to be present in court during the trial of his case is maintained. The fact and rulings are as follows: "Upon the trial, a young woman, who was a niece of the defendant, was upon examination as a witness for plaintiff, and, in the course of her examination, was asked some questions in relation to the condition she found Erb in when she visited the defendant about three weeks before he died; and, her answer not being satisfactory to the plaintiff's counsel, it was suggested to the court that she was intimidated by the looks and gestures of the defendant, and therefore the court was requested to order the defendant to leave the room until her examination was ended. This request was granted, and the defendant was ordered to leave the room, which he did. Exceptions were taken to this order, and this is one of the points insisted on here. The defendant had the right to be present at the examination of witnesses against him." And the court adds: "The defendant could not very well suggest explanations to be elicited by cross-examination unless allowed to be present at the examination in chief."

Larue v. Russell, 26 Ind. 386, is a case very much like the one before the court. The trial court there ruled that the plaintiff should go out of the court-room, and remain out until he was examined as a rebutting witness. Touching this ruling the supreme court of that state remarked, in *Larue v. Russell, supra*: "This proceeding is probably without a precedent. The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and it is so obviously necessary to the security of private rights, that the refusal to entertain the cause at all would scarcely be a greater error than the denial of the privilege. Besides, it is secured by plain and positive statute."

Ryan v. Couch, 66 Ala. 244, announces the same rule. See, also, *Powell v. State*, 18 Tex. App. 244; *Chester v. Bower*, 55 Cal. 46. Our attention has not been called to any satisfactory authority holding the other way.

Ordinarily, the trial court is the better judge of what is necessary to the proper trial of a cause pending before it than this court. The facts must be there developed in such manner as to insure, as far as possible, the complete administration of justice; and it is only where some right of a party is denied that we would feel disposed to interfere. The court which tries a cause must, in the nature of things, be vested with a large discretion over the parties, their attorneys, and the witnesses; and the orderly conduct of the trial requires this; but it does not extend to the exclusion of a party from the court-room during the trial of his cause.

Watts v. Holland, 56 Tex. 54, has been cited by the respondent. That case does not go to the extent of authorizing the exclusion of a party. It is confined entirely to the power of the court over the witnesses during the trial,—a doctrine to which we readily accede.

The judgment of the court below will be reversed, and the cause remanded for a new trial.

(All concur.)

(14 Or. 181)

BLOOMFIELD v. BUCHANAN and others.

(Supreme Court of Oregon. November 18, 1886.)

PARTNERSHIP—REMEDIES—ACCOUNTING—JOINT AND SEVERAL DECREE—FIDUCIARY RELATIONS.

Where, in a suit between partners for an accounting, the evidence shows facts which make the relation between the partners a fiduciary one,—such as the exclusion of one partner by the others from the business, the books, and all knowledge thereof by the other partners,—the proper decree against the partners found liable is a joint and several one.

Appeal from circuit court, Multnomah county.

Appeal of defendants from a decree on an accounting in a partnership suit. *Strong & Strong* and *Shattuck & McKee*, for appellants. *C. H. S. Wood* and *N. H. Bloomfield*, for respondent.

STRAHAN, J. This is the second appeal in this cause. The opinion of this court on the former appeal is reported in 8 Pac. Rep. 912. It was there found that a partnership existed between plaintiff and defendants, as alleged in the complaint, and that the plaintiff, then the appellant, was entitled to an accounting, and to one-fourth of all the profits arising upon the contracts described in the complaint; and the cause was remanded that an accounting might be had. For a fuller statement of the facts see the former opinion of this court. That accounting has been had, upon which the court rendered a joint and several decree against the defendants, and in favor of the plaintiff, for his share of the profits arising from the business of said copartnership, from which decree the defendants have appealed.

No question is made in this court as to the correctness of the accounting, or as to the amount of profits received upon the contracts mentioned in the complaint. The only question presented for our consideration is as to the form of the decree; that is, whether the decree ought to be rendered against each defendant separately for one-fourth of the profits he received upon the contract in his name, or whether it ought, under the particular facts and circumstances developed in the evidence, to be against the defendants, jointly and severally, for one-fourth of all profits received upon the three contracts. In an ordinary accounting between partners, where neither is guilty of such acts, omissions, or concealments as involve a breach of legal or equitable duty, trust, or confidence justly reposed, and which are injurious to another, or by which an undue or unconscientious advantage is taken of another, the rule of liability is as contended by appellant's counsel. In such case partners are liable to account to each other severally, but not jointly. Each of them is to account to every other for himself, and not for his copartner. *Portsmouth v. Donaldson*, 32 Pa. St. 202. But an examination of the evidence in this case has satisfied us that that rule could not properly be applied here. Whatever may be the general relations between partners, the facts developed in this case made it *fiduciary*, and the principles of law applicable to that relation must be applied. 2 Pom. Eq. Jur. §§ 963, 1050, 1052, 1079, 1081; 1 Colby, Partn. § 131; *Brooks v. Martin*, 2 Wall. 70; *Boire v. McGinn*, 8 Or. 466; 2 Perry, Trusts, § 841; 1 Perry, Trusts, p. 501, § 166; Kerr, Frauds, 366; *Farnam v. Brooks*, 9 Pick. 218.

Soon after the formation of this partnership the plaintiff was excluded from all participation in the business, and from all knowledge of the books or accounts, and from all share in the profits. The business was conducted by his copartners without consulting him, or recognizing his interest in any manner whatever. They so effectually excluded him that he was an entire stranger to all of their transactions. This could not have happened as it did by accident. It required purpose and concert of action on the part of the defendants to accomplish it. Besides, the defendants kept no regular books of account showing the transactions of the partnership, and rely mainly upon memory and the books of John M. Leavens & Co., and some *memoranda* that were made, under the direction of some of the defendants, from time to time. 2 Perry, Trusts, § 821. In addition to these facts, the conduct of the defendants towards the plaintiff in relation to the partnership business was not characterized by that perfect good faith and frankness which their relations towards him required. An attentive and careful perusal of the evidence in this case leads us irresistibly to these conclusions. We therefore hold that the defendants are jointly and severally liable to the plaintiff for his share of the profits of the partnership, and that there is no error in the decree in that particular. The case falls within the rule fixing the joint lia-

bility of co-trustees for a breach of duty. 2 Perry, Trusts, § 848; 2 Pom. Eq. Jur. § 1081.

But it is argued by counsel for appellants that the decree is erroneous for the reason that this court directed, upon the former trial here, that the defendants be held liable severally for the amount of profits received by each of them respectively. That ruling was correct upon the facts as they then appeared; but it has no application to another and entirely different state of facts developed upon the accounting. The *law of the case* does not apply to the facts, but only to the law. Therefore, when new and different facts are presented requiring the application of a different rule of law from that applied on the former appeal, this court must apply the law to the new facts as they appear. *Mitchell v. Davis*, 23 Cal. 381.

It follows that the decree must be affirmed; and it is so ordered.

(9 Colo. 331)

MILLER v. MICKEL.

(*Supreme Court of Colorado. November 12, 1886.*)

BANKS AND BANKING—SET-OFF AND COUNTER-CLAIM—OFFICIAL AGAINST AN INDIVIDUAL ACCOUNT.

Where plaintiff, having a private account at defendant's bank, opened an account at said bank in the name of a mining company, and signed all checks drawn against such company's account in his official capacity as treasurer of such company, and, in addition, distinctly notified defendant, at the time of opening such account and thereafter, that he was acting as treasurer of the company, and would in nowise be individually responsible on any of the company's transactions, nor for any of its debts, he, in an action to recover balance on his personal account, cannot be held liable to a set-off for an overdraft on said company's account resulting from the crediting by defendant of a draft drawn by plaintiff as treasurer upon members of said mining company, against which plaintiff was allowed by defendant to check as treasurer on behalf of the company.

Appeal from the district court, Summit county.

This action is brought by the appellee, Mickel, against the appellant Miller, the owner and proprietor of the Miners' & Merchants' Bank of Breckenridge, Summit county, Colorado, to recover on a book-account for services rendered by said Mickel, at the instance of Miller, and to recover the balance of a bank account at defendant's bank. There was a direct conflict of evidence, on which the court, sitting without a jury, gave judgment in plaintiff's favor. The only point considered on appeal is the refusal of defendant's counter-claim to be allowed credit against the plaintiff for \$180.53, the amount of an overdraft on an account which plaintiff had opened in the defendant's bank as treasurer of the Sallie Barber Mining Company, which defendant, claiming the right to hold plaintiff personally liable, had transferred from plaintiff's private account to balance the overdraft on the Sallie Barber Mining account. On this point it appears that plaintiff had deposited, as treasurer of the Sallie Barber Mining Company, in the defendant's bank for collection, a draft on a member of said company, with instructions to advise plaintiff if it was not paid on a certain date, after which plaintiff would check against it as treasurer. Defendant, by mistake, sent the draft to New York, instead of Denver, and, receiving no telegram from Denver notifying protest, told plaintiff he was satisfied it would be paid, and plaintiff checked against it for the benefit of his company.

Breeze & Breeze and T. C. Early, for appellant. *J. W. Horner and Peter Palmer*, for appellee.

ELBERT, J. This is a case of conflicting evidence. The plaintiff and the defendant were the only witnesses to the principal issues, and contradicted each other with regard to many items of the account sued upon. The court was the judge of their credibility, and an examination of the record discloses no

grounds for the reversal of the finding and judgment as being against the weight of evidence.

The chief objection urged here is the refusal of the court below to allow the defendant credit against the plaintiff for the \$180.53 overdraft on the account of the Sallie Barber Mining Company. The checks drawn by the plaintiff against the Sallie Barber Mining Company's account were, without exception, signed by him in his official capacity as treasurer of the company. In addition to this, he distinctly notified the defendant, at the time the account was opened and thereafter, that he was acting as treasurer of the company, and would in nowise be individually responsible on any of the company's transactions, nor for any of its debts. This part of the plaintiff's testimony stands uncontradicted. The defendant, thereafter, could not pay out money on account of the company, and hold the plaintiff responsible therefor. Unless he intended to credit the company, he should have rejected their drafts when there were no funds in his hands to meet them. The mistake whereby the letter intended for Denver was directed to New York, in consequence of which the telegram expected from Denver was not received, was the mistake of the defendant, for which the plaintiff was in nowise responsible, and for the consequences of which he cannot be held to answer. The court did not err in refusing to allow the overdraft on the account of the mining company as an offset against the individual claim of the plaintiff.

The judgment of the court below is affirmed.

(2 Cal. Unrep. 696)

AYLESWORTH v. DEAN. (No. 11,327.)

(*Supreme Court of California. August 28, 1886.*)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—EXEMPT PROPERTY—FINDING.

An assignment for the benefit of creditors, that is shown not to include all of the debtor's property, will be held void, unless it is further shown that the omitted property is exempt from execution.¹

Department 1. Appeal from superior court, county of Plumas.

Plaintiff is the assignee of Tremain & Co., for the benefit of their creditors, and brings this action against defendant, as sheriff, for the recovery of property alleged to have been wrongfully taken from his possession, as such assignee, in pursuance of an attachment against Tremain & Co. Defendant claims that the assignment is invalid because it does not include all of the assignor's property. It seems that all of the debtor's property is not, in fact, included in the assignment, but plaintiff claims that such as is omitted is exempt by law. The findings show that the assignment does not include all of the property, but do not show that the omitted property is exempt. Judgment for plaintiff. Defendant appeals, assigning as error the insufficiency of such finding to sustain the judgment.

A. L. Shinn, H. T. Hogan, and W. W. Kellogg, for defendant and appellant.

R. H. F. Variel and M. Ball, for plaintiff and respondent.

BY THE COURT. It does not appear from the findings that the property omitted from the assignment was in fact exempt from execution.

Judgment reversed, and cause remanded.

¹ As to fraudulent reservations in assignments for benefit of creditors, see McReynolds v. Dedman, (Ark.) 1 S. W. Rep. 552, and note.

(71 Cal. 335)

EMERSON v. BERGIN. (No. 9,487.)

(Supreme Court of California. November 30, 1886.)

1. WATERS AND WATER-COURSES—IRRIGATING DITCH—DIVERSION OF WATER—TRESPASS—STRANGER—INJUNCTION.

In 1865 one R. and E. owned farms upon a stream, R.'s farm being higher up the stream than E.'s. In that year, under an agreement with other owners, R. and E. went above their farms, and constructed a dam across the stream, and, by a flume and pipes, diverted its waters to their respective farms. E. paid one-half the expense of the dam and flume down to the point where R. used the water, and all of the expense thence on, to his own farm, and each of them took one-half of the water diverted. In 1868, R. sold his farm to D., and, in 1872, D. sold to P., the wife of B. From 1865 until June, 1881, the water flowed through the flume and pipes, and was distributed to the two farms, one-half to each, without objection or complaint from any one. In June, 1881, E. repaired the flume, and placed upon the land of P. a distributing cistern, into which all of the water was conducted. To distribute the water from the cistern, he inserted in the side of it two wooden pipes to carry the water, and then covered and locked the cistern up. On the fourteenth of July, 1881, B., without notice to E., so far as appears, and without any direction or authority from P., his wife, broke open the cistern, and plugged up the pipe leading to E.'s farm, thereby obstructing the flow of any water through it. *Held*, that B. had no greater rights in the premises than a stranger, and should be enjoined from any further interference with the cistern.

2. APPEAL—WHEN TAKEN—WITHIN A YEAR OF JUDGMENT.

Where an appeal from a judgment is not taken within one year from the date of rendition of the judgment, it should be dismissed.

Commissioners' decision.

Department 2. Appeal from superior court, Santa Clara county.

Action to restrain the obstruction of the flow of water. Judgment for plaintiff. Defendant appealed. The facts are stated in the opinion.

S. O. Houghton, for appellant. G. A. Heinlen, for respondent.

BELCHER, C. C. This action was commenced to obtain a perpetual injunction restraining the defendant from obstructing the flow of water into a pipe leading from a distributing cistern, on land owned and occupied by the wife of defendant, to land owned and occupied by plaintiff. By his answer defendant admitted that he had obstructed the flow of water into the pipe, as alleged in the complaint, and then set up certain facts to show that he was justified in so doing. At the trial, after the first witness was sworn and had commenced giving his testimony, the defendant objected to the admission of any testimony under the complaint; but no reason was stated why the testimony was not admissible, and the objection was overruled. At the conclusion of the trial, findings were filed and judgment entered in favor of plaintiff. The defendant moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It is now claimed that the complaint did not state facts sufficient to constitute a cause of action, and that the court erred in admitting any testimony in support of it. Doubtless the complaint might have been improved in some respects, but, in the absence of a demurrer, we think it sufficient, and the ruling proper.

The court found that plaintiff had complied with the terms of the agreement made between him and defendant in November, 1879, and there was testimony tending to support the finding. It is argued, however, for the appellant, that the defendant had no interest in the land, and so the agreement, though executed by him, conferred no rights whatever on the plaintiff. Assuming this to be so, it becomes unnecessary to consider what rights the agreement would, if valid, have conferred upon the plaintiff, and the case may be decided upon the other facts presented by the record.

The other facts are as follows: In 1865 one Robert McCubbin and the plaintiff owned farms situate upon a stream known as the Arroyo Permanente,

McCubbin's farm being higher up the stream than the plaintiff's. In that year, under an agreement made with other owners of land upon the stream, McCubbin and plaintiff went above their farms, and constructed a dam across the stream, and, by means of a flume and pipes, diverted its waters to their respective farms, to be there used for domestic and other purposes. The plaintiff paid one-half of the expense of the dam and flume down to the point where McCubbin used the water, and all of the expense thence on to his own farm, and each of the parties took one-half of the water diverted. In 1868, McCubbin sold his farm to George Donner, and, in 1872, Donner sold to Francisca Price, who is now the wife of defendant, and, as defendant alleges in his answer, "is now the owner and in the exclusive possession" of the said property. From 1865 until June, 1881, the water flowed through the flume and pipes, and was distributed to the two farms, one-half to each, without objection or complaint from any one. In June, 1881, the plaintiff repaired the flume, and placed upon the land of Mrs. Bergin a distributing cistern, into which all of the water was conducted. To distribute the water from the cistern he inserted in the side of it, and on the same level, two wooden pipes of the same size and capacity to carry water, and then covered and locked the cistern up. One of the pipes took water to the point where Mrs. Bergin used it, and the other to the farm of plaintiff. The water continued to run through these pipes until the fourteenth day of July, 1881, and the court finds that all the water which came into the cistern "would be and was equally divided, and one full half of the water so flowing into said cistern, and so divided, would and did flow through one of said pipes to and into an open flume, out of and from which the defendant could use the same for his, or for his and his wife's, own purposes." On the last-named day the defendant, without notice to the plaintiff, so far as appears, without any direction or authority from his wife, broke open the cistern, and plugged up the pipe leading to plaintiff's farm, thereby obstructing the flow of any water through it. This action was commenced on the next day.

Conceding, now, that plaintiff had only a license to conduct water across the land of defendant's wife, which was subject to be revoked at any time, still no mere volunteer had any right to interfere with his works. Mrs. Bergin, and not the defendant, owned the property, and, if the plaintiff had only a license, she could have revoked it. So, too, if the cistern was not placed upon her land with her consent, and she was not satisfied with the method of distributing the water, she could have required the cistern to be removed. But the defendant had no such power. He does not allege or pretend that he was acting by her direction, or under her authority, and hence he had no greater rights in the premises than a mere stranger. The court below acted rightly, therefore, in enjoining him from further interference.

The appeal from the judgment was taken more than a year after the judgment was entered, and should be dismissed, and the order denying a new trial should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order affirmed.

(71 Cal. 325)

TIPTON and Wife v. MARTIN and others. (No. 11,109.)

(Supreme Court of California. November 29, 1886.)

HOMESTEAD—ABANDONMENT—REMOVAL—ST. CAL. 1860, §§ 1, 10, p. 311.

A homestead created under sections 1 and 10, St. Cal. 1860, p. 311, cannot be abandoned by the mere fact of a removal from the homestead premises, with or without the intent of not returning to them.¹

Department 2. Appeal from superior court, Tehama county.

Action to enjoin the sale of land on the grounds that the premises constituted a homestead, and were exempt from execution. Judgment for plaintiffs. Defendants appealed. The facts are stated in the opinion.

Chipman & Garter, for respondents. *John F. Ellison* and *W. Henry Jones*, for appellants.

MCKEE, J. It appears from the record in this case that defendant Martin, as the sheriff of Tehama county, had levied on a parcel of land, as the property of the plaintiff John C. Tipton, by an execution issued upon a judgment against said Tipton in favor of V. P. Baker, one of the defendants herein; and, being about to sell the land under said execution, the plaintiffs commenced the action in hand to enjoin the sale on the ground that the premises constituted their homestead, and were exempt from execution.

The defendants contend that the land, although selected by the plaintiffs as their homestead, was not exempt from execution, because the plaintiffs had relinquished their homestead right thereon by abandonment. This contention was made upon the following facts alleged by the defendants in their answer to show abandonment: "That in the month of _____, 1878, the plaintiffs removed from said premises and from this state, and freely and voluntarily moved into the territory of Montana with the intention of remaining there and residing there permanently, and without any intention of returning again to this state, or upon said premises, and have since said month of _____, 1878, continuously resided in said territory of Montana, and do now reside therein, and since they moved into said territory of Montana the said John C. Tipton has taken the initiatory steps to acquire title therein to United States land under and by virtue of the United States homestead laws, and the said application for said land under said United States homestead laws is still pending."

The plaintiffs demurred to the sufficiency of the facts as thus pleaded. The demurrer was sustained by the court. Defendants declined to amend their answer, and judgment final was entered against them, from which they have appealed; and the only question arising on the appeal is whether the facts, as set forth in the answer, are sufficient in law to constitute an abandonment of the homestead.

Under the homestead law of 1851 a homestead right was founded upon occupancy of the homestead premises by the family. Such an occupancy constituted presumptive evidence of the appropriation of the premises as a homestead, (*Cook v. McChristian*, 4 Cal. 26;) and, as it was founded upon occupation, cessation of the occupancy constituted an abandonment. Hence removal from the premises was considered as presumptive evidence of abandonment. *Taylor v. Hargous*, Id. 268. Under that law, therefore, abandonment was a question of act and intent, ascertainable and determinable from evidence, like any other fact in a proceeding. If removal was only for a temporary purpose, and there was no intent to remain away permanently, it would not constitute abandonment; but, if the act of removal was coupled with an intent never to return, abandonment was considered as complete.

¹See *Honaker v. Cecil*, (Ky.) 1 S. W. Rep. 392; *Bowman v. Watson*, (Tex.) 1 S. W. Rep. 273.

Benedict v. Bunnel, 7 Cal. 246; *Moss v. Warner*, 10 Cal. 296; *Guiod v. Guiod*, 14 Cal. 506; *Harper v. Forbes*, 15 Cal. 202. Thereby the homestead right was destroyed, and the land, upon which the right had existed, became subject to execution creditors of the owner thereof.

That continued to be the law of the homestead and of its abandonment until the year 1860. In that year there was a statute passed on the twenty-eighth of April which changed the character of the homestead. Instead of being a right founded upon occupancy by the family, a homestead created under its provisions was declared to be an estate in joint tenancy, which upon the death of either of the spouses, descended to and vested absolutely in the survivor, subject to the power of the probate court to set it apart for the benefit of the survivor and the legitimate children, (sections 1, 10, St. 1860, p. 311; *McQuade v. Whaley*, 31 Cal. 526; *Estate of James*, 23 Cal. 416; *Barber v. Babel*, 36 Cal. 11; *Watson v. His Creditors*, 58 Cal. 556; *Herrold v. Reen*, Id. 443;) and, as an estate in joint tenancy, it could not be transferred or abandoned except according to the provisions of the law under which it was created. Now, the statute of 1860 provided that, in the case of a homestead selected by a husband and wife under its provisions, the only evidence of abandonment should be a declaration of abandonment signed by the husband and wife, and acknowledged by them and recorded as a conveyance of real property. Section 2, St. 1860, p. 312.

The homestead in question was selected on the sixteenth of January, 1862, upon common property of the claimants; and the selection protected the land, as against subsequent creditors, as much as if the claimants were vested with the fee-simple title. *Brooks v. Hyde*, 37 Cal. 373. It is well settled that title to real property cannot be abandoned. Occupancy of the property is not, therefore, necessary to preserve the right. The right is not barred or destroyed except by an adverse holding for the statutory time necessary to create the presumption of an adverse title.

As an estate in joint tenancy with the right of survivorship, the homestead created under the act of 1860 could not be abandoned by the mere fact of a removal from the homestead premises with or without the intent of not returning to them. "A homestead," says the Code, which embodies the statutory provisions of the homestead laws of 1860 and 1862 upon the subject, "can be abandoned *only* by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife if the claimants are married, or by the claimant if unmarried;" and "the abandonment is effectual *only* from the time it is recorded." Sections 1243, 1244, Civil Code. Abandonment of a homestead cannot be proved in any other way. As we have said: "The homestead having once been regularly created out of a parcel of land in accordance with the statute, the estate so created continues to exist until put an end to in the mode pointed out by the statute. * * * Under our law we know of no abandonment of the homestead except in the statutory mode." *Porter v. Chapman*, 65 Cal. 365; S. C. 4 Pac. Rep. 237.

It follows that the court below properly sustained the demurrer, and there is no error in the judgment appealed from.

Let the judgment be affirmed. So ordered.

We concur: THORNTON, J., SHARPSTEIN, J.

(71 Cal. 338)

TULLY v. TULLY. (No. 8,492.)

(Supreme Court of California. November 30, 1886.)

JOINT TENANTS AND TENANTS IN COMMON—ESTOPPEL—BY DEED.

A deed of a squatter's interest in what was supposed to be public land, made to two men, one of whom paid the purchase money, the object of the joint deed being to use the name of the gratuitous grantee as a pre-emptor in procuring title from the United States to so much of the land as should be in excess of 160 acres, does not create a tenancy in common; and, in an action by the gratuitous grantee against his co-grantee to recover an undivided one-half of the lands described in the deed, the latter is not estopped, by that deed, from setting up as a defense a good title subsequently acquired by him from the true owners of the land. *McKINSTRY* and *MCKEE*, JJ., dissenting.

In bank. Appeal from superior court, Santa Clara county.

See former opinion in 9 Pac. Rep. 841.

The facts in this action, as found by the court below, are that on November 11, 1856, the defendant and respondent purchased of Martin Murphy, the person in possession, his interest in 236 acres of land in Santa Clara county, California; paying therefor \$900 from his private funds. The deed was made to plaintiff and appellant and defendant. The deed was delivered to the defendant, who also received the exclusive possession of the land. Both defendant and his grantor supposed, at the time the deed was made, that the land was a part of the public domain; and the object of the joint deed was to use the plaintiff's name as a pre-emptor in procuring title from the United States to so much of the land as should be in excess of 160 acres. Defendant continued in the exclusive possession of the land, from the time of the purchase from Murphy, until the commencement of this action, with the exception of the period from the fall of 1859 to the fall of 1860, when plaintiff occupied it, under a verbal agreement to farm it for one-fourth the product as rent. On the nineteenth November, 1858, one Antonio Chaboya received a patent from the United States of the rancho "Yerba Buena," which included this land. On the twenty-seventh February, 1861, defendant purchased the legal and equitable title to the land in dispute from Chaboya's grantees, and had the conveyance properly recorded March 9, 1861. He paid \$4,400 for that title. Plaintiff has never offered to pay to defendant any portion of that sum, and has never requested defendant to convey to him any portion of or interest in said premises. At the trial judgment was entered for defendant. Plaintiff appeals.

W. G. Lorigan and *S. F. Lieb*, for appellant. *L. Archer*, for respondent.

THORNTON, J. This is an action of ejectment to recover a parcel of land in Santa Clara county. When the first purchase was made in 1856, the whole purchase money (\$900) was paid by the defendant, John Tully. Under the purchase John Tully took and received from his vendor and grantor the exclusive possession of the land in suit. In pursuance of this purchase the deed was made by procurement of John Tully to the plaintiff, Owen Tully, and himself. Under this purchase of 1856, no title whatever was acquired. The land bought was at that time supposed, both by John Tully and his grantor, to be public land. This was not so. The land was part of a Mexican grant formerly made to Antonio Chaboya, to whom a patent including the premises was regularly issued by the United States in November, 1858. In February, 1861, John Tully acquired by a proper conveyance the true title to this land from the vendees of Chaboya, paying from his own funds therefor the sum of \$4,400.

The history of the possession is correctly given in a dissenting opinion herein drawn up by Justice *MCKEE*. It appears that John Tully has been in the exclusive possession of this land, claiming the same as his own, for about 24 years prior to the commencement of this suit, and, since the purchase of

the true title in 1861, plaintiff has never offered to pay to defendant any portion of said sum of \$4,400, and has never requested defendant to convey to him any portion or interest in the premises, nor has he ever attempted or offered to enter into possession of this land, or claim any right to the possession thereof, until one year next before the commencement of this action.

In this action, which is ejectment, the paramount legal title usually prevails. This legal title is with defendant, and must prevail, unless the defendant is prevented by law from availing himself of it.

It is urged on behalf of plaintiff that he is so prevented; that he is estopped from using such title, because, when he acquired his title, in 1861, he was in possession as tenant in common with plaintiff. We do not think he was really so in possession. The plaintiff, though apparently tenant in common, really was not. He was a mere trustee of defendant for such title as was acquired by the purchase and conveyance made in 1856. The defendant, as appears from the above statement, paid the whole purchase money upon the purchase of 1856, and caused the deed thereon to be made to plaintiff and himself. The plaintiff's tenancy in common amounted only to holding the legal title in trust for defendant, which title the defendant had the undoubted right, when he made the purchase, in 1861, and received a conveyance thereunder, to have had conveyed to him by plaintiff. Plaintiff, being a mere naked trustee for defendant, would not, in offering to pay one-half of the purchase money under the purchase of 1861, be entitled to have any portion of the true title then purchased conveyed to him. Equity would not clothe plaintiff with any such right. His being a trustee for the defendant would rebut such equity. Under these circumstances, though the action is ejectment, we must hold that defendant is not estopped from availing himself of the true title to protect his possession.

We think the judgment and order should be affirmed, and it is so ordered.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.

MCKINSTRY, J. I dissent. It was held in *Olney v. Sawyer*, 54 Cal. 379, that, in an action at law by one tenant in common against another, to be let into the possession of demanded premises, the defendant cannot justify an ouster of the plaintiff by setting up an outstanding title—even if it be the true title—purchased by him while in possession under the common title. As this case is presented by the pleadings, the appeal must be determined by reference to the strictly legal rights of the respective parties. So regarding it, it was the duty of the defendant to let the plaintiff into the common possession. He might then have asserted his paramount legal title in a separate action.

It was decided by the former supreme court of New York, in 1841, that when a parent having a possessory title to lands dies in possession, leaving several children his heirs at law, who succeed to such possession, it is not competent for one of such heirs, who has obtained exclusive possession of the whole of the premises, to defeat a recovery, by his co-heirs, of their proportional parts or shares, by setting up a title acquired from the *owners* of the land. He must surrender possession to his co-heirs, and then bring ejectment. NELSON, C. J., said: "One of the co-heirs, having derived his possession from the common ancestor, as well as through his co-heirs, is disabled, while standing on this possession, from disputing their title. I do not deny that the title thus set up may be valid, nor but that the party may avail himself of it after surrendering this possession. In a court of law he clearly could. There might be considerations existing between the co-heirs that would lead a court of equity to declare the purchase to have been made for the benefit of all upon proper terms." *Phelan v. Kelley*, 25 Wend. 389. In the case at bar the plaintiff and defendant entered into the possession, as tenants in com-

mon, under a title derived from the same source; the defendant holding for the plaintiff to the extent of the latter's interest.

Under our system the equitable considerations referred to by Chief Justice NELSON, could be alleged in a cross-complaint; and if it appeared, for example, that the co-tenant who had been let into the possession by the purchaser of the outstanding title had paid or tendered, within a reasonable time, his proportionate share of the cost of acquiring the true title, (or elected with reasonable diligence to participate in the purchase,) equity might hold the purchase to have been made in part for his benefit. *Mandeville v. Solomon*, 39 Cal. 125.

But, even if it should be made to appear that the party had indicated his intention, with reasonable promptitude, to participate in the purchase of the true title, there might be controlling equities which would prevent him from obtaining a decree for a conveyance of such title to an aliquot portion. Thus, in the case at bar, it would seem that the present plaintiff had but the naked legal conveyance to an undivided moiety of the original possessory title; the defendant having paid the whole of the purchase price. If, in an action brought by the defendant here to recover the whole possession after letting plaintiff into the common possession, the defendant in such action should rely upon his equitable right to the benefit of the true title on payment of his share of the purchase money, and it should be made to appear that he had neglected and refused to pay to the plaintiff therein his part of the original purchase,—the purchase of the possessory title,—it may be a court of equity would refuse a decree for a conveyance of any portion of the true title. It is apparent, too, that the issues might be complicated by questions as to the validity of a purchase made in part in the name of Tully, (plaintiff herein,) with a view to securing for the present defendant the government title to more land than he was authorized to acquire directly under the statutes of the United States. It is enough to say that these matters cannot be gone into under the pleadings in the present action.

If facts exist (independent of the conveyance of the true title to him) which give the defendant a perfect equity on which he could defend his exclusive possession in the present action of "ejectment," those facts have not been pleaded herein. It is settled that to establish such a defense in ejectment the facts constituting the perfect equity must be alleged in the answer as fully as they are required to be in a cross-complaint. *Arguello v. Bours*, 8 Pac. Rep. 49; *Kentfield v. Hayes*, 57 Cal. 409. As I understand it, the defendant here has been given all the benefit of a decree declaring a resulting trust in his favor in land, to which he cannot deny the plaintiff has the legal title, without any pleading on which such decree could be based.

It may be said that, to prevent circuity of actions, the defendant here should be permitted to retain the exclusive possession. Why compel him to let the plaintiff into the possession only that the plaintiff may be excluded again under a judgment in an action brought by the present defendant? But, *first*, it may be that in such new action the present plaintiff would be held entitled to participate in the true title; *second*, on authority of *Olney v. Sawyer, supra*, the defendant cannot in this action rely on his acquisition of the paramount title; *third*, the same objection might be made in every case where the rule applies that a tenant cannot dispute his landlord's title.

As was said in *Phelan v. Kelly, supra*: "The rule of law that a person coming into possession of lands under the agreement or license of another cannot be permitted to deny the title of the latter, when called upon to surrender, is of almost universal application. Even if he had a valid title *at the time*, he is deemed to have waived it, and, as between the parties, to have admitted title in the person under whom he entered;" citing cases.

Of course, one of two co-tenants may oust the other, and acquire the exclusive title by adverse possession. But the statute of limitations was not

pleaded herein, and the plaintiff objected to evidence tending to prove the defendant's adverse possession on the ground that the same was irrelevant, incompetent, immaterial, and not pertinent to any issue in the case. Moreover, if the limitation had been pleaded, the transcript contains no finding of the fact that the defendant has had adverse possession for the statutory period, nor any finding which includes a finding of adverse possession. As a conclusion of law from preceding findings of fact, the court below held that the plaintiff was barred by sections 318 and 319 of the Code of Civil Procedure, and the bill of exceptions expressly recites that no other facts were proved than those set forth in the five findings. The facts stated in the five findings do not establish adverse possession, for the reason, among others, that there is no statement that the defendant has paid any taxes on the demanded premises, or that no taxes were assessed thereon.

MCKEE, J. I dissent. The action is one at law in which the plaintiff asks to be let into possession of a tract of land containing about 236 acres, in which he claims to be a tenant in common with the defendant. The title asserted by the plaintiff to an undivided one-half of the land is derived from a deed made to himself and the defendant on the eleventh of November, 1856. Under that deed defendant entered into the exclusive possession of the land, and occupied it exclusively until the fall of the year 1859, when he delivered possession to the plaintiff, who entered upon the land and cultivated it, during the farming season of 1860, upon an arrangement with the defendant to cultivate the same on shares. In November, 1860, the plaintiff withdrew from the possession, and the defendant re-entered, and continued to exclusively occupy and enjoy the use of the land. Meantime the land was claimed to be within the boundary lines of a Mexican grant which had been finally confirmed to the claimant, to whom the United States issued a patent for the land; and on the twenty-seventh of February, 1861, the defendant, being in possession, acquired by purchase the outstanding patent title by a deed which he took in his own name, and caused to be recorded on the thirteenth of March, 1861; and from the date of the deed until the commencement of this action—a period of 24 years—he has been in the actual exclusive possession of the land.

Upon these facts the court below held that the defendant, having been continuously in the actual and exclusive possession of the land, claiming to be the owner thereof in hostility to the plaintiff, was the legal and equitable owner, and "that any and all right of the plaintiff, if any he ever had, was barred by the provisions of sections 318 and 319 of the Code of Civil Procedure, before the commencement of this action, and that defendant is entitled to judgment for his costs." I think the decision is erroneous.

The defendant did not claim by his answer to have derived any title to the land from an adverse possession of the same sufficient to give him title under the statute of limitations. The answer contained (1) a general denial; (2) affirmative allegations of seizin in fee for over 20 years; (3) allegations that the cause of action was barred by the provisions of section 319 of the Code of Civil Procedure; and (4) that the cause of action did not accrue to the plaintiff within five years before the commencement of the action. These were the only issues made by the pleadings.

Now, as plaintiff and defendant originally acquired title to the land in common, the actual and exclusive possession thereof by defendant did not affect the plaintiff's right; for defendant's possession as a tenant in common with the plaintiff, in whatever title they had to the land, was the possession of the plaintiff. *Waring v. Crow*, 11 Cal. 367; *Knox v. Marshall*, 19 Cal. 617; *Colman v. Clements*, 23 Cal. 245; *Owen v. Morton*, 24 Cal. 373; *Miller v. Myle*, 46 Cal. 535. That possession continued while the relation of tenants in common existed; and the legal presumption is that the relation continued to exist

until the defendant ousted and disseized the plaintiff, by notice, express or implied, that he claimed the land adversely to the plaintiff, or by acts and declarations equivalent to notice of such a claim. There was no evidence, and there is no finding, that defendant, in or by his actual possession, ever ousted and disseized the plaintiff. The basis of the decision and finding is the fact of 24 years of exclusive actual possession by the defendant. But that possession, held by the defendant as a tenant in common with the plaintiff, did not divest the plaintiff of his rights in the land, or vest absolute title to the land in the defendant, either by the purchase of an outstanding title or under the statute of limitations.

There is no doubt that a tenant in common, in exclusive actual possession of land held in common may buy in an outstanding title, and take a conveyance thereof to himself alone; but the purchase does not *per se* dissolve the tenancy in common between himself and his co-tenant. The title acquired inures to the benefit of both. The general rule is that a tenant in common who buys in an outstanding title holds it in trust for his co-tenants. *Mandeville v. Solomon*, 39 Cal. 134. The mere fact of the purchase does not affect their legal relation; nor is it affected by mere seizin and possession of one after the purchase, however long continued; nor does such a possession constitute an adverse possession which sets in motion the running of the statute of limitations. There can be no adverse possession against a co-tenant out of actual possession until ouster and disseizin. The tenant in common out of actual possession has the right to assume that the actual possession of his co-tenant is his possession, and is held under and in subordination to their common title, whatever it be, and that the exclusive possession is not adverse to him.

It is true, there arises out of the purchase of an outstanding title an additional relation between a tenant in possession and his co-tenant out of actual possession; namely, that of trustee and *cestui que trust*. But the rights and remedies incident to this new relation, being distinct from the legal ownership of the land, are exclusively cognizable in equity.

This is not an equitable action; it is an action at law,—ejectment for the recovery of real property,—in which the court below could only try and determine the issues raised by the pleadings in the case. There was no issue before the court that the defendant held and possessed the land upon a claim of title, written or unwritten, adversely to the title of the plaintiff, as tenant in common with the defendant, for five years before the commencement of the action. Sections 321–328, 325, Code Civil Proc.

Sections 318 and 319, upon which the court below based its decisions, are inapplicable. The first provides that no action can be maintained for the recovery of real property unless the plaintiff, his ancestor or grantor, was seized or possessed of the property within five years before the commencement of the action. But, being a tenant in common with the defendant, the plaintiff was so seized until the defendant's possession became hostile or adverse. Besides, section 318 is not pleaded at all. Section 319 is the only one pleaded; but, as has been held, that section was never intended to apply to an action of ejectment. It has reference only to *personal* actions founded upon title to real property. *Richardson v. Williamson*, 24 Cal. 301.

I think the judgment and order should be reversed, and the cause remanded for further proceedings.

(2 Cal. Unrep. 698)

KETCHUM v. BARBER. (No. 11,428.)

(*Supreme Court of California. August 31, 1886.*)

1. DEED—DESCRIPTION OF GRANTEE.

A deed to Henry Stull & Co. vests the legal title in Henry Stull alone, and his deed will give to his grantee a good and valid title.¹

2. EJECTMENT—PROOF OF OUSTER—ADMISSIONS IN PLEADINGS.

In ejectment, if the defendant in his answer admits acts amounting to an ouster, but denies plaintiff's title or right to possession, plaintiff is not bound to prove ouster, and, if he prove title and right to possession in himself, is entitled to recover.

Department 2. Appeal from superior court, county of Amador.

Ejectment for possession of a certain mining and water ditch running across defendant's lands. Plaintiff claimed title through one Henry Stull, who in turn derived, or claimed to derive, title from defendant by virtue of a deed made to Henry Stull & Co. Defendant in his answer admitted having given to Stull & Co. a right to dig and maintain the ditch, but claimed that it had been abandoned, and admitted that hence he had re-entered upon and used the ditch continuously to the time of trial. On the trial, plaintiff, to make out his title, introduced the deed to Stull & Co. in evidence, and also put in evidence the deed from Stull to himself, and proved by witnesses the possession thereunder of himself and Stull, and closed. Defendant moved for a nonsuit on the ground that plaintiff had neither proven title nor possession in himself, nor ouster by defendant. The nonsuit was granted and plaintiff appealed.

Engon & Armstrong, for plaintiff and appellant. *McGee & Farnsworth*, for defendant and respondent.

By THE COURT. The nonsuit was improperly granted. The deed to Henry Stull & Co. vested the title in Henry Stull. *Winter v. Stock*, 29 Cal. 411, 412. The answer shows a sufficient ouster.

Judgment reversed, and cause remanded for a new trial.

¹See *Sherry v. Gilmore*, (Wis.) 17 N. W. Rep. 252.

(71 Cal. 306)

SCHWARTZ v. COWELL. (No. 9,691.)

(Supreme Court of California. November 24, 1886.)

1. **EJECTMENT—TITLE—ATTACHMENT—OFFICER SERVING—CODE CIVIL PROC. CAL., § 542.**
Where a plaintiff in ejectment claims title through an attachment, if it appears that the officer to whom it was directed failed to comply with the requirements of section 542, Code Civil Proc. Cal., the omissions on the part of the officer are fatal to his title, and plaintiff cannot recover in the action.
2. **JUDGMENT—LIEN—JUSTICE'S COURT—COUNTY COURT—DOCKETING OF JUDGMENT.**
S. recovered a judgment against B. before a justice of the peace, August 5, 1875, which, on appeal, was affirmed in the county court, April 10, 1877. On June 18, 1875, B. for a valuable consideration conveyed his land to C. by deed, duly recorded on the same day. *Held*, that C. thus acquired the title of B. before any lien was created in favor of S. by virtue of the docket of his judgment or otherwise.

Department 1. Appeal from superior court, Santa Cruz county.

This is an action of ejectment. On June 16, 1875, one Charles Brown was the owner of the premises. On that day one Steen commenced an action against him in a justice's court to recover \$150 upon contract, and on the same day a summons and a writ of attachment were duly issued against him. The said writ of attachment was on the same day delivered to a constable of the county, and on the seventeenth day of June, 1875, the constable attempted to levy the attachment on the premises by filing with the county recorder a copy of the attachment, together with a description of the property, and a notice that it was attached; but the recorder did not index the attachment when filed, nor did he do so until the twenty-fourth day of the said month. A final judgment was rendered in the cause against Brown, upon an appeal, in the county court, on the tenth day of April, 1877, and the judgment was on the same day docketed in the judgment docket of that court. An execution was issued on the judgment, and under it the premises were sold to the plaintiff, and thereafter conveyed to him by deed, by the proper officer, which was duly recorded. There was no evidence offered by the plaintiff showing, or tending to show, that any copy of the attachment, with a description of the property, and a notice that it was attached, or either of them, was ever left with an occupant of the property, or, if there was no occupant, by posting the same in a conspicuous place, or any place on said property. It further appears that on the eighteenth of June, 1875, the said Charles Brown duly granted and conveyed, for a valuable consideration, the said premises by deed to the defendant, which deed was duly recorded, and upon the delivery of the deed, on the said eighteenth of June, 1875, the defendant went into immediate possession, and has ever since been in possession, of the same. The cause was tried upon these and other facts not necessary to be stated, and resulted in a judgment for defendant. Plaintiff appealed.

Chas. B. Younger and J. M. Lesser, for appellant. *Jos. H. Skirm and Pillsbury & Blawding*, for respondents.

McKINSTRY, J. 1. The plaintiff derived no title through the attempted attachment in the action of *Steen v. Brown*. There is no finding, nor does it appear, that plaintiff offered any evidence tending to prove that a copy of the attachment, together with a description of the property attached, and a notice that it was attached, was left with the occupant of the property, or posted upon it. Code Civil Proc. 542, subd. 1. No lien was created by the attempted levy of the attachment, to which the right of the purchaser at the execution sale could relate. *Watt v. Wright*, 66 Cal. 202; S. C. 5 Pac. Rep. 91; *Main v. Tappener*, 43 Cal. 206; *Sharp v. Baird*, Id. 577; *Porter v. Pico*, 55 Cal. 172.

2. The judgment in the action of *Steen v. Brown* was entered by the justice of the peace, August 5, 1875; and the judgment was rendered in the county

court, April 10, 1877. On the eighteenth of June, 1875, Brown, defendant in that action, for a valuable consideration conveyed, by grant, bargain, and sale deed, the premises herein demanded to the defendant Cowell, which deed was duly acknowledged and recorded on the same day. Cowell thus acquired the title of Brown before any lien was created in favor of Steen by virtue of the docket of his judgment, or otherwise. Judgment affirmed.

We concur: THORNTON, J.; MYRICK, J.

SCHWARTZ v. COWELL and another. (No. 9,690.)

(*Supreme Court of California.* November 24, 1886.)

Department 1. Appeal from superior court, Santa Cruz county.

Action of ejectment to recover certain lots in Santa Cruz, purchased by plaintiff at an execution sale. Judgment for defendants. Plaintiff appealed.

Chas. B. Younger and *J. M. Lesser*, for appellant. *Jos. H. Skirm* and *Pillsbury & Blanding*, for respondents.

BY THE COURT. On authority of *Schwartz v. Cowell*, ante, 252, (No. 9,691,) opinion this day filed, judgment affirmed.

(11 Or. 177)

MARX and another v. SCHWARTZ.

(*Supreme Court of Oregon.* November 15, 1886.)

1. GUARANTY—FRAUD ON GUARANTOR—WHETHER SUFFICIENT TO AVOID.

Where defendant is sued on a contract signed by him, under seal, and showing a consideration of one dollar only, in which he agreed to guaranty to plaintiffs the payment of a sum due and owing to them by one Thomas Watson, his answer, alleging that (said Watson having had his account on plaintiffs' books transferred to defendant's name) the plaintiffs, knowing he had no interest in Watson's business, or in any of the goods purchased, represented to him, as an inducement to sign the contract, that it appeared by their books that he was indebted to them in said sum, and if he would sign the instrument they would sue Watson for the amount, together with the remainder of Watson's debt to them, by which they could collect the whole of said debt, and further promised, if defendant would sign the instrument, they would never use the same against him, does not show such fraud on the part of plaintiffs as will relieve defendant from liability on his written guaranty.¹

2. TRIAL—INSTRUCTIONS TO JURY—OUTSIDE OF ISSUES.

An instruction which directs the attention of the jury to a fact not in issue, and makes the finding on that fact decisive, is erroneous, though the fact, under proper issues, might be material to or decisive of the rights of the parties.

Appeal from Multnomah county.

Action on contract of guaranty. Judgment for defendant. Plaintiffs appeal.

George W. Yocum and *W. Scott Beebe*, for appellants, Marx and another. *W. B. Gilbert*, for respondent, Schwartz.

STRAHAN, J. The complaint in this action states in substance that on April 15, 1884, plaintiffs sold and delivered to Thomas Watson goods, wares, and merchandise of the value of \$2,368.35; that afterwards, on April 30, 1884, defendant, for a valuable consideration, made and executed to the plaintiffs a certain contract in writing, in words and figures as follows, viz.:

"In consideration of one dollar and other valuable considerations, receipt of which is hereby acknowledged, I do hereby guaranty the payment to Marx

¹See *Gammill v. Johnson*, (Ark.) 1 S. W. Rep. 610.

& Jorgenson, of Portland, Oregon, of the sum of six hundred and twenty-four 65-100 dollars, due and owing to them by Thomas Watson.

"Witness my hand and seal this thirtieth day of April, 1884.

"J. SCHWARTZ." [L. S.]

—That afterwards, on July 22, 1884, plaintiffs recovered judgment against Watson for said \$2,368.35; and that they realized, upon the sale of Watson's property on execution, \$519, and no more, and that the balance of said judgment remains unpaid, and that defendant has not paid said \$624.65.

The answer admits the execution of the contract sued on, but denies it was for value. The answer then alleges that said written guaranty was obtained from the defendant through fraudulent deceit of the plaintiffs, as follows: "That, shortly prior to the time the said instrument was signed, the said Watson, without the consent of the defendant, transferred his account with said firm to the name of this defendant, and purchased goods of said firm in the name of this defendant,—the said firm well knowing that the same was unauthorized by the defendant, and that said defendant had no interest in the business of said Watson, or in any of the goods so purchased; that, at the time said instrument was signed, plaintiffs, for the purpose of inducing the defendant to sign said writing, represented to the defendant that, as appeared by their books, the defendant was indebted to them in the sum of \$624.65, and falsely and fraudulently represented to the defendant that, if he would sign said instrument, they would sue said Watson for the amount, together with the remainder of said Watson's debt to them, and they could thereby collect the whole of said debt, and further promised to defendant that, if he would sign said instrument, they would never use the same against him, or attempt to hold him liable thereon; that he believed said representations, and was thereby induced to and did sign said writing, and that the said representations were false, and known to be false by the plaintiffs at the time they were made. The answer then alleges there was no consideration whatever for said writing, and that the one dollar, nor any sum, was paid as a consideration. The reply denied the new matter in the answer, and upon these issues the cause was tried. All the evidence given upon the trial is included in the bill of exceptions.

Upon the trial plaintiffs' counsel asked the court to instruct the jury as follows: "That if the jury find from the evidence that the debt guaranteed was the debt of Schwartz, and contracted by him, then the plaintiffs can recover in this action." The court refused this instruction, and gave in lieu thereof the following: "If the debt guaranteed was the debt of Schwartz, the defendant, then the plaintiffs are not entitled to recover in this action." The refusal to give the instruction asked, and the giving of the one in place thereof by the court, are assigned for error. The instruction given by the court was outside of the issues, and therefore erroneous. This instruction directed the attention of the jury to a fact not in issue, and made the finding on that fact decisive against the plaintiffs. There can be no doubt, under proper issues, the question presented might become material, and possibly decisive of the rights of the parties; but to present it the pleadings would have to be amended. For the same reason the instruction asked by the plaintiffs was properly refused. It was outside of the issues.

Inasmuch as there must be a new trial, there are two other questions presented by this record, and which were referred to upon this argument, upon which we deem it proper to indicate our views.

If the debt guaranteed was Watson's debt, and not Schwartz's, then the payment of \$519 on the execution against Watson inured to the benefit of Schwartz, and, after deducting the expenses of collecting same, the residue should be applied to extinguish Schwartz's guaranty *pro tanto*. In other words, Schwartz guaranteed to the plaintiffs that Watson would pay them

\$624.65. If Watson has paid any part of that sum, then, to that extent, the guaranty has been performed and satisfied, assuming the debt to have been Watson's, as alleged in the complaint.

The answer undertakes to allege fraud, and that there was no consideration for the guaranty. It was conceded upon the argument here that the guaranty being under seal, and expressing a sufficient consideration upon its face, that no question could arise as to the consideration; but it was claimed that the new matter in the answer, if true, would constitute such fraud on the part of the plaintiffs as would relieve the defendant from all liability on his guaranty. We have carefully considered the alleged fraudulent representations set out in the answer, and hold that they are not sufficient to relieve the defendant from liability on his written guaranty. The defendant was bound to know whether he was indebted to the plaintiffs in the sum of \$624.50 or not, and hence he had no right to rely upon the plaintiffs' statements on that subject. What appeared from the plaintiffs' books was wholly immaterial; so their promise to sue Watson for what he owed them was of no consequence to defendant. He had no interest in the suit, nor in its results, and his statement, that he was influenced by all or any of these things, is not available as a defense. Nor were plaintiffs' statements to the defendant that if he would sign the guaranty they would never use the same against him, or attempt to hold him liable thereon, of any importance. He cannot be permitted to say that he was in any manner deceived by such statements. Besides, all such matters became merged in the writing itself when it was executed, and must be held to contain the entire agreement between the parties at the time. Civil Code, § 682. We must not be understood as holding that a party cannot allege and prove fraud in the procurement of an agreement upon which he is sought to be charged, and thereby relieve himself from any liability; but only that the facts here pleaded do not constitute fraud in a legal sense, and that, therefore, the agreement is to be given effect according to its terms, on the case now before us. Without entering further into a discussion of the questions of what misrepresentations will constitute fraud, we refer to the following cases: *Hill v. Bush*, 19 Ark. 522; *Winter v. Bandel*, 30 Ark. 362; *Bigham v. Bigham*, 57 Tex. 238. Each case must depend very much upon its own peculiar facts and circumstances.

The judgment will therefore be reversed, and the cause remanded to the court below for a new trial.

(2 Cal. Unrep. 720)

FISK v. LEE. (No. 9,790.)

(*Supreme Court of California*. November 29, 1886.)

INTEREST—COMPUTATION—INTEREST ON COMPOUND INTEREST.

Where defendant, in California, executed her promissory notes payable in 30 days, with interest thereon at the rate of 4 per cent a month, interest to be paid monthly in advance, and, if not so paid, to become a part of the principal, and bear thereafter the same rate of interest; compounding monthly in advance, the court may properly, in calculating the interest due to plaintiff, allow interest on compound interest, or "interest on interest on interest."

Department 1. Appeal from superior court, Alameda county.

Action to enforce payment of notes and mortgage.

On or about the seventeenth day of June, 1881, the defendant borrowed from the plaintiff the sum of \$200 in gold coin of the United States, and to secure the payment of the same, with interest, she executed and delivered to the plaintiff her four promissory notes, for \$50 each; each being in the words and figures following:

"\$50.

SAN FRANCISCO, CAL., June 17, 1881.

"Thirty days after date, without grace, I promise to pay to Asa Fisk, or order, the sum of fifty and 00-100 dollars, to be paid only in gold coin of the

United States of America, for value received, with interest thereon, in like gold coin, from date at the rate of four per cent. per month until paid; interest to be paid monthly in advance, and, if not so paid, to become a part of the principal, and bear thereafter the same rate of interest, compounding monthly in advance, for value received. This note to be paid at the banking-house or office of Asa Fisk, in the city of San Francisco.

ABBA LEE."

The defendant at the same time, to secure the said notes, executed a mortgage on certain lots in the town of Haywards, Alameda county, California, in which it was stipulated, among other things, that defendant should pay 30 per cent. on said principal and interest as attorney's fees in case of foreclosure, and would also pay taxes and assessments, which, if not paid, should be added to the principal, and bear interest at 4 per cent. a month. The defense was that the notes and mortgage did not correctly set forth the terms of the agreement made between plaintiff and defendant respecting the loan, and the terms of the agreement were that plaintiff would loan defendant \$250 for five or six years, and defendant should pay interest therefor at 4 per cent. per annum: that defendant, being wholly inexperienced in business, had never previously executed any promissory note or mortgage, and had no one to advise her except plaintiff; that she was short-sighted, and unable to read without the aid of her eye-glasses, and, having left them at home, did not read over the notes and mortgage before signing them; that, in preparation of the notes and mortgage, she relied entirely on the plaintiff, and believed that they had been prepared in accordance with, and expressing therein the terms of, her previous agreement with plaintiff for the loan.

On the hearing judgment was given that plaintiff was entitled, on her said loan of \$200, to the total sum of \$744.31, and foreclosure sale was ordered, and, in case of the property proving insufficient, a judgment should be docketed for the balance against defendant, and execution issued thereon. The defendant appeals. Apparently there was an exception taken by defendant to the allowance of interest upon compound interest, which the appellate court overruled.

R. Percy Wright, for appellant. E. H. Rixford, for respondent.

BY THE COURT. The court below did not err in its calculation of interest. The mode adopted is in strict accord with the contract of the parties. Judgment affirmed.

(71 Cal. 14)

FLOURNOY v. VAN CAMPEN. (No. 11,371.)

(Supreme Court of California. September 18, 1886.)

STATUTE OF FRAUDS—DEBT OF ANOTHER.

A promise to answer for the debt, default, or miscarriage of another must be in writing, to be valid under the California statute of frauds.¹

Department 1. Appeal from superior court, Merced county.

Action by a physician to recover for professional services rendered to defendant's mother, and alleged in the complaint to have been rendered "at defendant's special instance and request." Plaintiff's own testimony at the trial showed that he had rendered part of the services at the special request of the mother herself. He offered, however, to prove by parol that, pending his treatment of the mother, at her request, the defendant had orally promised to pay plaintiff for the services he was rendering. Defendant objected to evidence of any such contract, unless it was in writing. The objection was overruled, and plaintiff was allowed to prove such a contract by parol. Judgment went for plaintiff. Defendant appealed.

J. K. Law, for defendant and appellant. *F. H. Farrar*, for plaintiff and respondent.

Ross, J. The complaint counts upon a contract alleged to have been made by defendant with plaintiff for the rendition of the services of the latter, and is sufficient. But the plaintiff's own testimony shows that prior to any agreement with defendant he had been employed by defendant's mother to attend her professionally, and, pursuant to that employment, had commenced his treatment of her. His recovery in the court below against the defendant included compensation for services rendered by him as well before as after the contract with defendant, and is not susceptible, as the record is presented, of severance. Certainly the services rendered prior to the contract with defendant were rendered at the instance of defendant's mother, and for them she was bound to pay. That debt was her debt, and for it defendant could, under the statute, only bind himself in writing.

It results that the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

We concur: *MCKINSTRY, J.; MYRICK, J.*

JOHNSON v. WALDEN. (No. 11,176.)

(Supreme Court of California. September 18, 1886.)

ACTION—CHANGE OF VENUE—AFFIDAVITS OF MERIT—"THE CASE."

Where, on a motion by defendant to change the venue of an action, the affidavits of merit in support thereof fails to state that defendant has fully and fairly stated "the case" to his attorney, the court will not make the order for a change of venue.

Department 1. Appeal from superior court, Sacramento county.

This action was brought by an attorney to recover money claimed to be due him from defendant for services performed for defendant, at his request, in Sacramento county, California. Defendant demurred to the complaint, and at the time of filing such demurrer made a demand and motion that the place of trial be changed to Stanislaus county, and filed an affidavit of merits in support thereof, the material part of which reads as follows: "I have a just and meritorious defense to said action, and I have stated fully and fairly all the grounds of my defense thereto to my attorney, S. W. Geiss, Esq., of Modesto, Stanislaus county, California; and I am by my said attorney informed, and I

¹See *Lookout M. R. Co. v. Houston*, (Tenn.) 2 S. W. Rep. 36, and note.
v.12P.no.8—17

sincerely believe, that I have a good and sufficient and meritorious defense to said action." The superior court of Sacramento county, California, granted the motion, and ordered the place of trial to be changed to Stanislaus county. From that order plaintiff appealed.

Grove L. Johnson, in person, and *Albert M. Johnson*, for plaintiff.

The affidavit of merits is defective in not stating that defendant has fully and fairly stated "*the case*" to his attorney. *People v. Larue*, 5 Pac. Rep. 157; *Nickerson v. California Raisin Co.*, 61 Cal. 268. Both these cases are directly in point. Both these cases were cited and read to the superior court of Sacramento county at the time of the argument of the motion to change the place of trial, and were by it overruled.

S. W. Geiss, for respondent.

BY THE COURT. On the authority of *Nickerson v. California Raisin Co.*, 61 Cal. 268, order reversed.

(5 Cal. Unrep. 744)

BISHOP v. GLASSEN. (No. 9,621.)

(*Supreme Court of California. October 23, 1886.*)

1. PUBLIC LANDS—HOMESTEAD—PRE-EMPTION.

Public lands of the United States, in the actual occupation and exclusive possession of one party, are not subject to pre-emption or homestead settlement by another.

2. APPEAL—REHEARING.

Where, on the hearing in the supreme court, there is no appearance for the appellant, and the judgment is affirmed, such judgment will not be vacated, for the purpose of another hearing, though a sufficient and good showing be made concerning such non-appearance, so as to authorize the court to do so, if it appears that it would be useless to do so for the reason that, upon another hearing, a like judgment must follow.

Department 2. Appeal from superior court, county of Contra Costa.

Ejectment. The complaint alleged, and the court found, that plaintiff had been in the peaceable possession of surveyed United States lands which were open to pre-emption; that while in such possession and the actual occupation of such lands defendant forcibly ejected plaintiff from said land, and took, and continued to the time of the action to hold, said lands unlawfully from defendant. Defendant in his answer claimed to have entered on said lands as a homestead pre-emptor, and that, after his entry, he had tendered to the United States land-officer his claim for the same, together with the necessary fees, which, however, such officer had refused. The court found that such land at the time defendant entered was in the actual occupation and exclusive possession of plaintiff, and therefore not then subject to pre-emption or homestead settlement. Judgment went for plaintiff. Defendant appealed. At the time for hearing in the supreme court the appellant failed to appear. The supreme court affirmed the judgment, as appears below, and the appellant then made a showing of the absence of this attorney from the state as ground for his non-appearance.

B. B. Newman, for defendant and appellant. *Mills & Jones*, for defendant and respondent.

BY THE COURT. We have examined the transcript herein, and are of opinion that this case must be governed by the rulings of this court in *Davis v. Scott*, 56 Cal. 165; *Hosmer v. Duggan*, Id. 258, and *McBrown v. Morris*, 59 Cal. 64. This must result in an affirmance of the judgment. Conceding that the showing is sufficient to authorize the court to grant the motion here made, and vacate the judgment of affirmance heretofore rendered, it would be useless to do so where, upon the hearing, the like judgment must follow. The motion is therefore denied. *Estate of Montgomery*, 59 Cal. 584.

Ordered accordingly.

(71 Cal. 238)

Ex parte ZEEHANDELAUR. (No. 20,230.)

(Supreme Court of California. October 29, 1886.)

1. HABEAS CORPUS—RETURN TO WRIT—CONTEMPT.

A return to a writ of *habeas corpus*, sued out by a witness who has been committed for contempt in refusing to answer a question, should show that the question which he refused to answer was pertinent to the matter in issue before the court, and, on the return failing to show this, the prisoner will be discharged.

2. CONTEMPT—WITNESS—REFUSAL TO ANSWER IMPERTINENT QUESTION.

Where a judge puts to a witness a question which is not pertinent to any issue before the court at the time the question is put, the refusal of the witness to answer it is no contempt, and the court has no jurisdiction to imprison him for such refusal.

In bank. On *habeas corpus*.

Charles F. Hanlon, for petitioner. Aylett R. Cotton and M. A. Wheaton, contra.

SHARSTEIN, J. The Code requires the person on whom a writ of *habeas corpus* is served to make a return thereto, and if the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return. Pen. Code, § 1480. Such a return has been made in this case, and the petitioner excepts to the sufficiency of it, because, as he insists, no legal cause is shown for his imprisonment. The return shows that during the progress of a trial in the superior court the petitioner was called and sworn as a witness, and was asked a question by the court which he refused to answer. For such refusal he was adjudged guilty of contempt, and ordered to be imprisoned until he should answer said question. There are no facts recited in the order which show, or tend to show, that the question was pertinent to the matter in issue. "A witness must answer questions legal and pertinent to the matter in issue." Code Civil Proc. § 2065. It is his right "to be examined only as to matters legal and pertinent to the issue." Id. § 2066. Such being his right, we think it follows that the refusal to answer a question not pertinent to the issue was no contempt, and that the order adjudging him guilty of a contempt, which fails to show that the question was pertinent to the issue, is invalid. Conceding as we do, that the court had jurisdiction of the action on trial, we cannot concede its power to inquire into matters outside of the issues therein. I had the power to order questions pertinent to the issues to be answered, but it had not the power to order questions not pertinent thereto to be answered. As to matters not in issue, it had no jurisdiction.

In order to show a legal cause for the imprisonment of the petitioner, the return in this case should show that the question which he refused to answer was pertinent to the matter in issue before the court, and, as this is not shown by the return, no legal cause for the imprisonment of the petitioner is shown, and he should be discharged, and it is so ordered.

MYRICK, J. I concur in the judgment. The question which the petitioner refused to answer, and for which refusal he was adjudged guilty of contempt, was not pertinent to any matter involved in any issue then before the court. Under such circumstances, his refusal was no contempt, and the court had no jurisdiction to imprison him.

The petitioner should be discharged.

MORRISON, C. J., (*concurring.*) The petition in this case shows that the petitioner was called upon to testify in a certain divorce case pending in the superior court of San Francisco, wherein one Alice Hinkle was plaintiff and P. Hinkle the defendant, and in the course of the proceedings the petitioner was asked the following question by the judge of the court: "I desire to know

if Mr. Hinkle, or Mr. Lowenthal, or anybody connected with Mr. Lowenthal's office, who has been present during the trial, has made to you any statements as to what transpired during the progress of the trial?" This was the first and only question asked the petitioner, which the petitioner declined to answer, and was thereupon imprisoned for contempt of court for such refusal. It does not appear for what purpose the question was asked, and it is not clear how an answer thereto could have been material to the divorce case then on trial. Unless the matter sought to be elicited from the witness had some bearing on the case on trial, or was in some manner material to matter in issue, it is hard to understand what right the court had to inquire into it, or how the refusal of the witness to answer it constituted a contempt of the court.

By section 1211 of the Code of Civil Procedure it is provided that "when a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt," etc. If all the facts set forth in this case are admitted to be true, it does not follow therefrom that the defendant was guilty of a contempt of court in declining to answer the question, and that he thereby committed a contempt of court.

I am of opinion that the petitioner should be discharged, and it is so ordered.

THORNTON, J., (*concurring.*) I cannot perceive that the court had jurisdiction to compel, by imprisonment, an answer to the question put to the petitioner. It appears that during the progress of the trial of *Hinkle v. Hinkle*, which was an action for a divorce, petitioner was called and sworn as a witness, and one question only was put to him. It is not stated in the commitment that petitioner was called as a witness in the cause on trial, but the statement is made generally, as given above. The following is the question put: "I desire to know if Mr. Hinkle, or Mr. Lowenthal, or anybody connected with Mr. Lowenthal's office, who has been present during the trial, has made to you any statements as to what transpired here during the progress of the trial?" How such a question could be pertinent in the divorce case on trial I cannot perceive. It may have been pertinent with regard to a violation of an order made that the case of *Hinkle v. Hinkle* should be heard with closed doors, from which the public generally should be excluded, and on a trial of some one for such violation; but the commitment does not show that such an order for the pending trial had ever been made. But, without some regular proceeding against a person for the violation of such an order, I am of opinion that the court is without jurisdiction to put such a question to anyone. In my judgment the court had no jurisdiction, conceding that the order for the trial with closed doors had been made and entered, to ask such a question of a witness, with a view of ascertaining if a certain person had been guilty of such violation, and in advance of a regular trial for an alleged violation of such an order.

It is argued that the petitioner cannot urge such ground for his discharge as is above stated, because he did not urge it before the court which ordered his imprisonment. I cannot agree that such a contention is sound. If the court is entirely without jurisdiction, the order called in question here is void, and the petitioner cannot, for the reason alleged, be precluded from availing himself of it.

I concur in the conclusion that the prisoner should be discharged for the reasons above given.

(71 Cal. 384)

PEOPLE v. JOHNSON. (No. 20,232.)

(Supreme Court of California. December 7, 1886.)

1. CRIMINAL LAW—JUDGMENT FOR WRONG OFFENSE—STATEMENT TO PRISONER.
The misstatement of his offense, by the judge, to a prisoner appearing for sentence, is not ground for reversal, especially if the defendant has, after conviction, moved in arrest of judgment on the ground that the information charges no crime; but the entry of judgment of conviction as for an offense other than that charged in the information is ground for reversal.

2. EMBEZZLEMENT—INFORMATION—BAILEE—SECTION 507, PEN. CODE CAL.

That in an information for embezzlement of property, under section 507 of the Penal Code of California, the defendant is not named as "bailee" or "tenant" or "lodger," as the case may be, does not render the information deniable, if the terms of the contract between the defendant and the person alleged to have been specially injured are specifically set forth, and the contract clearly shows that the defendant was thereby constituted a bailee, and received the property in that capacity.

3. CRIMINAL LAW—ARREST OF JUDGMENT—PEN. CODE CAL. 1185, 1004.

Under the Penal Code of California, 1185, 1004, a motion in arrest of judgment must be founded upon defects in the indictment or information appearing upon the face of it.

In bank. Appeal from superior court, Yolo county.

Information for embezzlement. Judgment for the people. Defendant appealed.

Thomas & Hurst, for appellant. Atty. Gen. E. C. Marshall, for respondent.

MCKINSTY, J. The information charges, if it charges any offense, embezzlement, and the verdict was guilty as charged. At the time appointed for pronouncing judgment, the following proceedings (as appears from the minutes) took place: "The district attorney, with the defendant and his counsel, Thomas & Hurst, came into court. The defendant was duly informed by the court of the information duly presented and filed on the tenth of April, 1886, by the district attorney of the county of Yolo, charging said defendant with the crime of grand larceny; of his arraignment and plea of 'not guilty as charged in said information'; of his trial and the verdict of the jury on the twenty-eighth day of July, 1886, 'guilty.' The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant replied he had not. And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment that whereas, the said R. H. Johnson having been duly convicted in this court of the crime of grand larceny, it is therefore ordered, adjudged, and decreed that the said R. H. Johnson be punished by imprisonment in the state prison of the state of California, at Folsom, for the term of twelve months. The defendant was then remanded to the custody of the sheriff of the said Yolo county, to be by him delivered into the custody of the proper officers of said state prison, at Folsom."

The transcript contains no bill of exceptions, setting forth of what the defendant was informed when he was called up for judgment, or that defendant excepted to the statement by the court that the information charged him with the crime of "grand larceny." Conceding, without deciding, that the statement made by the court to defendant as to the contents of the information was properly entered as a portion of "the minutes of the trial," which by section 1207 of the Penal Code constitute a part of the "record" of the action, and that we should therefore take notice of any error in such statement, the defendant was not injured by the misnomer of the offense charged in the information.

The bill of exceptions shows that the defendant moved in arrest of judgment, basing his motion on the alleged insufficiency of the information, and

on irregularities in the acts of officers which preceded the information. If it could be presumed that the defendant, to whom the information had been read, and who had been supplied with a copy of it, (section 988,) and who had been tried upon it, had forgotten the crime charged in it when he was called for sentence, the fact that he then and there moved in arrest because the information charged no crime, would seem to be sufficient to overcome such presumption, and to establish that he was fully informed of its contents. This court must give judgment without regard to errors which do not affect the substantial rights of the parties. Pen. Code, 1258.

But section 1207 of the Penal Code provides: "When judgment upon a conviction is rendered, the clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had," etc. There can be no doubt that this statement of the offense is part of the judgment. The clerk has no power to enter, and it is at least error in the court to direct, a judgment declaring that a defendant has been convicted of one offense, when in fact he has been convicted of another and distinct offense. The entry of a judgment declaring that a defendant has been convicted of an offense of which he has not been convicted is more than a mere "technical" error. A judgment is a solemn record, which is ordinarily conclusive evidence of the facts recited in it, and we ought not to permit such evidence to stand when, on direct appeal, it appears that the matters recited in it are not true.

Inasmuch as no proper judgment has been entered in the court below, the judgment in form must be set aside, and a proper judgment rendered and entered. The court below should appoint a time for pronouncing judgment, on reasonable notice to defendant and his counsel, and defendant should be present, that the law may be complied with. Nevertheless, as the defendant has already had his day in court during the proceedings preliminary to the rendition of judgment, with an opportunity to show legal cause why judgment should not be pronounced against him, the court is simply to render judgment as required by law upon a conviction for embezzlement, which judgment the clerk is to enter as rendered. In other words, the proceedings are to be taken up at the point when they ceased to be sufficiently regular, and are to be regularly completed.

The appellant claims that his motion in arrest should have been granted. If he be correct in this, we will not direct a judgment to be rendered and entered simply that on another appeal it shall be reversed. The question as to the alleged error in denying the motion in arrest has been fully argued, and we proceed to consider and pass upon it. If no judgment ought to have been rendered or entered in the cause, the defendant should be discharged, and the proceedings based on the information be dismissed. By the information the defendant is charged with the crime of embezzlement, "committed as follows: The said R. H. Johnson, on the twenty-fourth day of May, A. D. 1884, in the county of Yolo, in the state of California, was intrusted with one sorrel horse, of the value of \$100, by Joel Woods, said horse being then and there the property of said Joel Woods; that by the terms of said trust said R. H. Johnson was to use said horse for his own benefit for a part of one day, and return said horse to said Joel Woods on the twenty-fourth day of May, 1884; that said Johnson did not return said horse to said Joel Woods according to the terms of his said trust, but did then and there, on the said twenty-fourth day of May, 1884, in said Yolo county, willfully, unlawfully, feloniously, and fraudulently convert said horse to his own use, and embezzle the same, contrary to his said trust, and contrary to the form, force, and effect of the statute," etc.

Section 507 of the Penal Code reads: "Every person intrusted with any property, as bailee, tenant, or lodger, * * * who fraudulently converts the same, or the proceeds thereof, to his own use, * * * is guilty of embezzlement."

The defendant moved in arrest of judgment, and now here claims that the facts set forth in the information do not constitute a public offense. Pen. Code, 1004, 1012, 1185. It is insisted that the information is fatally defective in that it does not charge, in express terms, that the defendant was a "bailee." The decisions of the courts of the several states as to the sufficiency of the charging parts of indictments depend very largely on the various statutes. Under the section of the Penal Code of California we think it does not render the information subject to general demurrer that the defendant is not named therein as "bailee" or "tenant" or "lodger," as the case may be, if the terms of the contract between the defendant and the person alleged to have been specially injured are specifically set forth, and the contract clearly shows that the defendant was thereby constituted a bailee, and received the property in that capacity.

Of cases cited by counsel for defendant and appellant, *People v. Cohen*, 8 Cal. 42, was one in which the charge was that defendant, "being bailee of four hundred thousand dollars, the moneys, goods, and chattels of Adams & Co., did feloniously and willfully convert the same to his own use, with the intent to steal the same." The supreme court held that all conversions of property by bailees were not *ipso facto* felonies, but that the word "bailee," under the statute there considered, should be construed, in a limited sense, as designating bailees "to keep, transport, and deliver." The objection to the indictment was that the facts showing the nature of the bailment, and that it was of the class of bailments contemplated by the statute, were not alleged. In the information now before us the facts are stated to show the character of the contract of bailment under which the property was received by the defendant. In *People v. Peterson*, 9 Cal. 314, the defendant was charged, "being then and there the bailee" of certain money and gold-dust, "the money, goods, and chattels of John A. Clary," to have feloniously converted, etc. The indictment was held insufficient, because it did not state the "character" of the bailment. To the same effect is *People v. Poggi*, 19 Cal. 600. *People v. Smith*, 28 Cal. 280, points out the distinction, well established, between larceny and embezzlement, in cases where a bailee has obtained possession of property from the owner with the latter's consent. In *Ex parte Hedley*, 31 Cal. 109, the petitioner for *habeas corpus* had been held to answer on a charge of embezzlement. He was remanded by the court. He was held under a statute which related to embezzlement by "any clerk, apprentice, servant, or agent." It was not disputed that the petitioner was the "agent" of Wells, Fargo & Co., and there was no question as to averments in an indictment, for no indictment had been found. *People v. Tomlinson*, 66 Cal. 844, S. C. 5 Pac. Rep. 509, would seem to hold that the facts showing the character of the agency, where one is indicted under section 508 of the Penal Code, and is alleged to have been the agent, need not be alleged.

The cases cited from other states do not support the contention of appellant. Under a New York statute relating to "clerks and servants," it was charged in the indictment that the defendant received money "as the agent," and facts were not alleged showing that the defendant was either a clerk or servant. It was said by the supreme court of New York: "The term 'agent' is *nomen generalissimum*, and, although it includes clerks and servants, it is by no means restricted to such persons." *People v. Allen*, 5 Denio, 79. *People v. Tryon*, 4 Mich. 667, was decided upon a Michigan statute relating to embezzlements by attorneys of property of their clients. *State v. Newton*, 26 Ohio St. 265, holds that a county auditor is not an officer charged with the custody of money, within the meaning of a statute of Ohio. In *Gaddy v. State*, the court held that, to charge a bailee with embezzlement, the indictment must, by direct averment, charge that the embezzled property came into his possession, or was under his care, by virtue of his agency, or of the bailment. 8 Tex. App. 127. It was held that, under a statute of Minnesota,

which defined embezzlements of goods intrusted to a defendant for delivery to be carried for hire, an indictment was insufficient which failed to aver those facts.

None of the cases cited seem to sustain the proposition that where the facts showing that a party charged is a "bailee" are fully stated, and all the other facts necessary to constitute the offense are averred, an indictment is fatally defective because he is not in terms alleged to be a "bailee." On principle, we can see no reason why it should be so held. If it be necessary to allege facts showing the character of the agency, it becomes a question of law rather than of fact, whether, upon the averments, the defendant was or was not a bailee. If not necessary to state the facts showing the character of the agency, yet it is not a matter of which the defendant can complain if such facts are stated, and he thus given fuller notice of the charge than would be given by simply designating him as "bailee."

Another ground in arrest of judgment was that "the court had no jurisdiction of the person of the defendant, or of the offense charged." In support of this ground the defendant introduced certain evidence. We discover no reason why the proceedings before the magistrates should affect the validity of the information, or deprive the superior court of jurisdiction. Moreover, a motion in arrest of judgment must be founded upon defects in the indictment or information appearing on the face thereof. Pen. Code, 1185, 1004.

The judgment is reversed and set aside, with direction to the court below to render and enter an appropriate judgment.

We concur: MORRISON, C. J.; MCKEE, J.; MYRICK, J.; SHARPSTEIN, J.; THORNTON, J.

(71 Cal. 382)

GROSS v. SUPERIOR COURT. (No. 11,437.)

(*Supreme Court of California. December 7, 1886.*)

ACTION OR SUIT—CHANGE VENUE—APPEAL FROM JUSTICE'S COURT—CONST. CAL. ART. 6, § 5.

Under Const. Cal. art. 6, § 5, enacting that the superior courts in California "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law," a superior court to which an action has been appealed from a justice's court in the same county, where it was properly commenced, has no jurisdiction to make an order changing the place of trial to the superior court of another county.

In bank. *Certiorari* to superior court, city and county of San Francisco. Action for goods sold and delivered.

F. M. Husted, for petitioner. *E. H. Wakeman*, for respondent.

SHARPSTEIN, J. Petitioner commenced an action in the justice's court at San Francisco, against John S. Cleland, a resident of Siskiyou county, upon a cause of action for goods sold to Cleland by petitioner at San Francisco. The defendant answered, and went to trial. Judgment was rendered against him, and he appealed to the superior court of San Francisco. After the papers were filed in the superior court on the appeal, the defendant moved for a change of place of trial, on the sole ground that he was a resident of the county of Siskiyou, which motion was granted. This proceeding is *certiorari*, to review the order granting the motion.

The constitution provides that superior courts "shall have appellate jurisdiction in such cases, arising in justices' and other inferior courts in their respective counties, as may be prescribed by law." Article 6, § 5. As this case did not arise in a justice's or other inferior court in Siskiyou county, it is quite clear that the constitution confers no jurisdiction of it on the superior court of that county, and that the appellate jurisdiction is exclusively in the superior court of San Francisco, where the case was commenced and tried

in a justice's court. It therefore follows that the order changing the place of trial must be annulled. Order annulled.

We concur: MORRISON, C. J.; MCKINSTRY, J.; MYRICK, J.; THORNTON, J.

(71 Cal. 380)

WARREN v. ROBINSON and another. (No. 9,758.)

(*Supreme Court of California. December 6, 1886.*)

TRIAL — BY COURT WITHOUT JURY — FINDINGS — SUFFICIENCY TO SUPPORT JUDGMENT — SERVICES AND MATERIALS.

In an action for the value of services rendered and material supplied, where the complaint alleges that the services were rendered and material supplied at defendant's request, who agreed to pay what they were reasonably worth, that their reasonable value is so much, that defendants are and were husband and wife, and that the house at and upon which the services were rendered and the material supplied is the separate property of the wife, and defendants in their answer traverse all the allegations of the complaint, the finding of the court "that all the material allegations in plaintiff's complaint are fully sustained and proved, and that said labor performed and materials furnished, as alleged in said complaint, were and are for the benefit, profit, convenience, and use of defendants, and to said houses and premises, and that the charges for said labor performed and materials furnished were and are reasonable and proper," is insufficient to support a judgment for the plaintiff.

Department 1. Appeal from superior court, San Mateo county.

Action for value of services rendered and material supplied. Judgment for plaintiff. Defendants appeal.

Nygh, Fairweather & Durst, for appellants. *Geo. H. Buck* and *Geo. E. Filkins*, for respondent.

MCKINSTRY, J. The complaint alleges the defendants to be husband and wife, and that the services rendered and materials furnished (the value of which is sued for) were rendered at the special instance and request of defendants upon and furnished for a building the separate property of the wife; that the defendants promised to pay for such services and materials. The court found "that all the *material* allegations in the plaintiff's complaint are fully sustained and proved." This is insufficient. *Cassidy v. Cassidy*, 63 Cal. 352; *Ladd v. Tully*, 51 Cal. 277. The finding continues: "And that said labor performed and materials furnished, as alleged in said complaint, were and are for the benefit, profit, convenience, and use of defendants, and to said house and premises, and that the charges for said labor performed and materials furnished were and are reasonable and proper." There is no distinct finding that any labor was performed or that any materials were furnished. There is no finding that the services, etc., were rendered at the instance or request of the defendants, or either of them, or that husband or wife promised to pay therefor, or that the defendants were husband and wife, or that the services, etc., were rendered in or about the separate property of the wife, or that the house mentioned in the complaint was her separate property; nor is there any distinct finding of the value or reasonable worth of the services rendered or materials furnished.

Judgment reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; THORNTON, J.

(14 Or. 188)

PORTLAND & W. V. R. CO. v. CITY OF PORTLAND.

(*Supreme Court of Oregon. November 29, 1886.*)

1. CONSTITUTIONAL LAW — PUBLIC LEVEE — CITY OF PORTLAND — LEGISLATIVE POWER.

In an action brought by the Portland & Willamette Valley Railroad Company against the city of Portland, under an act of the legislative assembly of Oregon,

to condemn and appropriate what is known as the "Public Levee," in the city of Portland, to its use, for a depot and other purposes, held, that the legislature may regulate its use, or devolve it upon the defendant or the plaintiff, as its agent, in conformity with the purposes of its dedication, without the consent of the city, and without compensation to it.

2. SAME — MUNICIPAL CORPORATION — EMINENT DOMAIN — DEDICATION — LEGISLATIVE POWER.

When property is acquired by the exercise of the right of eminent domain, on payment of its value from public funds, or by dedication under a statute, where the fee to the soil passes out of the dedicatory, the legislature possesses, so far as the municipal corporation is concerned, unlimited control over the use of such property.

Action to condemn and appropriate what is known as the "Public Levee," in the city of Portland, to the use of the plaintiff, for the purposes stated in the act of the legislative assembly of Oregon, session 1885. Judgment for the plaintiff. The city appealed. The facts are stated in the opinion.

McDougal & Bower, for appellant, Portland & W. V. R. Co. *A. H. Tanner*, City Atty., for respondent, City of Portland.

LORD, C. J. This action was brought under an act of the legislative assembly to condemn and appropriate what is known as the "Public Levee," in the city of Portland, to the use of the plaintiff for the purposes therein stated. Sess. 1885, p. 100. It appears from the act that originally the piece of land in dispute was dedicated to the public use, as a levee or public landing, by Stephen Coffin, who subsequently, by deeds in 1865 and 1871, which were duly recorded, conveyed the same to the city of Portland. What right of estate remaining in Coffin after the dedication was intended to be conveyed by these deeds is not disclosed by the act or this record. It was assumed, however, in the argument and in the brief, that the city held the levee tract in trust, for the use of the public as a levee or public landing. The act itself is justly deserving of the criticism to which Mr. Justice DEADY subjected it. As he said, "it is largely a mass of senseless and redundant verbiage," and this applies directly and forcibly to all that part of the act devolving upon us to consider. See *Coffin v. City of Portland*, 27 Fed. Rep. 418.

Among other things, the levee tract is granted to the plaintiff by the act, "to be held, used, and enjoyed for occupation by track, side track, water stations, depot buildings, wharves, warehouses, and such other buildings and erections, of such form and manner of construction, as may be found requisite, necessary, or convenient in receiving, shipping, and storing of produce, goods, wares, merchandise, and, generally, of all kinds of freight, and for use generally, and in the manner usual and ordinary for depot purposes, and, as such, to be under the exclusive management and control of the owners of said railroad," etc., and with power to sell the same "as appurtenant to said railway," etc.; and that "said company shall never charge dockage to any boat, ship, or vessel while actively engaged in receiving or discharging cargo at the wharf which may be erected on said premises," etc.

It would not be difficult to give this language a construction so as to effect a purpose which the legislature could not authorize. But it does not follow that the act is void because something might possibly be attempted under it, and seem to be covered by it, in consequence of the broad language used, which the legislature could not give a legal right to do. It is our duty, if the act will admit of a construction which will justify it, to sustain it. The intentions in favor of validity of an act of the legislature must prevail, unless its provisions are necessarily void. The main purpose and purport of the act was succinctly stated by Mr. Justice DEADY in *Coffin v. City of Portland*, *supra*, in which he said that the act was "a grant or license to the Portland & Willamette Valley Railroad Company, then and now engaged in construct-

ing a road between Portland and Dundee; the use of the levee for a depot, and the wharves and warehouses necessary and convenient for receiving, storing, and shipping freight, on condition, among others, that said company shall not charge any vessel for 'dockage' while receiving or discharging cargo at any wharf on the premises."

It is contended, principally, (1) that the act is void in authorizing the plaintiff to do what the legislature is without power to authorize; and (2) that it is void, because the use to which the act devotes the property, or authorizes the plaintiff to devote it, is inconsistent with the use to which it is already dedicated.

The plenary power of the legislature over public corporations, except as to vested rights of property and of creditors, is indubitably established. *Dartmouth College Case*, 4 Wheat. 519; 2 Kent, Comm. 305. "Municipal corporations," said DILLON, C. J., "owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly, and so great a wrong, sweep from existence all the municipal corporations in the state, and the corporation could not prevent it. We know of no limitation on this right, so far as the corporations themselves are concerned. They are, so to phrase it, mere tenants at will of the legislature." *City of Clinton v. Cedar Rapids & M. R. Co.*, 24 Iowa, 456.

But while the municipality exists, as to private property which it may have been allowed to acquire under its charter, such property is, doubtless, as much protected by the constitution as the private property of the citizen. Nor can the legislature deprive the city of such property, except it be for public use, and only then upon just compensation. But the easement or property which the city has in public streets or public places is of a different character. It is not private property of the city; nor can the city sell or use it for other than proper public purposes. The city might sell its market-house, or appropriate it to some other municipal use; but it cannot sell its streets, nor use them for other than legitimate purposes connected with such use. Over these—all streets and highways and public places and their uses—the plenary power of the legislature, in the absence of special restrictions, has been often asserted in several leading cases.

In *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 354, BLACK, C. J., said: "The right of the supreme legislative power to authorize the building of a railroad on a street or other public highway is not now to be doubted. It has been settled, not only in England, (*King v. Pease*, 4 Barn. & Adol. 30,) but in Massachusetts, (*Newburyport Turnpike Corp. v. Eastern R. Co.*, 23 Pick. 328,) New York, (*Drake v. Hudson River R. Co.*, 7 Barb. 509,) and in Pennsylvania, (*Philadelphia & T. R. Co.'s Case*, 6 Whart. 43.) If such conversion of a street to purposes for which it was not originally designed does operate severely on a portion of the people, the injury must be borne for the sake of the far greater good which results to the public from the cheap, easy, and rapid conveyance of persons and property by railway. The commerce of a nation must not be stopped or impeded for the convenience of a neighborhood."

The interest in the use of streets and highways and public places and their uses being *publici juris*, the power of regulating such use is in the legislature, as the representative of the whole people. It is a part of the political or governmental power of the state, in no way held in subordination to the municipal corporation. It has therefore been held in many cases that the legislature has the power to authorize the building of a railroad on a street or highway, and may directly exercise this power, or devolve it upon the municipal authorities. *Moses v. Railway Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 Ill. 279; *Mercer v. Railroad Co.*, 36 Pa. St. 99; *Springfield v. Railroad Co.*, 4

Cush. 63; *People v. Kerr*, 27 N. Y. 188; *Lackland v. Railroad Co.*, 31 Mo. 180; *City of Clinton v. Railroad Co.*, *supra*.

The decisions, however, are not entirely harmonious, where the public have only an easement in the street or highway; and in some of the cases it has been held, as against the proprietor of the soil, the use of the street or highway for the purposes of a railroad created an additional burden of servitude, which, under the constitution, he could not be deprived of without compensation, (*Ford v. Chicago & N. W. R. Co.*, 14 Wis. 616; *Pomeroy v. Milwaukee & C. R. Co.*, 16 Wis. 640; *Gray v. St. Paul & P. R. Co.*, 18 Minn. 315, [Gil. 289:] *Williams v. Natural Bridge P. R. Co.*, 21 Mo. 580;) and this Judge COOLEY says appears to be the weight of the authority, (Cooley, Const. Lim. 549.) But where the fee of the streets is in the city corporation, and not in the adjoining owner, a different rule has been applied. *Moses v. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516; *Protzman v. Indianapolis & C. R. Co.*, 9 Ind. 467; *People v. Kerr*, *supra*; *City of Clinton v. Cedar Rapids & M. R. Co.*, *supra*; *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289. See also Cooley, Const. Lim. 555, and notes.

It may be—it is not necessary for us to decide the question—that private citizens owning adjoining property may have such rights or estate in or to the use of streets or public places over which the power of the legislature is not supreme or plenary. Whatever their rights may be we are not required to consider upon this record. They are not parties, and their interest cannot be affected by this proceeding. All that we are required to consider is the rights of the defendant, a municipal corporation; and, as we have seen, these rights the defendant holds subject to the supreme will of the legislature, as the representatives of the people, and that, so far as regards defendant, its streets and public places, and their uses, are not the private property of the municipality, in the sense that the legislature cannot authorize the same to be used for a public purpose, unless it make compensation to the city for such use.

In *People v. Kerr*, *supra*, EMOTT, J., said: "The title [in the streets] thus vested in the city of New York is as directly under the power and control of the legislature, for any public purpose, as any property held directly by the state, or any public body or officers, and its application cannot be challenged by a corporation [the city] which, in respect to such property at least, is a mere agent of the sovereign power of the people." And, in concurring, WRIGHT, J., said: "I am clearly of the opinion that the city corporation has no property in the streets of a character to be protected by the constitutional limitation on the right of eminent domain."

The principle deducible from these authorities is that when property is acquired by the exercise of the right of eminent domain, on payment of its value from the public funds, or by dedication under a statute, where the fee to the soil passes out of the dedicator, over the use of such property, so far as the municipal corporation is concerned, the legislature possesses unlimited control. It is immaterial whether the fee of the street is in the public, or in the city, in trust for the public, as then the city would not hold the fee for itself or its inhabitants only, but for the public generally, including its own inhabitants. The power of the legislature to authorize the use of the same by a railroad, without the consent of the city, and without compensation to it, is undeniable. The reason is plain. The streets are not the private property of the corporation. It owns no property in them in the sense, or of a character, to be protected by the constitutional limitation on the right of eminent domain. It results as a consequence of the unlimited power of the legislature, in the absence of special restrictions, not only over the existence of the municipality, but, while it allows it to exist, over its streets and public places, held for the use and benefit of the general public. By analogy, these principles of the law are alike applicable to other property held by the

city for the general public, such as levees or public landings. Unless there is something in the particular facts and circumstances to take such property, devoted to public uses, out of the operation of these general principles, it will be governed and controlled by them.

In the case now in hand the levee was unconditionally dedicated to the public use, as a public landing. When this was done, there remained in the dedicatoe the legal title, to which, so to speak, was attached, and belonged to him, every right of use or of property not inconsistent with the use he had given to the public. In a word, it may be used for the use to which he dedicated the property, viz., as a levee or public landing. Any other use inconsistent with that use belongs to him. To this property thus dedicated to the public use the dominion of the legislature is attached, but its power over it is not supreme. It might regulate its use or promote its improvement, but it could not divert or subject it to any use clearly inconsistent with the purposes of its dedication. To do that would violate the contract of dedication, and any person interested would be authorized to institute proper proceedings to enjoin it. Nor is it perceived that, so far as regards the defendant corporation, the holding of the title by it, in trust for the use of the general public, as a levee or public landing, makes any difference. The corporation holds only in trust, in subordination to the contract of dedication, for the use of the general public, as a levee or public landing. The city does not own it, nor can it sell or dispose of it, or divert it to any private use. Such a title is a holding for a public use; is public property, to be used in subordination to the use for which it was dedicated, and is not private or municipal property. To this extent, then, it may be said that whatever interest or estate the city may hold in the levee is essentially and wholly public, and not private, property, and that the city in holding it is the agent or trustee for the public, and not as a private owner for profit. It is a title conferred on it by the dedication for the benefit of the public to the uses granted, and not of private ownership, which comes within the constitutional limitation on the right of eminent domain.

It results that the legislature may regulate its use, or devolve it upon the defendant or the plaintiff, as its agent, in conformity with the purposes of the dedication, without the consent of the city, and without compensation to it. The legislature may therefore authorize the doing of the things by the plaintiff prescribed by the act, within the limitations indicated. It cannot itself do, nor authorize the defendant or plaintiff, nor can either of them do, anything to divert or subvert the use to which the levee is already dedicated. The things to be done under the act must be consistent with the use of the levee as a public landing, and it is only in this sense that the act can be upheld. Are the things authorized to be done under the act clearly inconsistent with the use of the levee as a public landing? As we have construed the act, it only, in effect, purports to grant to the defendant—to adopt the language of Mr. Justice DEADY—"the right to improve and use the premises as a public landing, with the added facility of direct and immediate railway connection therewith."

Now, will not the construction of wharves and warehouses, at which vessels may load and discharge cargo, be rather an improvement of its use as a levee or public landing, than its subversion as such? Are not these things, in fact, necessary and essential to afford proper facilities to the public, and make the levee of any value and benefit as a public landing? Are they not in accord with the general purposes for which the property was dedicated? Do they not, in fact, contribute to give it more identity as a public landing, and render the use it was dedicated to serve more beneficial to the general public? Nor does the construction of a depot thereat, in connection with the railway, subvert or destroy its use as a public landing; nor is it inconsistent therewith, but, within proper limitations, it may tend to improve and make the use of the levee, as such, more beneficial. "A 'landing' is a place on a

river or other navigable water for lading and unlading goods, or for the reception and delivery of passengers." *State v. Randall*, 1 Strob. 111. "It is either the bank or wharf to or from which persons or things may go from or to some vessel in the contiguous waters. *State v. Graham*, 15 Rich. 310. See, also, *Coffin v. City of Portland, supra*.

Now, are not all these things, and may they not be so constructed—wharf, warehouse, and depot—as proper incidents to a public landing, which improve and facilitate its use, extend its benefits to a larger public, and make it more suitable for the accommodation of passengers, and the stowing and shipping of general freight? The legislature, as the representative of the general public, has the right to regulate its use, and improve the same, consistent with the purposes of its dedication; and it may do this directly, or authorize the defendant to do it as the agent of the state.

If then, these structures may be built to improve the landing, and make its use more beneficial to the general public, and are not inconsistent with the use to which the levee was dedicated, what right in this property of the city, as trustee, is affected, which entitles it to compensation, or to be protected by the constitutional limitation on the right of eminent domain? As Mr. Justice DEADY said: "As Portland has no 'pecuniary' or other right in this property, except as trustee, and then only as far as the legislature may provide or permit, it is not apparent what claim it can have for damages in consequence of the appropriation to such uses and purposes." But my associates, while not disagreeing as to this result on the theory of condemnation, suggest and think that it was the intention of the legislature by the act to indemnify the city for any improvements—money expended on the levee, paid out on the same—or interest acquired by the deeds, (which is not disclosed by this record,) as damages, and that the proceeding, although in the form of condemnation, is for this purpose; and that in such case the state has a right to prescribe such conditions, although, without manifest intention to indemnify, the result would be otherwise.

The judgment must be reversed, and the cause remanded for further proceedings.

(71 Cal. 322)

In re STUTTMEISTER. (No. 11,527.)

(*Supreme Court of California.* November 27, 1886.)

1. CERTIORARI—WHEN IT LIES—CODE CIVIL PROC. CAL. § 1068.

Under the Code of Civil Procedure of California, § 1068, the writ of *certiorari* will not lie where there is an appeal from the action complained of; and if there is an appeal, but the time for taking it has elapsed, the writ will not lie.¹

2. APPEAL—WHAT APPEALABLE—ORDER OF PROBATE COURT—CODE CIVIL PROC. CAL. § 963, SUB. 3.

An order of the probate California courts, directing the sale of real estate, is appealable, under Code of Civil Procedure, § 963, sub. 3.¹

Commissioners' decision. In bank.

Application for a writ of *certiorari*. Dismissed. The facts are sufficiently stated in the opinion.

Ben. Morgan, for petitioner. *S. S. Wright* and *J. H. Moore*, for respondents. *John A. Collins, in pro. per.*

SEARLS, C. This is an application by W. O. Stuttmeister, as administrator with the will annexed of the estate of F. W. R. Stuttmeister, deceased, for a writ of *certiorari*, directed to J. V. COFFEY, judge of the superior court, department 9, (probate,) in and for the city and county of San Francisco, requiring him to certify to this court, for review, the record in the matter of the estate above referred to. An alternative writ issued, under which the

¹See note at end of case.

record is before us, and from which it appears that on the twenty-third day of July, 1885, an order was made by the superior court, in probate, requiring the petitioner, as administrator of the estate of F. W. R. Stuttmeister, to sell, at public auction, certain real estate belonging to the estate of deceased, situated on Howard street, San Francisco. The petition for the order of sale was filed by and on behalf of John A. Collins, an adjudged creditor of the estate, and is in the usual form, showing the existence of debts, the necessity of a sale to pay the same, that the administrator has failed to apply for an order, etc. The order of sale recites the facts of notice, and service upon the administrator; finds the existence of debts against the estate; necessity of sale of the real property to pay such debts, etc., in the usual form; shows that the administrator was present by attorney, and consented to the order. Subsequently, and on the nineteenth day of February, 1886, after notice and hearing, an order was made by the court, reciting that the administrator had unreasonably neglected and refused to comply with the order of sale of July 23, 1885, and ordering him, without delay, to proceed to sell the property as in the order of sale directed, etc. Thereupon the writ herein was sued out.

"A writ of review [*certiorari*] may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy." Code Civil Proc. § 1068. The writ will not lie where there is an appeal from the action complained of. *People v. Shepard*, 28 Cal. 117; *People v. Turner*, 1 Cal. 152; *Clary v. Hoagland*, 13 Cal. 174; *Newman v. Superior Court*, 62 Cal. 545; *Golden Gate H. M. Co. v. Superior Court*, 65 Cal. 187; S. C. 3 Pac. Rep. 628; *Slavonic M. B. Ass'n v. Superior Court*, 65 Cal. 500; S. C. 4 Pac. Rep. 500. And if there is an appeal, but the time for taking it has elapsed, the writ will not lie. *Bennett v. Wallace*, 43 Cal. 25; *Faut v. Mason*, 47 Cal. 8. An order of the probate court, directing the sale of real estate, is appealable. Code Civil Proc. § 963, sub. 3; *Estate of Corwin*, 61 Cal. 161. It follows that, as petitioner had a remedy by appeal for any errors or irregularities involved in the order of sale, the writ of review will not lie.

If it be urged that the order of February 19, 1886, requiring the administrator to proceed with the sale as directed in the previous order, is not appealable, it must be admitted. *Estate of Martin*, 56 Cal. 208. But the answer is, if the original order was regular and proper to be made, petitioner is not entitled to any relief; if it was not, he should have appealed from it. Were the rule otherwise, every defendant against whom a final judgment is rendered, requiring the performance of a specific act, could wait until adjudged guilty of contempt for non-performance of the required act, and then, by a writ of review, call for the examination of alleged errors in the judgment. The writ is not given in lieu of an appeal, but only to review errors in excess of jurisdiction, for which an appeal does not lie; and the error here (if any) was in the order of sale, and not in the subsequent order directing the administrator to proceed therewith.

The application should be dismissed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the application for a writ of *certiorari* is denied.

NOTE.

No appeal lies from an order dismissing a petition for the revocation of the probate of a will, or denying motions to set aside the orders and decrees made in the matter of the probate of a will, *Estate of Sbarboro*, (Cal.) 11 Pac. Rep. 563; nor from an order refusing to vacate an order of distribution and settlement of the final account of an ex-

ecutor, *In re Lutz*, (Cal.) 8 Pac. Rep. 89; nor from the appointment of commissioners to receive and examine claims against an estate, *Putney v. Fletcher*, (Mass.) 5 N. E. Rep. 640; nor from an order made by consent of the party appealing, *In re Pemberton*, (N. J.) 4 Atl. Rep. 770.

An order denying a motion for a new trial in the matter of the probate of a will is appealable. *In re Pemberton*, (N. J.) 4 Atl. Rep. 770.

As to appeals from other orders of the probate court, see *Morey v. Sohier*, (N. H.) 3 Atl. Rep. 636; *Charles v. Charles*, (Minn.) 29 N. W. Rep. 170; *Hardy v. Minneapolis & St. L. Ry. Co.*, (Minn.) 28 N. W. Rep. 219; *Auerbach v. Gloyd*, (Minn.) 27 N. W. Rep. 193; *Daniels v. St. Clair Circuit Judge*, (Mich.) 27 N. W. Rep. 1; *Hart v. Circuit Judge*, (Mich.) 23 N. W. Rep. 326; *In re Brown*, (Minn.) 21 N. W. Rep. 474; *In re Huntsman*, (Minn.) 21 N. W. Rep. 555.

(71 Cal. 395)

PEOPLE v. MCCOY. (No. 20,190.)

(Supreme Court of California. December 9, 1886.)

1. CRIMINAL LAW—MANSLAUGHTER—ARRAIGNMENT—STANDING MUTE—PLEA BY COUNSEL.

Where, upon an appeal from a judgment of conviction in a trial for manslaughter, the record shows that the defendant was regularly arraigned; that he was asked if he pleaded guilty or not guilty; and that he personally made no answer, but, in his presence, his attorney, answering, said, "We plead not guilty," whereupon the clerk of the court made an entry in the minutes of the court that the "defendant pleads not guilty of the offense charged in the information, and, by consent of all parties, the cause is set for trial on the twentieth of October, 1885;" held, that the substantial rights of the defendant were in no way prejudiced.

2. SAME—DUTY OF COURT—PEN. CODE CAL. § 1024.

Under section 1024, Pen. Code Cal., where, in the conduct of a criminal trial, the prisoner, on being arraigned, stands mute, it is the duty of the court to enter on the minutes a plea of "not guilty."

3. SAME—INSTRUCTIONS REFUSED EMBRACED IN CHARGE—FALSUS IN UNO FALSUS IN OMNIBUS.

Where, on a trial for manslaughter, the court is asked to instruct the jury, "A witness false in one part of his testimony is to be distrusted in all," the instruction is a plain proposition of law to which the defendant is entitled; but if, in the charge to the jury, it has been already substantially given, the court is not bound to repeat it.

4. SAME—JUROR—MISCONDUCT—WHEN TO BE TAKEN ADVANTAGE OF—NEW TRIAL.

Where a party in the trial of a criminal action sees or knows of an act of misconduct by a juror which he does not bring to the attention of the court, or object to at the time, or at any other time during the trial, or on the hearing of a motion for a new trial, it will be too late to make it the basis of objection and exception after the court has disposed of the motion, and pronounced judgment.

5. SAME—NEW TRIAL—GROUNDS FOR MOTION—RECORD—APPEAL.

If, in the trial of a criminal case, the record fails to disclose the grounds upon which a motion for a new trial was heard and determined, the ruling of the court upon the motion cannot be made the subject of review on appeal.

In bank. Appeal from superior court, Ventura county.

Information for manslaughter.

Hall & Hamer, L. F. Eastin, J. M. Brooks, and L. C. Keeby, for appellant. *Atty. Gen. E. C. Marshall*, for respondent.

MCKEE, J. The defendant in this case having been convicted of the crime of manslaughter, appealed from the judgment of conviction, and from an order denying his motion for a new trial.

The first assignment of error is that the verdict returned by the jury, and the judgment rendered by the court, are void, because the defendant did not personally plead to the information, and, in consequence, there were no issues raised upon which he could be tried and convicted. But the record shows that the defendant was regularly arraigned; that upon his arraignment he was asked if he pleaded guilty or not guilty; and that personally he made no answer, but, in his presence, his attorney, answering, said, "We plead not guilty;" whereupon, the defendant still standing mute, the clerk of the court made an entry in the minutes of the court, in the following words,

namely: "Defendant pleads not guilty of the offense charged in the information, and, by consent of all parties, the cause is set for trial on the twentieth of October, 1885." The plea of the defendant, as it was formulated for him by his attorney, was therefore regularly entered upon the minutes. He consented to it, and in the form in which it was made we cannot see that any of the substantial rights of the defendant were in any way prejudiced. Besides, if the refusal of the defendant to answer in person was equivalent to a refusal to plead to the information, the law cast upon the court the duty of having entered on the minutes of the court a plea of not guilty. Section 1024, Pen. Code. That was in effect done, and thereby issues were raised according to law, upon which the defendant was legally tried and convicted.

The next assignment of error is that the court refused, at defendant's request, to give the jury the following instruction: "A witness false in one part of his testimony is to be distrusted in all." Unquestionably that is a plain legal proposition, which a court is bound by law to give to a jury on all proper occasions. Section 2061, Code Civil Proc.; *White v. Disher*, 7 Pac. Rep. 826; *Brown v. Griffith*, 9 Pac. Rep. 425. But the court in its charge to the jury had substantially given the proposition to them as law; and, as we have repeatedly held, a court is not bound to repeat any of its instructions.

Lastly, the refusal of the court to grant a new trial is assigned as error. The judgment roll shows that, on the day appointed for pronouncing judgment, the defendant moved *vis-a-vis* for a new trial, "on grounds then stated, and taken down by the court reporter." But the grounds of the motion, whatever they were, are not embodied in the bill of exceptions prepared by the defendant and settled by the court.

There is in the bill an affidavit, made by one of the defendant's attorneys, which contains a statement that some of the jurors, while engaged in the trial of the cause, occupied their time by reading copies of a newspaper which contained an editorial condemnatory of the administration of justice in criminal actions in the courts of the country, but it had no reference to the case on trial. There is no doubt, however, that the reading of newspapers by jurors while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected; and, if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act would constitute ground for a motion for a new trial. Jurors in a criminal action are sworn to render a true verdict according to the evidence. They cannot, under the oath which they take, receive impressions from any other source. If it be proved as a fact, or may be presumed as a conclusion of law, that their verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new trial. Subd. 2, § 1181, Pen. Code.

But there is nothing in the bill of exceptions which affirmatively shows that the motion for a new trial was made on that ground. The affidavit itself, if regarded as a part of the bill, does not show it. It contains a statement that the affiant had no knowledge of the objectionable character of the editorial in the newspaper, in the hands of the jurors, until after the close of the trial and the recording of the verdict, and that, on the argument of the motion for a new trial, he brought it to the attention of the court, and made it a ground of motion for a new trial. But, assuming that the editorial contained matter which it was objectionable for a juror to read, there was no showing that any of the jurors read the objectionable matter, or that it in any way influenced their verdict, or prejudiced any substantial right of the defendant. Such a showing was not made on the hearing of the motion. The motion was heard and decided on the third of December, 1885, and the affidavit was not made until the sixteenth of January, 1886,—six weeks after the court had denied the motion and pronounced judgment. Therefore the affidavit could not

have been used on the hearing of the motion; and, in fact, the bill of exceptions affirmatively shows that it was not used. Where a party, in the trial of a criminal action, sees or knows of an act of misconduct by a juror, which he does not bring to the attention of the court, or object to, at the time, or at any other time during the trial, or on the hearing of a motion for a new trial it will be too late to make it the basis of objection and exception after the court has disposed of the motion and pronounced judgment.

The judgment pronounced brought the proceeding to an end, and was final and conclusive, subject only to be reviewed and reversed for errors apparent on its own record; and, where such a record fails to disclose the grounds upon which a motion for a new trial was heard and determined, the ruling of the court upon the motion cannot be made the subject of review on appeal.

Judgment and order affirmed.

We concur: MORRISON, C. J.; MYRICK, J.; SHARPSTEIN, J.; MCKINSTRY, J.; THORNTON, J.

(71 Cal. 314)

HARRIS v. HARRIS. (No. 11,223.)

(*Supreme Court of California. November 26, 1886.*)

HUSBAND AND WIFE—SEPARATE ESTATE—PRE-EMPTION—RIGHTS OF WIFE ON DIVORCE.

Where a wife, before her marriage, was the holder of a pre-emption right to land, which she paid for with funds loaned her upon her personal faith and credit, and, after her marriage, a patent was issued to her by the United States, the patent relates back to the date of her entry; and in an action for divorce, and a moiety of the land, brought by the husband, the land will be adjudged the separate property of the wife, free from all claim, interest, or control of the husband.¹

In bank. Appeal from superior court, San Joaquin county.

Suit for divorce upon the ground of willful desertion, and for a division of land claimed to be community estate. Judgment for defendant. Plaintiff appealed. The facts are sufficiently stated in the opinion.

W. C. Green and J. B. Hall, for appellant. James A. Loutitt and Woods & Levinsky, for respondent.

MCKINSTRY, J. In this action for divorce the plaintiff claims a moiety of the land patented to the defendant, on the ground that the money paid for the government title belonged to the community.

1. Even if it appeared that the money was paid out of community funds, the land would be the separate property of the wife. With full knowledge and consent of the plaintiff, the land was proved up and paid for in her name, and the proof of her occupation and "declaration" or affidavit was as necessary a prerequisite to the acquisition of the government title as was the payment of the price. The patent is a record which proves the facts which preceded its issue, on proof of which the proper officers of the United States were authorized to issue it. For certain purposes the possession of either spouse is the possession of both. But here the pre-emption declaration and exclusive occupation of the defendant preceded her marriage with the plaintiff, and constitute part of the acts which culminated in the certificate of purchase and patent. The plaintiff ought not to be permitted to ignore her declaration and possession, (without proof of which she could not have received the benefits of pre-emption,) and treat the acquisition of the government title simply as an ordinary purchase, made after the marriage, with community funds. Under the pre-emption laws, a woman, after her marriage, may secure a pre-emption based on occupancy, the right to which is her separate property. That was done in this case, and the plaintiff, who seeks

¹See note at end of case.

to benefit by the transaction, cannot say the pre-emption title was not acquired legally and regularly.

She then had a right to acquire the United States title. Can the husband say that he obtained an interest in the pre-emption claim, prior to the certificate of purchase, by reason of the payment, with his consent, of money of which he had the control? Such a claim would seem to be invalid, because the express or implied agreement that he should have such an interest would be in fraud of the United States statute. If she "directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title she might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except herself," it was void. *Act of congress of September 4, 1841, § 13.* It will not do to say that no contract was made; that the interest of the plaintiff, as a member of the community, arose out of the relation the parties so occupied towards each other under the state law. If he has an interest in this land, it is not one created by the marriage, but by reason of the fact that community money was paid for it. This was done, as the case shows, with his express consent, and, in any event, his consent would be implied. The attempt of plaintiff, therefore, is to enforce a claim growing out of an agreement made before the certificate was issued. The court will not aid in the enforcement of such agreement, because it is in violation of the spirit and letter of the pre-emption law.

2. But there was evidence that the money used to secure the government title was paid to the defendant by Cahill, in consideration of a promise that she should convey to him 40 acres so soon as she should obtain the United States title to a tract of 160 acres under the pre-emption laws. That contract was fully executed. When it was entered into, the possessory title to the 160-acre tract was in the defendant as her separate property. If the land had never been proved up and paid for, the possessory right would still be her separate property as between herself and husband. It may be conceded that her mere possession, in connection with her pre-emption declaration, gave her no vested interest in the land which the United States was bound to recognize. But her possession commenced prior to the marriage,—was as to all persons except the United States a separate property right. In her possessory title the plaintiff had no part. The contract with Cahill was that she should convey, when she should get the government title, a portion of the tract, the possessory title to the whole whereof was in her as her separate property. She had a standing on which, and the payment of the money received from Cahill, she could acquire the true title. She, in accordance with her contract, perfected her title, as pre-emptor, by proceedings initiated by her "declaration" and sole possession, made and begun before her marriage. The plaintiff necessarily concedes the regularity and validity of those proceedings. The promise of defendant to Cahill could be performed only by and through a merger in the government title of her possessory title. The transaction was not a loan from Cahill to the community. The defendant parted with a portion of the right annexed to her possessory title, on which could be secured the government title; Cahill receiving the benefit of her possession *pro tanto*. The plaintiff had no interest in any part of the consideration which passed from the defendant to Cahill, either as a member of the community or otherwise. The money became her separate property when she received it, and continued such until she paid it to the United States.

Even if it should be conceded that the patent is absolutely void, the plaintiff could assert no claim here. It is only property "*acquired*" by either spouse after marriage which is community property.

Judgment and order affirmed.

We concur: MORRISON, C.J.; MYRICK, J.; THORNTON, J.; SHARPSTEIN, J.

NOTE.

In California, property acquired after marriage becomes community property, unless it be acquired by gift, descent, devise, or bequest, or on the credit of the separate estate. Schuyler v. Broughton, 11 Pac. Rep. 719; but the rents, issues, and profits of the separate estate remain separate property, *Id.*; Shumway v. Leakey, 8 Pac. Rep. 12; In re Higgins, 4 Pac. Rep. 389. In Arizona the rents, issues, and profits, during coverture, of the separate estate of a married woman, remain her separate property. Stiles v. Lord, 11 Pac. Rep. 314; Woffenden v. Charouleau, *Id.* 117, overruling Woffenden v. Charaleau, 8 Pac. Rep. 302. In Arkansas the earnings of a married woman, arising from her labor, become her separate property. Sellmeyer v. Welch, 1 S.W. Rep. 777. In Kentucky the common-law rule prevails that all the personal property of the wife at her marriage, or which she may acquire during coverture, unless it be her separate estate, belongs to the husband, unless she has been created a *feme sole*. Wiggins v. Johnson, 1 S.W. Rep. 643. In Ohio, prior to act of April 3, 1861, money received by the wife became the property of the husband, unless the circumstances imparted to it a different character. In re Wood, 5 Fed. Rep. 443. In Montana the husband is entitled to the rents and profits of his wife's property, unless it is otherwise provided in the deed, Hopkins v. Noyes, 2 Pac. Rep. 280; or she has filed a list of such property pursuant to the statute, Palmer v. Murray, 9 Pac. Rep. 896; Herman v. Jeffries, 1 Pac. Rep. 11. In Texas the profits arising from her separate estate become community property. Smith v. Bailey, 1 S.W. Rep. 627.

Property which comes to a married woman from any source except her husband, is her sole and separate property, and not liable to seizure for his debts, in the District of Columbia. Hitz v. National Met. Bank, 4 Sup. Ct. Rep. 613; in Iowa, Second Nat. Bank v. Gaylord, 24 N.W. Rep. 56; in Minnesota, Ladd v. Newell, 24 N.W. Rep. 366; Hassfeldt v. Dill, 10 N.W. Rep. 781; in Nebraska, Breadwater v. Jacoby, 26 N.W. Rep. 629; Leighton v. Stuart, *Id.* 198; Edgerly v. Gregory, 22 N.W. Rep. 776; Spellman v. Davis, 15 N.W. Rep. 336; Benis v. Davis, 13 N.W. Rep. 284; in New Jersey, Kutcher v. Williams, 3 Atl. Rep. 257; in Oregon, King v. Voos, *post*, 281; in Wisconsin, Dayton v. Walsh, 2 N.W. Rep. 65.

In Pennsylvania the property of a married woman is not subject to execution for the debts of her husband if she can show that she did not acquire it on the credit of her husband. Spering v. Laughlin, 6 Atl. Rep. 54; Tibbins v. Jones, 4 Atl. Rep. 383; Kingsbury v. Davidson, *Id.* 33; Hess v. Brown, 2 Atl. Rep. 416; Simpson v. Kennedy, 3 Atl. Rep. 191, and note; Gregg v. George, 6 Atl. Rep. —; or has received it as a gift, Gibson v. Sutton, 6 Atl. Rep. —; Hess v. Brown, 2 Atl. Rep. 416.

(14 Or. 199)

THOMPSON v. HAWLEY.

(Supreme Court of Oregon. November 29, 1886.)

1. SPECIFIC PERFORMANCE—PLEADING—REAL AGREEMENT ENFORCED.

In a suit for the specific performance of a contract for the sale of land, the defendant has a right to plead a contract in his answer different from the one alleged in the complaint, and, on such a state of the pleadings, the trial court will ascertain from the evidence which was the real agreement, and enforce it accordingly.

2. VENDOR AND VENDEE—CONSTRUCTION OF CONTRACT—TITLE.

Where, in a contract for the sale of land, the terms are such as to bind the grantor to convey by good and sufficient deed, or to make a good and sufficient conveyance, he can only perform his agreement by making a deed that will pass a good title. But if it clearly appears from the contract itself, or from the circumstances accompanying it, that the parties had in view merely such conveyance as will pass the title which the vendor had, whether defective or not, that is all the vendee can claim or insist upon.

Appeal from circuit court, Lake county.

Suit in equity for specific performance of a contract to convey certain lands situate in Lake county, Oregon. Decree for the plaintiff. Defendant appealed. The facts are stated in the opinion.

Joshua J. Walton and John Kelsay, for appellant, Hawley. *Warren Truitt and Wm. H. Holmes*, for respondent, Thompson.

STRANAN, J. This is a suit in equity, brought to enforce the specific performance of a contract to convey certain lands situate in Lake county, Oregon. The complaint alleges, in substance, these facts: "That on June 25, 1880,

at Silver Lake, Oregon, the defendant sold to the plaintiff the real property particularly described, and agreed to and with the plaintiff that, upon the payment to the defendant of \$1,800, with interest thereon at 10 per cent. per annum from said June 25, 1880, the said sum being the purchase price of said land as agreed upon by said plaintiff and defendant, and that said defendant would execute and deliver to plaintiff a good and sufficient deed that would convey to the plaintiff the title in fee-simple to said lands; that on said twenty-fifth day of June, 1880, the plaintiff did, by virtue of and under the said sale, enter into the possession of all the above-described land, and ever since has been and now is in the actual and exclusive possession of said land, and has placed permanent improvements thereon of the value of \$250; that on June 11, 1884, the plaintiff paid to the defendant the full sum of \$1,800, together with interest thereon at the rate of 10 per cent. per annum from June 25, 1880, and that defendant received the same in full payment for said land, and that said plaintiff has duly performed all the conditions of said contract on his part to be performed; that the defendant, though frequently requested, has failed, neglected, and refused, and still neglects and refuses, to make, execute, or deliver to the plaintiff any deed whatever to said premises, and has wholly failed and refused to convey to plaintiff any title whatever to said land."

The defendant's answer is as follows:

"The defendant herein, for answer to plaintiff's amended complaint, denies that the defendant sold the premises described in plaintiff's complaint, particularly described as the N. E. $\frac{1}{4}$ of section 8, the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 9, T. 28 S., R. 14 E., Lake county, Oregon, except as hereinafter alleged in defendant's separate and further answer; denies that defendant promised or agreed, or in any manner undertook, to make the best title to plaintiff that the defendant could, as the heir of Lyman L. Hawley, and perfect the same; and denies that he (defendant) promised or agreed to make any title to said premises, except as hereinafter alleged; denies that defendant did on June 25, 1880, or at any other time, make or execute or deliver to plaintiff, or any other person, the instrument of writing set out in plaintiff's complaint; denies that said instrument of writing is correctly set out in plaintiff's complaint; denies that the instrument of writing signed by this defendant contained the words 'and perfect same,' or was intended to contain the same; denies that defendant promised or agreed to perfect the same, meaning the title to said premises; denies that said instrument in writing was so delivered to plaintiff as evidence of the sale of said property as aforesaid, or the land described therein as the hay ranch belonged to the estate of Lyman L. Hawley, except as hereinafter alleged; denies that on said twenty-fifth of June, 1880, the plaintiff, by virtue of the sale above set forth, entered into possession of said above-described premises, or ever since has been in actual or exclusive possession of said land, excepting as hereinafter alleged; denies that defendant has failed to perform the conditions of his contract in this, that he has failed, neglected, or refused, or still neglects or refuses, to make the proof of reclamation, or pay the balance of the purchase price for said land; denies that there was ever such a contract made or entered into between plaintiff and defendant; denies that defendant agreed or promised to make proof of reclamation, or pay the balance of the purchase price for said land;" denies that defendant has wholly failed or neglected or refused, or still neglects or refuses, to make any kind of conveyance to the plaintiff of any title whatever in or to said described lands.

"And, for a further and separate answer and defense, the defendant alleges that on or about the twenty-fifth day of June, 1880, the defendant agreed to sell to the plaintiff a certain lot of sheep, being 1,505 head, at \$1.50 per head, and all his right and title in and to the hay ranch of Lyman L. Hawley, son of defendant, together with certain personal property, as follows: The kitchen

and household furniture, two head of cow, two calves, one horse, two wagons, set of harness, mowing-machine, hay-rake, forks, and other tools belonging to the ranch, and 2,500 poles.

"Defendant alleges it was agreed and understood by and between plaintiff and defendant, at the time mentioned, that the defendant would make, execute, and deliver to said plaintiff a quitclaim deed to said premises, and that plaintiff could make proof of reclamation, and pay the balance of the purchase price to the state of Oregon, if the state of Oregon held the said premises as swamp and overflowed land.

"Defendant alleges that the personal property, consisting of the kitchen and household furniture, two cows and calves, one horse, two wagons, one set of harness, mowing-machine, hay-rake, forks, tools, and 2,500 poles, which were turned in with the ranch, were intended to pay the said plaintiff for the balance due the state of Oregon on the purchase price of said land, and the said personal property last mentioned was turned over and delivered to said plaintiff in such consideration, and accepted by him; that said personal property, as delivered to said plaintiff, was of the reasonable value of \$300; that at the time of making such sale of said premises the defendant was offered the sum of \$2,000 for the same, if the defendant would make a warranty deed to the same.

"The defendant alleges that said plaintiff wrote the said bill of sale of the personal property, and memorandum of the sale of said hay ranch, set up in plaintiff's complaint, and read the same to this defendant in the presence of the said witnesses signed thereto, and that, if the said words 'and perfect the same' were written in said instrument, the said plaintiff failed and neglected to read the same to defendant, or that defendant did not understand the same, thereby intending to deceive and cheat this defendant; that defendant did not read said instrument of writing, but relied wholly upon the said plaintiff to write the same, and read the same to this defendant. Defendant alleges that he would not have signed the said instrument of writing if said words 'and perfect the same' had been read to him, or if he had known the said instrument of writing contained said words.

"And defendant further alleges that before the said contract was consummated, before the said property, or any part thereof, was delivered to plaintiff, and before the said plaintiff would make any payment on said contract, the defendant, at the special instance and request of said plaintiff, made, executed, and delivered to plaintiff, on or about the third day of July, 1880, a bond for a deed of said premises; that the said defendant delivered said bond to the said plaintiff on or about the third day of July, 1880; and thereupon the said plaintiff made a payment on said contract of about \$2,000, and the defendant then and there delivered the said personal property and said real estate to the said plaintiff.

"That the said bond for a deed to said premises was then and there read over, and accepted by said plaintiff, and has been in his possession ever since said time, and is now in his possession; that the said bond for a deed to said premises is in words and figures as follows, except the acknowledgment thereto, and the defendant has no copy thereof, the same being in the possession of said plaintiff, to-wit:

"Know all men by these presents, that I, Ira L. Hawley, sole heir and legal representative of the estate of L. L. Hawley, deceased, of the county of Lane, state of Oregon, am held and firmly bound unto George Thompson, of the county of Lake, state of Oregon, in the sum of eighteen hundred dollars, gold coin of the United States of America, to be paid to the said George Thompson, his executors, administrators, or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal, and dated the third day of July, A. D. 1880.

"The condition of the above obligation is such that if the above-bounden obligor shall, on or before the third day of July, A. D. 1884, make, execute, and deliver unto the said George Thompson—provided that the said George Thompson shall, on or before that day, have paid to the said obligor the sum of \$180 yearly, as the annual interest upon \$1,800, at ten per cent., and at the end of four years from this date the sum of \$1,800, the price agreed to be paid therefor—a good and sufficient conveyance, with full warranty only against my heirs, executors, and administrators, all that tract of land belonging to the estate of L. L. Hawley, deceased, situate in the county of Lake, state of Oregon, bounded and described as follows, to-wit: The N. E. $\frac{1}{4}$ of sec. 8, and N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 9, T. 28 S., R. 14 E., containing 200 acres,—then this obligation to be void, otherwise to remain in full force.

[Signed]

"IRA HAWLEY.

"Done in the presence of

"R. B. HATTON.

"J. KNOX."

"The said bond for a deed above described and set forth was duly acknowledged before R. B. Hatton, county clerk of Lake county, Oregon, but that the defendant has no copy of said acknowledgment, and cannot set out a copy of the same in this answer; that the said last-mentioned instrument of writing contains all the terms of the contract for the sale of said real estate between the plaintiff and defendant. The defendant alleges that he has fully and completely executed and complied with the said contract set forth in said bond for a deed."

That on or about the third day of January, 1885, the said defendant made, executed, and duly acknowledged a deed of conveyance, conveying to the said plaintiff all the right, title, and interest of the said defendant in and to the said premises, describing the said land in said conveyance as the N. E. $\frac{1}{4}$ of section 8, and N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 9, township 28 S., range 14 E., containing 200 acres, in the county of Lake, state of Oregon; that the said defendant, through his agent, William Lane, tendered said deed of conveyance to the said plaintiff, George Thompson, at Lake county, Oregon, and he, the said George Thompson, refused to accept the same.

The defendant alleges that he is now, and has been at all times since the expiration of said bond, ready and willing to comply with the conditions of said bond; that a deed conveying all the right, title, and interest in and to said premises is now ready to be delivered to said plaintiff, executed and duly acknowledged according to law. The defendant further alleges that at the time of delivering said bond to plaintiff he also delivered to him (plaintiff) the receipt from the state of Oregon for 20 per cent. paid on said lands by said L. L. Hawley, deceased, which was to aid said plaintiff to make proof in acquiring a title for said lands from the state of Oregon, and which receipt is now in the possession of said plaintiff.

All of the foregoing answer included in quotation marks was, on motion of the plaintiff, stricken out, and, the cause having been tried, the plaintiff obtained a decree from which this appeal is taken. The propriety of the ruling of the court in striking out defendant's answer is the first question demanding attention. That the defendant had a right to plead a contract in his answer different from the one alleged in the complaint I have no doubt. It is new matter, constituting a defense. This part of the answer presented an issue that was material. If the contract pleaded in the answer was the only contract made between the parties, then it constituted a defense to the plaintiff's suit. On such a state of the pleadings the trial court would ascertain from the evidence which was the real agreement, and enforce it accordingly. The defendant, by his answer, having submitted to specific performance of the agreement set up by him, is entitled to a decree in accordance with the an-

swer, if the same is sustained by the evidence. *Wat. Spec. Perf.* § 101; *Bradford v. Union Bank of Tennessee*, 13 How. 69. Some of the authorities hold that if the agreement alleged in the answer is the real agreement, the suit must be dismissed, (*Byrne v. Romaine*, 2 Edw. Ch. 445;) but I think the other the better rule, for the reason that the litigation is terminated more promptly, and at less expense, and the rule seems to be supported by the better authority.

On the argument counsel for the plaintiff insisted that, in case of an executory agreement for the sale of real property, the law implies a warranty of title, and that the terms in the agreement, requiring a good and sufficient conveyance, bind the vendor to convey a good title; and cite *Burwell v. Jackson*, 9 N. Y. 535. I have also examined *Cogan v. Cook*, 22 Minn. 137, and *Shreck v. Pierce*, 3 Iowa, 350, and authorities there cited; also *Porter v. Noyes*, 11 Amer. Dec. 30, and note. On the other hand, counsel for appellant contend that the terms "good and sufficient conveyance," in the writing set up in the answer, import a deed which shall be in proper form to pass to the grantee whatever title the vendor had at the time of the sale, and no more; and they cite *Gazley v. Price*, 16 Johns. 269; *Tinney v. Ashley*, 15 Pick. 552; *Aiken v. Sandford*, 5 Mass. 493; *Parker v. Parmele*, 20 Johns. 130; *Brown v. Covillaud*, 6 Cal. 573; *Green v. Covillaud*, 10 Cal. 322; *Barrow v. Bispham*, 11 N. J. Law, 119; and some other authorities. On this subject the earlier authorities are in conflict, and not easily reconciled. It seems to me that the more reasonable rule is that where the terms of the contract are such as to bind the grantor to convey by good and sufficient deed, or to make a good and sufficient conveyance, he can only perform his agreement by making a deed that will pass a good title. But if it clearly appears from the contract itself, or from the circumstances accompanying it, that the parties had in view merely such conveyance as will pass the title which the vendor had, whether defective or not, that is all the vendee can claim or insist upon. *Porter v. Noyes*, 11 Amer. Dec. 30, and note, where the later authorities are collated. By the terms of the contract pleaded by the defendant he was bound to make "a good and sufficient conveyance, with full warranty *only* against my heirs, executors, and administrators." If this was the agreement, it bound the defendant to convey such title as he had, and which conveyance must contain the covenants mentioned in the writing. On the other hand, if the agreement is as set out in the complaint, it can only be performed by the vendor's making and delivering a deed that shall vest the fee in the vendee. Such a contract requires a conveyance that shall be good in form and good in substance, and that shall vest in the grantee a fee-simple in the land conveyed.

The decree will be reversed, and the cause remanded for further proceedings. The defendant may apply to the court below for leave to amend his answer, if he shall be so advised.

(The other judges concur.)

(71 Cal. 393)

BROWN v. WELDON. (No. 9,606.)

(Supreme Court of California. December 9, 1886.)

1. PROMISSORY NOTES—ACTION ON—PLEADING—COPY OR NOTE—CODE CIVIL PROC. CAL. § 447.

Under section 447, Code Civil Proc. Cal., providing that the "genuineness and due execution of a promissory note are deemed admitted" when a copy of the note is set out in the complaint, and no answer under oath is filed, a demurrer to a complaint in an action on a promissory note will not be sustained on the ground that it does not allege that defendant promised to pay the note, when a copy of the note is so set out in the complaint.

2. SAME—WHEN AND WHERE MADE—PRESUMPTIONS.

A copy of a promissory note being set out in the complaint in an action thereon, the complaint is not demurrable on the ground that it contained no allegation as to when and where it was made, as, *prima facie*, it was made when and where it bore date.

Department 1. Appeal from superior court, Alameda county.

This is an action on a promissory note. The complaint alleges that defendant is indebted to plaintiff in the sum of \$765; sets up a copy of the note; alleges its delivery to Mrs. L. H. Brown, the payee, its indorsement by her to plaintiff, and his ownership; that the note is long past due and owing to him; that there is now due thereon the full sum of \$500, and interest from its date at 1 per cent. per month, amounting to the full sum of \$765, no part of either principal or interest having been paid. The defendant demurred to the complaint because (1) the court has no jurisdiction of the person of the defendant, or the subject-matter of the action; (2) the complaint does not state facts sufficient to constitute a cause of action; (3) the complaint is ambiguous, unintelligible, and uncertain, in this: that it does not state when or where said pretended promissory note was made, or that defendant ever promised to pay the same, or any part thereof. Demurrer overruled. Defendant answered. Cause tried. Judgment for plaintiff. Defendant appeals from the judgment, and from the order denying his motion for a new trial.

Welles & Whitmore, for appellant. *H. P. Brown*, for respondent.

McKINSTRY, J. The complaint is inartificially and loosely drawn. But we do not think it fails to state a cause of action; nor is it subject to demurrer as ambiguous or uncertain. But it so far departs from established precedents, and so nearly approaches the line which separates pleading which may be tolerated, though not approved, from pleading radically defective, that we refuse to treat this appeal as frivolous.

Defendant's motion for nonsuit was properly denied. The genuineness and due execution of the promissory note were admitted. Code Civil Proc. 447. *Prima facie*, it was made when and where it bore date. The findings are sufficient.

Judgment and order affirmed.

We concur: **MYRICK, J.; THORNTON, J.**

(14 Or. 91)

KING v. VOOS and others.

(*Supreme Court of Oregon. November 9, 1886.*)

HUSBAND AND WIFE—RIGHT OF HUSBAND'S CREDITORS TO WIFE'S PROPERTY.—GRATUITOUS SERVICE OF HUSBAND TO WIFE.

Where a wife engages in business, the husband has a right, as against his creditors, to work for her without compensation, and they cannot charge her property with his debts on the ground that the relation between her and her husband is a fraud on them.¹

J. C. Moreland, for appellant, King. *T. N. Strong and E. B. Williams*, for respondents, Voos and others.

LORD, C. J. This suit is a creditors' bill seeking to subject certain real property described in the complaint, owned by the defendants Fordice Bros., to the payment of certain judgments recovered against Q. Voos, the husband of Fredericka Voos. The defendant Fredericka claims that the property referred to was bought with her own money, earned and accumulated from her restaurant business; that it was owned, conducted, and carried on by her in her own name, and for her own benefit; that she contracted all bills in her own name, and was individually responsible for all debts; and that her husband only assisted her with his services in the management of the business. The judgments which it is sought to satisfy out of this property were recovered against

¹See note at end of case

the defendant Q. Voos several years prior to Fredericka's engagement in the restaurant business. The evidence shows that in the spring of 1875 the defendant Q. Voos went to California, where, shortly after, his wife joined him, and that from that time until the fall of 1876, when he returned to Portland, he had engaged in various kinds of business, at different places in that state, all of which proved to be failures in a business point of view. Returning again to Portland, although without means, with the assistance of friends, during the next three years, he made several other business adventures, all of which were attended with a like result. At this juncture in their affairs, when the husband was without money, or credit, or business, the wife recognized that something must be done, and presently, to provide a support for their family, which consisted of eight children, besides the defendants. An opportunity offering, in the fall of 1879, she leased the restaurant and dining rooms of the Occidental Hotel, and began in her own behalf, and on her own individual responsibility, the restaurant business. The arrangement entered into at that time was regarded as a desirable one, and which required no particular outlay of money; and all the facts and circumstances show that this transaction, from its inception, and all other matters subsequently connected with it, was *bona fide*; that she was the party trusted and responsible for all the obligations it imposed, and all other engagements incidental to the management and prosecution of the business. Without entering into detail, it is sufficient to say that during the intervening years, she was the responsible head of the business, contracting and paying all its obligations of whatever kind, and managing and directing its affairs with such prudence, economy, and foresight as avoided disaster, and secured financial success. The profits of the business, when accruing, she prudently husbanded, and, as the result has since proven, invested them wisely and successfully. The property in question, which is now sought to be subjected to the payment of the judgments against the husband, was bought by her direction, and for her, with her money thus acquired, and the deed was executed to her, and in her name, and is so recorded.

As to these general facts there can be no dispute, although it was intimated that the arrangement to carry on the business was fictitious, and designed as a cover of fraud. The main contention, however, arises out of the circumstance that her husband, whose services were valuable, assisted her in conducting the business, without compensation, and that it would be a fraud in law to allow her to retain the benefit of them, at least in excess of what is required to support the family. Let it be understood that the evidence satisfies us that the business was her own, and honestly carried on by her, separately from her husband. In such case, it is clear that the relation of employee and employer, and principal and agent, may exist between the husband and wife, without subjecting her interest in the business, or the acquisitions arising out of it, to the debts of the husband. The mere fact that the defendant employs her husband does not make the business in which she embarks or carries on his business, nor is it perceived why, if she needs an agent or servant to assist her in the conduct of her business, she may not employ her husband as well as a stranger. These relations may exist in the law, and are not inconsistent with good faith and fair dealing.

But can the husband give his services to the wife, in her separate business, without committing a fraud upon his creditors, or rendering her interest in the business liable? It is said by Mr. Bump that "an arrangement by which the husband acts as his wife's agent, without any compensation, or for a compensation that is insufficient, is, in effect, an attempt to make a voluntary conveyance of the products of his skill and labor in her favor, and is void as against creditors." Bump, Fraud. Conv. 270. But this proposition, as thus stated, is thought not to be accurate, nor sustained by the decisions cited in the note. See opinion of BUSKIRK, J., in *Cooper v. Ham*, 49 Ind. 393; and

also *Miller v. Peck*, 18 W. Va. 81. It is freely admitted, on account of the opportunity that the marriage relation affords the husband and wife to conduct a scheme to defraud creditors, that the transaction ought to be vigilantly scrutinized, particularly when fraud is charged. Any device designed to cover the property or acquisitions of the husband debtor, or to conduct his business in the name of the wife, or some member of the family, to defraud creditors, is a sham and a fraud, which, when discovered, the law will not tolerate, but brand with the mark of its condemnation. But the mere fact that the husband gives his services to the wife in the conduct of her separate business is not, of itself, sufficient to vitiate it with fraud, or to make her interest in the business, or the profits arising out of it, chargeable with his debts.

In *Abbey v. Deyo*, 44 N. Y. 343, it was held that a husband may work for his wife in the management of her separate business or property, without any compensation, and that his creditors will not thereby acquire any rights against the wife, or her property. HUNT, J., said: "In arguing this point the appellant's counsel insists that the services, the time, and talents of the husband are valuable, and he has no more right to give them to his wife, as against his creditors, than to give to her his property to their prejudice. The one, he says, is as much their property as the other. The argument is entirely unsound. The property of a debtor, by the laws of all commercial countries, belongs to his creditors. He must be just before he is generous. He must pay before he gives. Not so with his talents and his industry. Whether he has much, or little, or nothing, his first duty is to support his family. The instinctive impulse of every just man holds this to be the first purpose of his industry. The application of the debtor's property is rightly directed to the payment of his debts. He cannot transport it to another country, transfer it to his friend, or conceal it from his creditor. Any or all these things he may do with his industry. He is at liberty to transfer his person to a foreign land. He may bury his talent in the earth, or he may give it to his wife or friend. No law, ancient or modern, of which I am aware, has ever held to the contrary. No country, unless both barbarous and heathen, has ever authorized the sale of the person of the debtor for the satisfaction of his debts." And EARL, J., said: "The creditors of an insolvent have no claim upon his services. They cannot compel him to work and earn wages for their benefit, and hence he does not defraud them, if he chooses to give away his services by working gratuitously for another. The husband may, therefore, in the management of his wife's separate business or property, work for her, as any person might, without any compensation, and his creditors would not thereby gain any right against the wife, or her property, and would have no legal right to complain." See, also, 2 Bish. Law Mar. Wom. §§ 450-466.

The law gives the creditor no power over the volition of his debtor, so that he may direct or control his future labors, or his contracts relating to the future. Whether the debtor shall exercise his volition, by laboring in his own behalf or for another, is a matter of his own free choice, which the creditor cannot coerce, control, or prevent. If he choose to work for himself, the acquisitions of his labors belong to him and the creditor, and the creditor may lay hold, and apply them to the payment of his debt. On the other hand, if he choose to give his services to his wife in the management of her separate property or business, the fruit of such labor is not his, but another's, and, on principle, the creditor cannot seize and appropriate it to the payment of his debt. So that, if a husband choose to give his wife his services in the conduct of her separate business, the creditor, having no power over his volition, or to compel him to work for his benefit, is not defrauded; nor is the fact of such service any ground for subjecting her interest in such business, or the profits arising out of it, to the payment of her husband's debts.

There does not appear by the record to have been any contract of employment between the husband and wife. He seems to have rendered his services gratuitously, although they were valuable, and from the part he took was, as to the other employes, so to speak, "foreman of the gang." The responsibility of providing for the family the wife undertook out of her separate business, and if she derived any assistance from him it arose out of the circumstances detailed. Under the act of 1880 the wife was released of all "civil disabilities" not imposed upon the husband, except the right to vote, (Sess. Laws 1880, p. 6;) and her property is equally liable for the expenses of the family, (Sess. Laws 1878.) Her right to acquire property, to enjoy the fruits of her labor, or to hold and invest the profits arising from the successful management of her own trade or business, can no longer be disputed; and when, by her industry, prudence, economy, and business foresight, she acquires property in the management of her separate business, it is her property, and not his, and cannot be liable for his debts.

The case was very thoroughly examined by the learned referee, and subsequently confirmed, after full argument and thoughtful consideration, by the court, and the result reached is in accordance with our views, and the decree must be affirmed.

NOTE.

The relation of employer and employed, or principal and agent, may exist between wife and husband, without subjecting the wife's property to liability for debts of the husband, *Kutcher v. Williams*, (N. J.) 3 Atl. Rep. 257; *Shuster v. Kaiser*, (Pa.) 2 Atl. Rep. 110; *Broadwater v. Jacoby*, (Neb.) 24 N. W. Rep. 629; *Second Nat. Bank v. Gaylord*, (Iowa) 24 N. W. Rep. 56; *Ladd v. Newell*, (Minn.) 24 N. W. Rep. 366; *Edgerly v. Gregory*, (Neb.) 22 N. W. Rep. 776; *Dayton v. Walsh*, (Wis.) 2 N. W. Rep. 65; but it is a proper subject of judicial inquiry whether or not such agency is fraudulent, and intended to cover the substantial ownership of the husband in the product resulting from his services, *Ladd v. Newell*, (Minn.) 24 N. W. Rep. 364.

In contests with the creditors of her husband, the burden is on the wife of proving that property purchased during coverture was paid for with funds not furnished by the husband, *Simms v. Morse*, 2 Fed. Rep. 325; *Kingsbury v. Davidson*, (Pa.) 4 Atl. Rep. 38; *Smith v. Bailey*, (Tex.) 1 S. W. Rep. 627; but in Minnesota such questions are to be determined on the fair preponderance of the evidence, *Laib v. Brandenburg*, 25 N. W. Rep. 803.

As to what constitutes the separate property of a married woman, and how far it is exempt from liability to her husband's creditors, see *Harris v. Harris*, (Cal.) *ante*, 274.

(71 Cal. 375)

ROCHE v. WARE, Adm'r, etc. (No. 11,282.)

(Supreme Court of California. December 6, 1886.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS—PROOF OF ACCOUNT-BOOKS—CODE CIVIL PROC. CAL. § 1880.

Section 1880, Code Civil Proc. Cal., providing that "parties to an action against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person," cannot be witnesses, does not prevent a party from testifying, in such an action, to prove his account-books as preliminary to their introduction in evidence; and, it not appearing that he was not within the jurisdiction of the court, books proven by the testimony of the party's wife are inadmissible.

In bank. Appeal from superior court, Colusa county.
Stabler & Bayne, for appellant. *T. J. Hart* and *Geo. A. Blanchard*, for respondent.

MCKINSTRY, J. Plaintiff's books of account were admitted in evidence over the objection of defendant that they were not sufficiently proved. The only evidence on which the books were admitted consisted of testimony of the wife of plaintiff, which tended to prove that the plaintiff had no clerk; that entries were made in original books by the plaintiff on the evening of each day purporting to be charges for work done and material furnished dur-

ing the day; and that the accounts, as entered in the blotter or day-book, were correctly transferred to the ledger.

In the English courts tradesmen's books were not formerly legal evidence in favor of the party making them. It would seem that the practice of allowing a party's books of account as evidence came into use in New York and New Jersey with the Dutch colonists, and into the eastern states with the English colonists from Holland, who settled in New England. *Beach v. Mills*, 5 Conn. 496; *Conklin v. Stamler*, 8 Abb. Pr. 395; Introduction to 1 E. D. Smith. It would seem, also, that, by the Dutch law, the cogency, as evidence, of the books might be strengthened by the testimony of the party.

Yet in *Vosburgh v. Thayer*, 12 Johns. 461, it would appear to have been assumed that the party could not testify with respect to his own books. The supreme court of New York there held that books of account ought not to be admitted "unless a foundation is first laid for their admission by proving that the party had no clerk; that some of the articles charged have been delivered; that the books produced are the account-books of the party; and that he keeps just and honest accounts; and this by those who have dealt or settled with him." And the court added: "Under these restrictions, from the necessity of the case, and the consideration that the party debited is shown to have reposed confidence by dealing with and being intrusted by the other party, they are evidence for the consideration of the jury." In subsequent New York cases it was held that a party's books of account were inadmissible unless he proved, not only that he kept just and honest accounts by those who had settled with him by his books, but also that the party charged had dealt with him, and that some of the articles charged were actually tendered or delivered. *Morrill v. Whitehead*, 4 E. D. Smith, 239; *Conklin v. Stamler*, 2 Hilt. 432; S. C. 8 Abb. Pr. 395.

The practice of all the other states, so far as we are informed, where books of account are admitted in evidence, is to *authorize*, at least, the preliminary proof to be made by the party himself. In a note to section 118 of the first volume of Greenleaf's Evidence it is said, (many cases being cited to sustain the statement:) "The rules of the several states with regard to the admission of this evidence are not perfectly uniform; but in what is about to be stated it is believed they concur. * * * If the books appear to be free from fraudulent practices, * * * the party himself is then required to make oath, in open court, that they are the books in which the accounts of his ordinary business transactions are usually kept, and that the goods therein charged were actually sold and delivered to, and the services actually performed for, the defendant." He should also swear that "the entries were made at or about the time of the transactions, and are original entries thereof."

It may be conceded that, if able to do so, the party may prove by other witnesses the matters which he is allowed to testify to himself. But if the party who kept the books, being in a position to give testimony, does not offer himself as a witness to those matters, he must at least prove by others those things which he would be required to prove by his own testimony. It was said generally by DALY, C. J., and BRADY, J., in the New York common pleas, that, since the Code provisions allowing parties to testify, the books of account of a party are no longer evidence on his behalf; that the admissibility of such books, on certain preliminary proofs, had been put on the ground of necessity, arising from the former incompetency of a claimant to be a witness on his own behalf; and that the reason of the rule was destroyed by the legislation authorizing the examination of the parties. *Conklin v. Stamler*, 8 Abb. Pr. 400. But it would seem there to be admitted, not only that the books might be referred to to refresh the memory of the witness, but that the entries themselves might be evidence, if the witness could testify that the transaction was correctly recorded when the entry was made, although he might not be able to recollect the "fact."

In the case now here it is urged that the ruling of the court below should be sustained on the ground of necessity, because the plaintiff was prohibited from becoming a witness by section 1880 of the Code of Civil Procedure. It would by no means follow that the preliminary proof would be sufficient if the plaintiff was prohibited from making it by his own testimony. The section of the Code, however, did not forbid his being a witness for the purpose of making such proof. Section 1879 of the Code of Civil Procedure provides: "All persons, without exception, otherwise than is specified in the next two sections, * * * may be witnesses." And by section 1880 it is declared: "The following persons cannot be witnesses. * * * (3) Parties to an action * * * against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

The evident purpose of the provisions of the Code is to render competent (with certain exceptions) persons incompetent at the common law; as parties to the record, and those directly interested in the event of the action. The parties under certain circumstances excepted from the general rule established by the Code, continue incompetent in the same manner, and to the same extent, that all parties were formerly incompetent. But, before the Code, the party offering his books, although incompetent to be a witness with respect to the issues submitted to the jury, was competent to give testimony, addressed to the court, going to establish the facts which rendered the books admissible. This was determined in *Landis v. Turner*, 14 Cal. 573. There FIELD, C. J., said:

"The defendants objected to the examination of the plaintiff on the ground of his incompetency as a party to the suit, and to the introduction of the book of entries on the ground that it was not sufficiently proved. Neither of these objections was well taken. The evidence of the plaintiff was upon an incidental and preliminary matter, and the rule which excludes the testimony of parties has no application. That rule has reference to the matters in issue, and not to incidental matters auxiliary to the trial of the cause upon which the testimony is addressed solely to the court. *Bagley v. Eaton*, 10 Cal. 146. The book of entries constituted the evidence in the case bearing upon the issue. The testimony of the party only laid the foundation for the introduction of that evidence. The referee occupied the double character of judge and jury, and the admissibility of the book was to be decided by him, in the first instance, in his character as judge; and, to enable him to determine the question, the testimony was properly received. The credit and weight given to the entries were entirely distinct from the preliminary matter. There are, it is true, numerous decisions against the reception of the party's testimony in cases like the present, but the clear weight of authority is the other way. His testimony is taken in nearly every state of the Union. When this case was argued, we supposed the rule was otherwise, recalling at the time the decisions of the New York courts on the subject. A somewhat extended examination since has satisfied us that the prevailing and the better rule in the United States differs from that of New York. The testimony of the party must often be the only means of establishing the fact that the book contains the original entries, that the party kept no other books, and that he had no clerk; and, as it is subject to the scrutiny of a cross-examination, it must afford protection against the perpetration of fraud by false entries."

The plaintiff was competent to make the preliminary proof. There is no pretense he was not within the jurisdiction. For aught that appears he was present at the trial.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; THORNTON, J.; MCKEE, J.

MYRICK, J. I concur in the judgment.

(72 Cal. 110)

DEMICK v. CUDDIHY. (No. 9,708.)*(Supreme Court of California. December 7, 1886.)***1. MORTGAGE—RIGHTS OF MORTGAGOR—MORTGAGEE IN POSSESSION—APPLICATION OF RENTS AND PROFITS—CONTRACT AFFECTING.**

A mortgagee in possession may, under contract with the mortgagor to that effect, apply the rents and profits of the mortgaged premises, in excess of the interest due on the mortgage debt, to the payment of unsecured indebtedness due or to become due from the mortgagor to the mortgagee.

2. JUDGMENT—REVERSAL—FAILURE TO FIND ON ISSUES RAISED.

A judgment rendered upon a finding of the truth of the allegations of a cross-complaint, without any findings on the issues raised by the answer to the original complaint in the action will not be sustained; when the allegations of the cross-complaint do not cover the issues thus raised.

Department 1. Appeal from superior court, Del Norte county.

This is an action by Demick, appellant, as the grantee of one George H. Crumpton, to redeem a mortgage.

Cuddihy, the respondent, filed an answer and also a cross-complaint, in which he asked for a decree of foreclosure and order of sale of the premises, and recovered judgment in the court below. This appeal is taken from the judgment, and from the order of court refusing to grant a new trial; the contention being on the amount due. The mortgage was given by deed and defeasance on the twenty-ninth April, 1881, to secure payment of \$800, with interest at 1 per cent. per month, and the mortgagee (defendant) went into immediate possession of the mortgaged premises. These premises consisted of several houses and lots in the town of Happy Camp, Del Norte county, California. The plaintiff claims that the rent received should be applied—*First*, to the payment of interest due on the mortgage; and, *second*, to the extinguishment of the mortgage debt. Defendant claims that there was, at the time of the execution of the mortgage, a parol agreement to apply the rents in excess of the interest on the mortgage to the payment of antecedent and subsequent debts of the mortgagor, Crumpton, to defendant. Plaintiff demurred to the defense made in the answer that there was an agreement between the mortgagor and mortgagee disposing of the rents and profits of the mortgaged premises. Demurrer overruled.

L. F. Cooper, for appellant. *R. G. Knox, W. H. H. Hart*, and *Aylett R. Cotton*, for respondent.

McKINSTRY, J. The demurrer of plaintiff to "the second separate cause of defense" was not well taken. The answer alleges:

"(1) That, at the time of the execution of the mortgage in the complaint set forth, the mortgagor thereof was indebted to this defendant for goods, wares, merchandise, and money, aside from the consideration of said mortgage, had and received; (2) that from time to time since the execution of said mortgage, and prior to the deed from George H. Crumpton to the plaintiff herein, in the complaint set forth, the said Crumpton has incurred sundry items of indebtedness to this defendant; (3) that it was mutually understood and agreed, by and between said George H. Crumpton and this defendant, that any rents collected under and by virtue of said mortgage in excess of the interest on the principal sum thereof should be applied to the liquidation of the debts existing at the time of the execution of said mortgage and those thereafter to be incurred, and such excess was and has been so applied."

Counsel for appellant say: "Our theory is that in an action to redeem a mortgage, where the mortgagee is in possession of the premises, he is accountable for the rents and profits; and the same, as they are received by him, should be applied to the extinguishment of the mortgage debt. In support of this view we cite Story, Eq. Jur. (12th Ed.) § 1016a; *Gibson v. Crehore*, 5

Pick. 158; Jones, Mortg. §§ 671, 772; *Morse v. Merritt*, 110 Mass. 460, where the court say: 'So long as any portion of the mortgage debt remained due, the mortgagee would take the rents recovered, in trust, to account for and apply towards its payment.'

But we know of no equitable principle which will prohibit a binding contract between mortgagor and mortgagee in possession, or mortgagee who has been authorized to collect the rents, by which it is stipulated that the excess of rents beyond interest of the mortgage debt shall be applied to other indebtedness due from the mortgagor, or to become due up to an assignment of the equity of redemption. The equity imposed upon the mortgagee receiving rents to apply them to the interest and then to the principal of the mortgage debt, etc., (in absence of specific agreement,) may be overcome and supplanted by a specific agreement between mortgagor and mortgagee for the disposition of the rents.

The court below, however, failed to find upon the issues made by the allegations in the answer above quoted, and the implied denials thereof. The court found "that all the allegations of the said defendant's cross-complaint are true." The allegations above recited are not in the *cross-complaint*, and there is no finding that the averments in the answer are true.

Judgment and order reversed, and cause remanded for a new trial, and with leave to the parties to apply to the court below for leave to amend their pleadings if they shall be so advised.

We concur: MYRICK, J.; THORNTON, J.

(71 Cal. 353)

In re Disbarment of TYL R. (No. 11,442.)

(Supreme Court of California. December 3, 1886.)

1. ATTORNEY AND COUNSEL—RETAINER—WHAT AMOUNTS TO.

An attorney who is retained by a guardian to recover the possession of certain promissory notes, and a policy of life insurance pledged as security for their payment, becomes the attorney of the person from whom the recovery is sought, when that person, at the attorney's request, places the papers in his hands for the collection of the loss under the policy, paying the attorney a fee, and taking from him a receipt, in which the attorney promises and agrees, when the money is paid, to turn over to such person, after the lapse of a certain time, and the non-occurrence of certain litigation, the part thereof claimed by him. MYRICK, J., dissenting.

2. SAME—UNPROFESSIONAL CONDUCT—WHAT IS—SUSPENSION.

A failure on the part of the attorney to pay over such money, when collected as agreed, coupled with the institution of a suit against his client, at his instigation, by a claimant to the fund,—the suit being brought in the name of another attorney to conceal from the client his connection with the claimant's case,—and the giving of a bond, with sureties known by the attorney to be insolvent, to stay execution on an appeal from a judgment rendered in favor of the client for the money appropriated, is such unprofessional conduct as to warrant the suspension of the attorney for two years, and until satisfaction of the judgment. MYRICK, J., dissenting, as to the term of suspension.

3. REFEREE—REFEREE'S DISCRETION—CROSS-EXAMINATION.

Referees are invested with large discretion as to the limits within which a cross-examination shall be confined.

4. SAME—ADJOURNMENT—TO ALLOW COUNSEL TO BE PROCURED—HARMLESS ERRORS.

The action of a referee in refusing to adjourn a session immediately upon the withdrawal of an attorney from the case, in order to give his client an opportunity to secure other counsel, is not ground for interference by the supreme court, unless the client has been injured thereby.

In bank.

Pillsbury & Blanding, for complainant. *James L. Crittenden*, for respondent.

THORNTON, J. This is an application for the disbarment of George W. Tyler. The accusation is preferred by J. M. Hogan, in which it is stated that he (Hogan) was the plaintiff, and sued Tyler, the defendant, in an action entitled *J. M. Hogan v. George W. Tyler*, which has been heard and finally determined in this court; that on the thirtieth of March, 1882, he recovered a judgment in said action against Tyler in the superior court of the city and county of San Francisco, in the sum of \$3,862, and \$284.10 costs, with interest thereon from the date of judgment; that Tyler, on the nineteenth of September, 1882, appealed from this judgment to this court, which appeal was determined in this court on June 24, 1885, by affirming the judgment;¹ that thereafter a *remititur* was issued in the cause, and was filed and docketed in the above-named superior court on July 30, 1885; that payment of said judgment has been demanded of said Tyler, upon execution issued thereon since the filing of the said *remititur*; that Tyler has failed and refused to pay the same, and no part of it has been paid; that upon said appeal Tyler procured an undertaking to stay execution on said judgment to be given, and execution thereon was stayed, by virtue of this undertaking, pending said appeal; that the sureties on said undertaking, and each of them, is wholly irresponsible financially, and entirely unable to respond in damages; that each of them was so irresponsible when the said undertaking was given, and that this was then well known to Tyler; that he (Tyler) procured said sureties to make such undertaking, well knowing that they were worthless, and with intent to evade the law requiring such undertaking; that the money for which the judgment above referred to was had and recovered in the action

¹See *Hogan v. Tyler*, 7 Pac. Rep. 454.

above stated against Tyler, to-wit, the sum of \$3,862, was by him theretofore collected and received as the agent and attorney of the complainant, Hogan, and which he failed and refused to pay over to complainant before the commencement of said action,—all of which will more fully appear by the transcript on appeal of said cause to this court, numbered 8,744 of the records thereof, to which special reference is made, and which is asked to be taken and considered as a part of this accusation.

Complainant charges that Tyler is, and was at all times hereinafter mentioned, an attorney and counselor of this court, and that he has willfully violated his duties as such attorney and counselor, and has been guilty of unprofessional conduct, more particularly in this:

First. That on or about the third of June, 1880, Tyler, in this state, agreed to act as the attorney of complainant in the collection of certain money, the sum sued for and recovered in the action hereinbefore mentioned, and by reason of such employment received from complainant certain policies of insurance, a promissory note, and an authority in writing to receive said money; that Tyler thereafter collected said money by virtue of said employment, and the confidence reposed in him as such attorney; that he (Tyler) violated the confidence so reposed in him, and his duties as attorney, and practiced deceit upon complainant concerning said money by instigating and procuring a suit to be brought against complainant and himself by one Fred N. Hedge, in the superior court of the city and county of San Francisco to recover the said money, and to defraud complainant thereof, and concealed from complainant the facts concerning said suit, and converted said money to his own use, and has failed and refused to pay over this money to complainant.

Second. That on or about August 6, 1880, the said Tyler did willfully violate his duty as an attorney and counselor at law, and the confidence reposed in him as such by complainant, in this: That Tyler, being then the attorney and in the possession of \$3,862 of the moneys of this complainant, which he had theretofore collected for complainant as his attorney, and contriving to cheat and defraud complainant, did instigate and procure a suit to be commenced in the superior court above mentioned, by Fred N. Hedge, against himself and complainant, for the recovery of the money above mentioned, and did procure said Hedge to falsely represent and allege to said court in his complaint in that action, that he (Tyler) threatened to pay said money over to complainant unless such action was instituted, and, wrongfully and without cause, to ask said court in said complaint to enjoin and restrain Tyler from paying over said money to complainant before the termination of said action, whereas, in fact, Tyler had then no intention of paying over said money to complainant; and thereby Tyler sought to mislead said superior court, and the judges thereof, by a false statement of fact, and failed to maintain the respect due by him to said court and its officers, as an attorney of said court.

Third. That prior to the sixth day of August, 1880, Tyler had collected the money for complainants as above stated, as his attorney, agent, and trustee, and held the same as such; that on or about the said last-named day, and while he was the attorney, agent, and trustee of complainant, and without complainant's knowledge, Tyler did instigate, encourage, and procure said Hedge to commence the action above mentioned against complainant and himself, and did thereafter encourage and procure said Hedge to continue the prosecution of said action, and did procure the said action to be commenced and continued, with intent to cheat and defraud said complainant, and to prevent said money from coming to the complainant, and with the corrupt motive to thereby wrongfully acquire said money, and the whole thereof; that Tyler did at all times have a corrupt interest in said action, and the result thereof, which interest was hostile to complainant, and Tyler was thereby making use of said Hedge to hide and conceal such interest, and to deceive and mislead this complainant, and did then and there, at all times, counsel and maintain said ac-

tion, well knowing that the same was illegal and unjust, and was calculated and intended to cheat and defraud complainant, and in so doing he was violating his duty and obligations to complainant.

Fourth. The accusation in the fourth count or paragraph sets forth the same facts as to collecting, receiving, and holding the money aforesaid, the instigation and procurement of Hedge to commence the action against complainant and Tyler, the procurement of Hedge to continue the prosecution of said action, the intent with which Tyler procured it to be commenced and continued, and the motive thereof, as are contained in the third count or paragraph, and in addition states that prior to the commencement, to-wit, on the thirtieth day of July, 1880, Tyler being then the attorney, agent, and trustee of complainant, did, without the knowledge or consent of complainant, enter into an arrangement with said Hedge for the commencement and prosecution of said action, whereby it was agreed that Tyler should receive one-third of all said moneys so to be received of complainant, and thereafter, on October 7, 1880, the said Hedge, at the instance and procurement of Tyler, sold and assigned all his right in said suit ostensibly to one Walter C. Dimmick, but in reality for the interest and benefit of Tyler, and this assignment was so made to Dimmick with intent to cheat and deceive complainant; that Tyler never informed complainant during the pendency of the action that he had an interest therein, or that he had instigated or maintained the same.

Fifth. That on July 30, 1880, Tyler was an attorney and counselor of this court, and on that day, and by virtue of his position as such attorney and counselor, he did, with the consent and at the request of complainant, collect and receive the sum of money belonging to complainant, and did thereafter have and hold the same as the agent and trustee of complainant, and not otherwise; and while so holding and retaining said money of complainant, and without his knowledge or consent, Tyler, on said thirtieth day of July, did enter into an agreement with one Fred. N. Hedge to obtain and recover said money from complainant, Tyler to have one-third of all that might be so recovered; and to that end he (Tyler) caused a complaint to be drawn, and an action to be commenced thereon, on August 6, 1880, in the court aforesaid, for the recovery of said money, wherein Hedge was made plaintiff, and Tyler and complainant defendants; that he (Tyler) did thereafter secretly prosecute this action, until it was, on August 30, 1881, dismissed at the instance of Tyler, to avoid a trial thereof; that on October 7, 1880, Tyler procured Hedge to make a transfer of all his interest in said action, ostensibly to one Walter C. Dimmick, but in reality for the benefit of Tyler; that Tyler instigated and prosecuted said action during the pendency thereof, and until August 30, 1881, without the knowledge or consent of complainant, and during all times failed and neglected to inform complainant of the facts touching the action, and his connection therewith; that during said times, and prior to September 15, 1881, Tyler converted all of said money to his own use, and has entirely failed to pay over said money, or any part thereof, to this complainant; that Tyler has squandered said money, and is now unable to pay the same, and complainant is remediless in the premises; that by reason of the matters next hereinbefore stated, complainant charges that Tyler has been guilty of unprofessional conduct as an attorney, and as such has violated his duties, and the confidence reposed in him by complainant, and has practiced deceit upon complainant, and has encouraged and instigated the commencement and prosecution of an action, to-wit, the said suit of *Hedge v. Tyler and Complainant*, from a corrupt motive and interest, and is unworthy to be permitted to practice as an attorney and counselor of this court.

We have carefully examined and weighed the evidence, and consider the following facts established by it:

The respondent, Tyler, had been for many years prior to the fifteenth of May, 1880, and since that date, an attorney and counselor at law, duly ad-

mitted to practice by this court, and authorized to practice his profession in all the courts of this state, and since his admission has been engaged in practice in this court, and other courts of this state; that J. M. Hogan, on the fifteenth of May, 1880, and for some time prior thereto, had in his possession a promissory note, executed by Samuel Langdon, and two policies of insurance which had been issued upon the life of Langdon. The note and policies of insurance are described in a certain paper, which will be hereinafter inserted, executed by respondent on the third day of June, 1880, and delivered to Hogan. Hogan had received the note and policies above mentioned from Mrs. Charlotte Hedge in the capacity of her attorney and legal adviser. He was then practicing as an attorney and counselor at law, under an admission by one of the district courts of the state. Mrs. Hedge was the guardian of her two sons, George H. and Fred N. Hedge. The note of Langdon was made payable to her as such guardian, and was executed for a loan of money held by Mrs. Hedge as part of the estate of her two sons above mentioned. The policies of insurance had been assigned to her by Langdon as security for the payment of his note.

While Hogan was holding this note, and the policies above mentioned, he lent Fred. N. Hedge various sums of money, in all amounting to \$500, and, not long after Hedge became of age, Hogan purchased of him all his interest in the note and policies above mentioned, and in the estate of his deceased father, Nelson Hedge, for the sum of \$850, which sum was made up of the \$500 theretofore lent him, and \$350 paid him at the time. At the time of this purchase Hogan took from Fred. Hedge an assignment to him of the interest so purchased. This assignment bears date the twenty-ninth of March, 1880. Prior to this assignment Langdon had died. Mrs. Hedge had, before the fifteenth day of May, 1880, demanded of Hogan the note and policies above mentioned, and he had refused to deliver them to her, on the ground that he was part owner of them by virtue of his purchase and assignment from Fred. Hedge, and had as much right to their custody as Mrs. Hedge. The claim of Hogan became known to the insurance companies who had issued the policies. Mrs. Hedge was demanding of the companies the payment of the policies, and Hogan had notified them that he had an interest in them, and warned them not to pay Mrs. Hedge. In this condition of affairs the companies were unwilling to pay until it was determined in some way to whom they could pay, so as to procure a discharge from their liability. Thus matters stood when Mrs. Hedge employed the respondent to get the note and policies from Hogan, without recourse to legal proceedings, if it could be so effected, or by such recourse if requisite. The respondent, after such employment, promptly addressed a letter to Hogan, of which the following is a copy:

"SAN FRANCISCO, May 15, 1880.

"*J. M. Hogan, Esq.*—DEAR SIR: Your letters to Mrs. Hedge and George Hedge have been placed in my hands to answer. I will say that I have been employed as counsel for Mrs. H. There is no desire on her part or mine to deprive any one of the money coming to them. The money, or the \$10,000, must come through Mrs. Hedge. It will come into my hands, with your consent, and then every one shall have his own. Please call and see me when you come down. Very respectfully,

GEO. W. TYLER."

This communication seems to have been addressed to Hogan at Stockton, of which city he was then and still is a resident, and soon after its receipt Hogan came to San Francisco, and had an interview with Tyler in regard to the subject of Tyler's letter. The result of that interview was that Hogan surrendered the note and policies to Tyler, and gave his consent in writing that the money due on the policies should be paid to respondent. During the interview above mentioned Hogan explained fully to Tyler his relation to and claim on the note and policies, substantially as above set forth, and gave

him a history of the mode in which he had acquired such claim. Upon the surrender of the possession of these papers to Tyler, he signed and delivered to Hogan a paper, of which the following is a copy:

"This certifies that I have, this third day of June, A. D. 1880, received from J. M. Hogan policy number 54,115, issued upon the life of Samuel Langdon by the Union Mutual Life Insurance Company of Maine, for the sum of \$10,000, dated January 18, 1875, assigned to Charlotte Hedge; and also policy number 60,350, issued upon the life of Samuel Langdon by the New England Mutual Life Insurance Company of Boston, Mass., for the sum of \$5,000, dated April 26, 1878, and assigned to Charlotte Hedge; also a promissory note made by Samuel Langdon, payable to Charlotte Hedge or order, guardian of George H. and Fred. N. Hedge, for the principal sum of \$8,175.66, payable one day after date, bearing interest at 1 per cent. per month, credited on back thereof with payments,—January 11, '80, \$35.69; January 27, '80, \$200; February 11, '80, \$300. I have received foregoing papers at the request of said Charlotte Hedge that said J. M. Hogan should deliver same to me as her attorney; and whereas, said J. M. Hogan claims to be the owner of, and entitled to receive, the one-half of all moneys due, payable, received, or collected upon said promissory note by said Charlotte Hedge or any person, and to have a lien interest upon said two insurance policies, as collateral security for payment of said promissory note, therefore, in consideration of delivery to me of said papers, and of request of said Hogan that I so act in the matter, I do promise and agree with said Hogan that I will receive from said two insurance companies whatever money is paid by either said insurance companies upon said policies, and to the extent of the one-half of the amount unpaid on said promissory note, and which said one-half at this date amounts to about \$4,600, I agree to hold and retain the same. Inasmuch as I have been notified that Fred. N. Hedge has, or claims to have, some interest in said money, I agree to notify him of the payment of the same to me; and if he does not, within ten days from receiving such notice, bring some suit against said Hogan to determine the right to said money, I agree to pay the same to said Hogan on demand. In case such suit is brought, I will pay at once to whomsoever the court shall decide to be entitled to the same.

"GEO. W. TYLER,
"636 Clay Street."

It is contended that Tyler at the same time that he executed the foregoing paper also agreed with Hogan, as his attorney and counselor at law, to persuade and induce Fred. N. Hedge not to bring a suit for the portion of the money claimed by Hogan; but we are not satisfied that Tyler's engagement extended any further than set forth in the paper just above recited. At the same time it was agreed that Tyler was to receive of Hogan \$100 of the portion claimed by Hogan when collected, whether as a payment for services to Hogan as his attorney, or as a gift to Tyler, does not clearly appear. Hogan testifies that it was to be paid for such services; Tyler says it was a gift from Hogan, and that he distinctly refused to be his attorney.

Tyler thus procured the possession of the note and policies, and, invested with the authority of Mrs. Hedge, and the further consent of Hogan to collect the money due on the policies, the money was paid by the insurance companies to Tyler. On the thirtieth of July, 1880, Tyler writes Hogan that on that day he had received from "the insurance company \$8,260.05, and have this day notified Fred. Hedge of the fact, and unless he sues in ten days from to-day I will forward the one-half to you (less \$100) as agreed." On the same day that Tyler wrote as above stated to Hogan, he received from Fred. N. Hedge the following paper:

"I hereby empower Geo. W. Tyler to take such steps as may be necessary to set aside and cancel an assignment of my interest in the estate of my fa-

ther, Nelson Hedge, to J. M. Hogan, and to secure my interest in said estate. I agree to pay said Tyler one-third of all the moneys received by me for his services, and he is to receive nothing if he recovers nothing. Said Tyler is to pay expenses of suit, and deduct same from amount recovered.

"FRED. N. HEDGE.

"July 30, 1880."

On the sixth of August, 1880, an action was commenced in the superior court for the city and county of San Francisco by Fred. N. Hedge, as plaintiff, against J. M. Hogan and respondent, as defendants, to cancel and annul the above-mentioned assignment of Hedge to Hogan, and to enjoin Tyler from paying over to Hogan more than \$850, with interest, until the final termination of the action, and for judgment against Tyler for the moneys received by him, less the sum above-mentioned, etc. The complaint in this action was prepared by the respondent; was filed with the clerk of the court aforesaid on the date last above-mentioned, having the name of H. H. Reid signed thereto as attorney for plaintiff. Tyler procured Reid to sign his name as attorney for plaintiff, but the action was really commenced by Tyler, and was to be managed, controlled, and prosecuted by him. The complaint set forth that plaintiff had been overreached and cheated by Hogan in the purchase and transfer of his interest in the note of Langdon and the policies of insurance, and that the same had been effected by Hogan when he (plaintiff) was intoxicated.

On the same day on which this complaint was filed Tyler wrote Hogan, inclosing in the letter a check for \$888. At or about the same time he informed Hogan that Fred. Hedge had commenced suit against him. Hogan received the money (\$888) on the check, and kept it. He acknowledged receipt of Tyler's letter inclosing the check on the seventh of August, 1880; and states in his reply to this letter that he does not admit "that \$888 is the full amount of my claim, nor the full amount of the money in your hands, received by you from the Union Mutual Life Ins. Co., belonging to me. On the contrary, the one-half of that \$8,260 belongs to me, and you will please not deliver to Fred. Hedge, or any other person, except by order of court or upon my order." This letter thus proceeds: "I am obliged to you for notifying me that Fred. has brought suit. You did not tell me when the suit was instituted, nor who are the parties defendant. Please let me know. If you are sole defendant, I will defend you in the action. I will get an attorney in San Francisco to do so. When was you served with papers? Please send me a copy of complaint."

To this letter Tyler replied. This reply is written on the sheet which contains Hogan's letter of August 7th. It is without date, and no doubt written soon after the receipt of the letter to which it is a reply, and it is as follows:

"J. M. Hogan, Esq.: I am not sole defendant; you and I are defendants. Of course I know \$888 is not what you claim, and my receipt to you is security that I will only pay the money to whomsoever the court shall order it paid. I sent you the money for the reason that as to that amount there was no dispute, and therefore no reason for my keeping it. I understand you will be served in a few days. I shall simply answer that the money is in my hands, and ready to be paid over to either, as court may direct.

"Yours, truly, TYLER".

Soon after receiving this letter Hogan came to San Francisco, and had an interview with Tyler. He told Tyler that he would employ E. S. Pillsbury, Esq., an attorney of San Francisco, to appear and defend them in the Hedge suit, to which Tyler consented.

On demurrer filed by Pillsbury on behalf of Tyler, it was held Tyler was not a necessary party to the action. Tyler dropped out of the action as a party thereto, as far as shown by the record. Hogan answered, denying, *inter alia*, all allegations of fraud, circumvention and concealment, and that

he acquired his interest from said Hedge while he was in a state of intoxication.

While the cause of *Hedge v. Hogan* was pending, some depositions were to be taken of certain witnesses at Stockton. On these occasions Tyler appeared to represent plaintiff, and Reid made no appearance.

On the twenty-sixth of February, 1881, Tyler addressed a note to Hogan in the following words:

"*J. M. Hogan, Esq.*—DEAR SIR: One Walter C. Dimmick has notified me and left with me an assignment in writing from Fred. N. Hedge to him of all interest in the suit of *Hedge v. You and Me*. I hereby notify you of that fact, so you may be informed.

"Very truly,

GEO. W. TYLER."

The above-named Dimmick, a brother-in-law of Tyler, who resided in Colorado, was afterwards substituted as plaintiff in this action in place of Hedge.

The case was called for trial on the thirtieth of August, 1881. The respondent appeared for plaintiff, and moved, on his own affidavit, for a postponement of the trial. This was opposed by a counter-affidavit of Hogan. The court continued the cause until the Monday following, upon payment by plaintiff of defendant's witness fees, amounting to \$16. Whereupon the respondent, for plaintiff, moved for a dismissal of the action, and on this motion a dismissal was ordered by the court.

That this action was encouraged and instigated by the respondent, and was maintained at his expense and by his efforts, we have no doubt. That he was personally interested in the cause, and was to share in the recovery, if any was had, the testimony distinctly establishes. In our judgment, the evidence shows that Tyler never informed Hogan of his contract with Hedge, or of his connection with the suit brought by the latter, and that he prosecuted that suit, concealing from Hogan his contract with Hedge, and his real connection with the suit, until the time it was dismissed.

On the trial of this cause one reason was alleged by Tyler for dismissing the action above mentioned, while the complainant contended that it was dismissed for another and a different one. Whether it was dismissed for the reason set forth by respondent, or for the reasons contended by complainant, is, in our view, entirely immaterial. It clearly appears that the cause was never tried, and that it was dismissed on the motion of respondent, who acted for plaintiff in making the motion, and that respondent was personally interested in whatever money might have been recovered in the action. As the reason for which the suit was dismissed by Tyler is immaterial, the depositions of Hedge, Clark, and Shurtleff may be excluded from consideration.

Soon after the dismissal of the action of *Hedge v. Hogan*, Hogan demanded payment of the portion of money coming to him on the policies above mentioned, and which Tyler had retained in his hands under the agreement above set forth. Tyler refused to pay him anything. Thereupon an action was brought by Hogan, as plaintiff, against Tyler, as defendant, to recover it. This action was instituted in the superior court for the city and county of San Francisco, and was commenced on the fifteenth of September, 1881.

The complaint therein contained two counts,—one based on the averment that the defendant had collected a certain sum as agent for plaintiff; the other, on an averment that the defendant had collected a certain sum of money as attorney at law for plaintiff. In both counts it was averred that the money had been demanded of defendant, and that he had refused to pay. The defendant answered the complaint, denying its material allegations. The cause came on for trial, was regularly tried, and resulted in a verdict for plaintiff for \$3,862. The verdict was rendered on the twenty-fourth of March, 1882, and on the twenty-fifth of the same month judgment was entered on the verdict for \$3,865.25, with interest, etc. This judgment was, on appeal, affirmed

by this court, and a rehearing on said appeal was by this court, in bank, denied. The *remittitur* was in due time sent from this court to the court below. Subsequently, by letter, Hogan demanded of respondent payment of the amount due on the judgment so affirmed. A reply in writing to this letter was made by respondent, and sent to Hogan, in which, in language of defiance, bitterness, abuse, and insult, he refused to pay the money, or any part of it. Afterwards Hogan took steps to have the respondent examined on proceedings supplementary to execution on the judgment aforesaid. Such examination was had, from which it clearly appeared that respondent was totally unable to pay, and that he had converted to his own use and spent the money above referred to, which he had received, and which it had been adjudged was due to and belonged to Hogan.

On the appeal to this court in the above-mentioned cause of *Hogan v. Tyler* the defendant was desirous of staying the execution of the judgment pending the appeal. To effect this, an undertaking to stay execution was filed, two of the sureties to which were John S. Wheeler and Philip Schenck. This stay undertaking was in the form and with the condition prescribed by law. The sureties were irresponsible, and without the means of payment, when the undertaking was executed by them. Upon the affirmance of the judgment, and the rendition of judgment against the sureties on the undertaking, it was found that they were entirely without means to pay any part of the judgment. The evidence satisfies us that respondent, Tyler, knew, when the undertaking was executed, that the sureties were without means to meet the obligation of the undertaking, and that they were then without ability to respond to any judgment which might be rendered against them on it. We are forced to the conclusion that the respondent, by design, filed an undertaking the signers of which were worthless as sureties, with the intent that it should be worthless to the plaintiff as security, in case the judgment appealed from should be affirmed.

The paper of the third of June, 1880, above set forth, executed by Tyler, and delivered by him to Hogan, in which he receipts for the note of Langdon, and the policies of insurance, is not only a receipt, but a contract between Tyler and Hogan. The terms of the contract are set forth distinctly in the portion of said paper beginning with the words, "Therefore, in consideration of," etc. For a consideration expressed in this document, Tyler promises and agrees with Hogan. It so clearly states: "I do promise and agree with said Hogan that I will receive from said two insurance companies whatever money is paid by said insurance companies upon said policies; and to the extent of the one-half of the amount unpaid on said promissory note, and which said one-half at this date amounts to about \$4,600, I agree to hold and retain the same." Tyler having here agreed with Hogan to hold and retain the money thus received, could not pay it over to Mrs. Hedge, for whom it is clear that he was acting as attorney at law. It is evident that he did not intend to recognize any right in his client, Mrs. Hedge, to have any portion of this half which he binds himself to hold and retain.

But the foregoing is not the whole of the agreement. The document sets forth further terms of agreement. It proceeds thus: "Inasmuch as I have been notified that Fred. N. Hedge has, or claims to have, some interest in said money, I agree to notify him of the payment of the same to me, and if he does not within ten days from receiving such notice, bring some suit against said Hogan, to determine the right to said money, I agree to pay the same to said Hogan on demand. In case such suit is brought, I will pay at once to whomsoever the court shall decide to be entitled to the same." In our judgment the above words show an agreement with Hogan to hold the money on certain conditions, which are thus expressed: If, upon his (Tyler's) notifying Fred. Hedge that this half of the money has been paid to him, Hedge does not bring suit for it against Hogan within ten days from the date of receiving such notice,

he is to pay it over to Hogan. If suit is brought, and judgment on such suit is rendered in Hogan's favor, he is to pay it to Hogan; if in Hedge's favor, he is to pay it to Hedge. The legal effect of this agreement is that the money is held and to be held and paid over to Hogan, if suit is not brought within the time specified, and if suit is brought and determined in Hedge's favor, then to be paid over to Hedge. The money is only to be paid over to Hedge if suit is brought, and judgment passes for him. It turned out that suit was brought and dismissed. What was the effect of such dismissal? In our judgment, upon such dismissal, as the ten days referred to in the contract had then elapsed, Tyler held the money as the agent of Hogan, and was bound to pay it to him.

This document of the third of June certainly shows a contract with Hogan, and a contract of agency with him. Tyler received the half of the money by consent of Hogan, and he was then to hold it as above set forth. He seems to have had no doubt that he had a right to enter into such a contract. It does not appear that there was anything in his employment by Mrs. Hedge, or his relations to Fred. Hedge, which conflicted with it. In fact, Tyler stated that Mrs. Hedge consented that he should keep this money in his hands if Fred. Hedge had an opportunity to litigate the question whether it was to go to him or Hogan. The claim of Fred. Hedge, if he had any, was regarded in the contract, and a reasonable time was given him to bring the suit to enforce such claim. It does not appear that this contract conflicted with any duty that he owed to Fred. Hedge. There is evidence that he objected to contracting with Hogan to use his influence with Fred. Hedge or Mrs. Hedge to persuade the former not to sue Hogan for the money which Hogan claimed. Tyler refused to enter into any such agreement with Hogan, and, in our judgment, no such agreement was made.

From the relation which Tyler sustained to Hogan, it was his duty to make known to him all the facts in relation to his connection with Hedge, his agreement with him, and the relation he bore to the Hedge suit. This he did not do until about the time the suit was dismissed. The information then given was in his affidavit for a continuance. But, as above stated, the contract entered into does show a contract of agency, trust, and confidence by Tyler with Hogan; and to say that this contract was one in which Tyler became an attorney *de facto*, and not an attorney at law, for Hogan, would be making a distinction savoring too much of a mere refinement of words. Tyler was an attorney at law; had been for many years practicing as such when he entered into this contract. He was contracting concerning a matter of difference which might be, and did become, a matter of litigation. Tyler collected the money as attorney at law,—a business in which attorneys at law are much engaged. He collected it with the consent and by the authority of Hogan, on the conditions named in the contract; and by this contract, and on its terms, he became the agent and attorney of Hogan to collect and hold the money, and pay it over to him (Hogan) on the conditions named in such contract. If Hedge had brought the suit for this money within 10 days, and it had been adjudged in the action that he (Hedge) was entitled to the money, Tyler would then have ceased to be the attorney of Hogan. The suit brought by Tyler for Hedge was dismissed. Tyler's responsibility to Hogan, then, never ceased.

We think that the testimony justifies us in holding that he was the attorney at law of Hogan, on the terms of the contract which was made between them.

An exception was made to the ruling of the referee who took the testimony in this case, by which he stopped the cross-examination of one of the witnesses of complainant. The cross-examination of the witness had, in our judgment, been unnecessarily prolonged, and the referee acted within a proper discretion in stopping it as he did. On this ruling being made by the referee, counsel for the respondent, who was conducting the cross-examination, re-

tired from the cause, and respondent then asked for time to procure other counsel. The referee said that it was not long before the noon recess, that the cause should proceed until that time, when respondent might procure counsel. If we could perceive that respondent was injured by this ruling of the referee, we would interfere for his relief, but we do not see that he did suffer any injury.

We will say, further, that in bringing the action of *Hedge v. Hogan and Tyler* the respondent was really on both sides of the case. He was really attorney for the plaintiff, and interested in any recovery of money by plaintiff, and was himself a defendant in the action. By this conduct he violated his obligations to Hogan under the contract as his agent and attorney, and violated his duties as attorney at law. In the relation of agent which he bore to Hogan under his contract it was in violation of his duty to Hogan, as his principal, to assume an attitude antagonistic to him, without his knowledge and consent.

We are of opinion that the accusation in regard to the undertaking on appeal, and the portion of the accusation numbered 1, is sustained by the evidence herein.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

MCKEE, J. I concur in the opinion on the sole ground that the accusation is sufficiently sustained by the evidence of the acts and conduct of the respondent, in connection with the judgment and undertaking on appeal in the case of *Hogan v. Tyler*, referred to in the prevailing opinion.

MYRICK, J. From the statement contained in the foregoing opinion it appears that the respondent, G. W. Tyler, is charged in this proceeding with having agreed to act as the attorney for complainant in the collection of certain money, and, by reason of such employment, received from complainant certain policies of insurance, a promissory note, and an authority in writing to receive said money; that thereafter he collected said money by virtue of said employment, and the confidence reposed in him as such attorney, etc. It will be remembered that Mrs. Hedge had held the note and policies as guardian of her two sons, (to whose estates the note belonged,) and that she had placed them in the hands of Mr. Hogan as her attorney; that after one of the sons attained majority, Mr. Hogan, for the consideration of some \$350, took an assignment of his interest, amounting to about \$4,500; that Mr. Hogan then asserted his right to retain the possession of the note and policies, and refused to surrender them to Mrs. Hedge, from whom he had received them as her attorney; that Mrs. Hedge and the son claimed the latter had been overreached in the matter of the assignment, and Mrs. Hedge employed Mr. Tyler to get the note and policies from Mr. Hogan, of which employment the latter had notice. Mrs. Hedge was unable to recover the money on the policies, as they were out of her possession, and Mr. Hogan had given notice to the companies not to pay to her; neither would the companies pay to Mr. Hogan. Thereupon, at an interview had between Mr. Tyler and Mr. Hogan, the latter delivered the policies and note to the former, and Mr. Tyler gave his receipt therefor, in which he stated: "I have received foregoing papers at the request of Charlotte Hedge that said J. M. Hogan should deliver same to me as her attorney." The policies were paid without suits. It seems clear to me that, as between Mrs. Hedge and Mr. Hogan, Mr. Tyler was the attorney of the former, of which Mr. Hogan had notice, and that he (Hogan) delivered the papers to Tyler at the request and as the attorney of Mrs. Hedge, and not as the attorney of himself; that the allegation of employment of Tyler by Hogan as his attorney at law is not sustained. Whatever may have been the duty of Mr. Tyler to Mr. Hogan as attorney in fact, or agent, is not now for consideration; I am dealing only with his duty as an attorney at law.

In regard to the giving of the undertaking on appeal, I am of opinion that Mr. Tyler violated his duty and obligation as an attorney at law. Hogan had recovered a judgment against him. He gave notice of appeal, and caused an undertaking to be executed and filed. The statute requires that the undertaking be accompanied with the affidavit of each surety that he is worth the sum specified in the undertaking. In my opinion Mr. Tyler knew that the surety Wheeler was insolvent, and with that knowledge procured him to join in the execution of the undertaking. His object, doubtless, was to prevent Hogan from realizing the fruits of a successful litigation. In so doing he violated his duty as laid down in subdivision 4, § 282, Code Civil Proc. The acts done by Mr. Tyler and Wheeler, in regard to the deed from the former to the latter, do not render obscure the real transaction, and its purpose.

While I am of opinion the acts of the respondent deserve censure, and the imposition of a penalty, I am not in favor of his removal or his suspension for an extended period. I think the penalty of suspension for six months sufficient; but there should be added the provision that the suspension continue thereafter until the object of requiring an undertaking, viz., payment of the judgment, interest, and costs, in case of affirmance, be accomplished.

MORRISON, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J. All the justices of this court being of the opinion that the evidence proves the respondent guilty of a violation of his duty as attorney and counselor, and of his oath of office as such, and that the allegations in the accusation with respect to his conduct in procuring and filing the undertaking to stay execution on appeal from the judgment in the case of *Hogan v. Tyler* have been fully proved, and no four of the justices concurring in any other judgment than that hereinafter stated, but five of the justices, after full consultation, having agreed on the judgment following, it is ordered and adjudged that respondent, George W. Tyler, be deprived of the right to practice as attorney or counselor in any and all the courts of this state, and be suspended from practicing as attorney or counselor at law in any of said courts for the period of two years from the date of the entry hereof, and until the judgment in favor of J. M. Hogan against the said respondent, mentioned and described in the accusation, shall be fully satisfied and paid, if the same shall not have been satisfied during such period of two years.

(2 Cal. Unrep. 702)

WHITTLE v. DOTY. (No. 11,170.)

(*Supreme Court of California*. August 31, 1886.)

APPEAL.—ACTION TO QUIET TITLE—FINDINGS NOT CONTRADICTORY—MATERIAL ISSUES COVERED.

Where, on appeal from a judgment in a cause tried by the court without a jury, the findings are not contradictory, and cover all the material issues presented therein, the judgment of the trial court must be affirmed.

Department 2. Appeal from superior court, Amador county.

The plaintiff in his complaint, for a second cause of action, which is the one considered on this appeal, alleged that he was the owner in fee of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 23, in township No. 7 N., of range No. 9 E., Mount Diablo base and meridian, situated in the county of Amador and state of California. The defendant answered, and claimed an interest adversely to the plaintiff in and to the following portion of said land, to-wit: Commencing at the north-west corner of said subdivision, and running thence east, along the northern boundary thereof, to the north-east corner thereof; thence south, about nine and one-half rods, to a fence crossing said subdivision from east to west; thence west 80 rods, along said fence, to the western boundary of said subdivision; thence north seven and one-half rods, to the place of beginning,—said piece of land containing four and one-quarter

acres, more or less. The plaintiff claimed that the claim of the defendant was without right, and prayed that he might be enjoined from asserting any claim whatever to the premises adverse to himself. The case was tried by the court without a jury, and, in accordance with its findings of facts, entered a judgment for the plaintiff, quieting in him the title to the land, and restraining the defendant from setting up any claim thereto. The defendant contended that the findings were contradictory, and failed to cover the material issues; but the court entered up its judgment, and defendant appealed.

Eagon & Armstrong, for appellant, Doty. *Blanchard & Swisler*, for respondent, Whittle.

BY THE COURT. The findings are not contradictory, and they cover all the material issues. Judgment affirmed.

(2 Cal. Unrep. 709)

CAHEN and others v. MAHONEY. (No. 9,850.)

(*Supreme Court of California. September 16, 1886.*)

1. ATTACHMENT—DISSOLUTION—AFFIDAVITS—COUNTER-AFFIDAVITS.

Where, upon a motion to dissolve an attachment, the counter-affidavits of the defendant are fully answered by the affidavits produced in behalf of plaintiffs, the court has no right to disregard or discredit the showing on behalf of plaintiffs, and, on appeal, the order dissolving the attachment will be reversed.

2. SAME—UNDERTAKING—SUFFICIENCY.

The undertaking in this case executed by the plaintiffs examined, and held to be sufficient.

Department 2. Appeal from superior court, Stanislaus county.

This was an attachment sued out by the plaintiffs against the defendant upon an alleged indebtedness. The affidavit required by law was made and filed in the cause, and an undertaking was executed by the plaintiffs in the following words:

"Whereas, the above-named plaintiffs have commenced, or are about to commence, an action in the superior court of the county of Stanislaus, state of California, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiffs by the said defendant the sum of seven hundred and fourteen and 57-100 dollars of the United States, besides interest, and are about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein, now, therefore, we, the undersigned, residents of the said county of Stanislaus, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake, in the sum of five hundred dollars, and promise to the effect, that, if the said defendant recovers judgment in said action, the said plaintiffs will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding the sum of five hundred dollars.

"Dated the twenty-sixth day of September, 1884.

[Signed]

"C. A. STONESIFER. [Seal.]
"J. C. TRANER." [Seal.]

The justification and verification were as follows:

"C. A. Stonesifer and J. C. Traner, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and free, state of California, and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

[Signed]

"C. A. STONESIFER.
"J. C. TRANER."

"Subscribed and sworn to before me this twenty-sixth day of September, 1884.

[Signed]

"Wm. O. MINOR, Notary Public."

Affidavits and counter-affidavits were filed by both plaintiffs and defendant in support of their respective claims and defenses; and at the November term, 1884, the defendant moved the court to dissolve the attachment on several grounds; among them, that no sufficient or proper undertaking was made or filed, and that the pretended undertaking was not properly verified or justified. The court below dissolved the attachment, and from this judgment plaintiffs appealed.

C. A. Stonesifer and Wm. O. Minor, for appellants, Cahen and others. Stanton L. Carter, for respondent, Mahoney.

BY THE COURT. The court erred in dissolving the attachment in this case. The affidavit of the defendant was fully answered by the affidavits produced on behalf of plaintiffs. The court had no right to disregard or discredit the showing on behalf of plaintiffs. The undertaking was sufficient. Order reversed.

(2 Cal. Unrep. 717)

PEOPLE v. HIGGINS. (No. 20,214.)

(*Supreme Court of California.* September 30, 1886.)

CRIMINAL LAW—APPEAL—INSTRUCTIONS.

Where the instructions given by the court are contradictory, the judgment will be reversed.

Department 1. Appeal from superior court, Mendocino county.

Prosecution for assault with deadly weapon, with intent to do great bodily harm. Defendant was found guilty, fined \$100, and appealed to the supreme court.

The Attorney General, for the People. J. A. Cooper, for appellant.

BY THE COURT. In respect to the crime of which defendant was convicted, the instructions of the court below to the jury were conflicting, for which reason the judgment and order are reversed, and cause remanded for a new trial.

(2 Cal. Unrep. 727)

GREER v. TRIPP. (No. 9,643.)

(*Supreme Court of California.* December 10, 1886.)

STATUTE OF LIMITATIONS—EJECTMENT.

Evidence held to sustain defense of statute of limitations, and judgment affirmed.

Department 1. Appeal from superior court, San Mateo county.

Action of ejectment. Among other defenses, defendant set up the statute of limitations. It appeared that defendant claimed under deeds executed in 1858, had from that time claimed title, most of the time was in possession, and was in possession when this action was instituted, on May 10, 1876. The superior court held the action barred, and, plaintiff's motion for a new trial being denied, he appealed to the supreme court.

John Reynolds, for appellant. Fox & Kellogg, for respondent.

BY THE COURT. There was sufficient evidence to support a finding in favor of defendant upon the plea of the statute of limitations to uphold the judgment.

Order denying plaintiff's motion for a new trial affirmed.

(71 Cal. 399)

SCHROEDER v. SCHMIDT. (No. 9,812.)

(Supreme Court of California. December 13, 1886.)

APPEAL—WHEN TAKEN—JUDGMENT—ORDER ON—MOTION FOR NEW TRIAL.

An appeal cannot be taken from a judgment before the judgment is entered, but may be taken from an order denying a motion for a new trial before the entry of judgment.

In bank. Appeal from superior court, city and county of San Francisco. *John F. Burris*, for appellant. *E. W. Blaney*, for respondent.

SHARPSTEIN, J. Respondent moves to have the appeals from the judgment and the order denying the motion for a new trial dismissed, on the ground that the appeals were taken *before* the judgment was entered. That is doubtless a sufficient ground for dismissing the appeal from the judgment. *McLaughlin v. Doherty*, 54 Cal. 519; *Thomas v. Anderson*, 55 Cal. 43. But the appeal from the order denying the motion for a new trial was taken within 60 days *after* the order was made. That is within the time prescribed by the Code. Code Civil Proc. 939. We think no sufficient ground for dismissing the appeal from the order denying the motion for a new trial has been shown in this case, and the motion to dismiss that appeal is denied.

Appeal from the judgment dismissed.

We concur: **MORRISON, C. J.; THORNTON, J.; MCKINSTRY, J.; MYRICK, J.; MCKEE, J.**

(71 Cal. 48)

PEOPLE v. GIACAMELLA. (No. 20,222.)

(Supreme Court of California. September 22, 1886.)

CRIMINAL LAW—INFORMATION—DESCRIPTION OF OFFENSE—ATTEMPT TO COMMIT ARSON—Pen. Code Cal. §§ 447, 448.

An information alleging, in accordance with section 447, Pen. Code Cal., that the "defendant did, in the night-time of said day, willfully, maliciously, and feloniously attempt to burn a building," is sufficient to charge the crime of an attempt to commit arson. It is not necessary to set out the provisions of section 448 relating to the circumstances of the commission of the offense.

Department 1.

The Attorney General, for the People. *Wm. P. Veuve*, for appellant.

MYRICK, J. The defendant was accused of the crime of an attempt to commit arson, the information alleging that the "defendant did, in the night-time of said day, willfully, maliciously, and feloniously attempt to burn, with intent then and there to destroy, a building," the property of, etc. No demurrer was interposed. The defendant was convicted of an attempt to commit arson in the second degree, and moved in arrest of judgment, on the ground that the information did not state facts sufficient to constitute a public offense, in that the information contained none of the definitions set forth in section 448, Pen. Code.

The offense was stated in accordance with the language of section 447, Pen. Code, and was sufficiently stated. As well might the provisions of sections 449 to 452 be held necessary to be stated, as those of 448. Section 447 declares the offense; and the following sections relate to circumstances of its commission.

There were circumstances tending to connect the defendant with the fire; and the question as to the sufficiency of those circumstances was with the jury. The court committed no error as to the instructions.

Judgment and order affirmed.

We concur: **MCKINSTRY, J.; Ross, J.**

(36 Kan. 51)

ST. LOUIS, FT. S. & W. R. CO. v. CHENAULT and another.

(Supreme Court of Kansas. December 9, 1888.)

1. **SET-OFF AND COUNTER-CLAIM—DEMAND OF TREASURER AGAINST RAILROAD COMPANY.** Where a railroad company sues its former treasurer for moneys alleged to belong to the company, and to have been received by him as treasurer, and wrongfully appropriated by him to his own use, and it appears that he appropriated the same in payment of certain claims of his against the railroad company, which claims were founded upon contract, *held*, that the treasurer may, in such action, have the amount of his claims set off against the claim of the railroad company, so far as his claims are legal and valid, and just and equitable.

2. **CORPORATIONS—RIGHT OF OFFICER TO PURCHASE NOTES OF COMPANY.**

Where a treasurer of a railroad company, with his own money, and for himself individually, purchases promissory notes executed by the railroad company, and at the time of the purchase he is under no obligation to the railroad company to purchase or to pay the same, *held* that, although he purchased them at a discount, still he may collect from the railroad company their full face value.

(*Syllabus by the Court.*)

Error from Bourbon county.

J. H. Salles and *J. H. Richards*, for plaintiff in error. *J. D. McCleverty* and *E. M. Hulett*, for defendant in error.

VALENTINE, J. This was an action brought by the St. Louis, Fort Scott & Wichita Railroad Company against Waller Chenault and the First National Bank of Fort Scott, Kansas, to recover \$11,928.39. It is admitted that Chenault was the treasurer of the railroad company from March 14, 1882, up to May 27, 1884, with the exception of about one month, in November, 1882, and was also a director for the company for a portion of that period of time, and was also president and business manager of the bank; and the bank, as a corporation, was the depository of the funds of the railroad company. It is also admitted that Chenault at one time had in his hands, as treasurer of the railroad company, the said sum of \$11,928.39; and that out of this sum he paid to the railroad company, after this suit was commenced, the sum of \$6,125, leaving the sum of \$5,803.39 still in dispute. To account for this last-mentioned sum Chenault claims that, prior to the commencement of this action, he paid to himself out of the company's funds the sum of \$2,250, as compensation due him for his services as treasurer of the plaintiff; \$310, due him for traveling expenses, paid by him for the plaintiff; \$313.50, due him for exchange purchased for the plaintiff of the bank, and paid for himself; and \$2,926.89, due him on three promissory notes executed by the plaintiff to one Robert D. Clifford, and owned and held by himself. Upon these disputed claims, and these only, a trial was had before the court without a jury, and the court made a general finding in favor of the defendants, and against the plaintiff, and rendered judgment accordingly, and the plaintiff brings the case to this court for review.

In one of the plaintiff's briefs it is claimed that the following questions arise: "(1) Can a treasurer of a corporation (he also being a director) arbitrarily allow himself a salary, fix the amount, adjudge it to be reasonable, and appropriate the company's money in payment thereof without its consent? (2) Has an officer of a corporation, such as defendant in error Chenault, a right to buy up outstanding claims against his corporation, and then arbitrarily pay such claims out of the corporation funds without the consent of the corporation? (3) In an action against an officer of a corporation to recover money alleged to have been unlawfully appropriated and converted by him, as in this case, can he offset such claims, and his own wrongful acts, against the corporation's demand for its funds? (4) Sustaining the relation Chenault did towards his co-defendant in error bank, being its president and chief executive officer and business manager, is not the bank charged with

knowledge of the misappropriation of these funds, and is it not a party to the transaction, and liable as joint tort-feasor?"

In another of the plaintiff's briefs it is claimed that the following questions arise. "(1) Whether Chenault had the legal right, while treasurer of this company, to 'adjudicate' and audit and pay his own claims in the manner shown by the record? (2) If not, and he was therefore liable as claimed, is the bank of which he was president liable? (3) Is Chenault liable to account to his company for the discount of the notes he purchased?"

The plaintiff claims that the foregoing disputed items are not proper subjects of either set-off or counter-claim in this action. We think that the defendant Chenault had no right to adjudicate upon his own claims, or to adjust or audit them, or to pay the same without the consent of the railroad company; but these are not the controlling questions in this case. The real and controlling question is this: Having done all these things with reference to his own claims, (and he had frequently done similar acts before with reference to his own claim and the claims of others, and his acts with reference to these other claims had been ratified and approved by the railroad company,) and having afterwards ceased to be the treasurer of the railroad company, and this action having afterwards been brought against him by the railroad company for the amounts which he had thus paid to himself or appropriated, can he not now, in this action, have these claims of his set off, as against the claim of the plaintiff, so far as his claims are legal and valid, and just and equitable? The plaintiff says not, for the reason, among others, that this action is not founded upon contract, within the meaning of section 98 of the Civil Code, but is founded exclusively upon tort. Now, is it true that this action is founded exclusively upon tort, and not upon contract? Chenault held the moneys sued for as the treasurer of the railroad company. His office or agency was created by contract. His duties thereunder were also created by contract, and were regulated by contract. It was his duty, under these contract relations, to dispose of these moneys as ordered by his principal; and if he did not do so he violated his contract, and at once created a cause of action on the contract against himself, and in favor of his principal. Even if the facts stated would also constitute a cause of action on tort, still they also constitute a cause of action on contract. And this is enough to authorize the interposition of a set-off.

We think the case of *Austin v. Rawdon*, 44 N. Y. 63, lends support to the proposition that this is an action founded on contract. Indeed, the plaintiff cannot state his cause of action without stating a contract; for, in order to properly state his cause of action, he must state the facts thereof, and, when he states the facts thereof, he states a contract. In this state all the old forms of action are abolished, and in their stead we have only one form of action, called a "civil action," and the plaintiff, in stating his cause of action, must state the real facts thereof as they have actually occurred, and not forms or fictions, as was frequently permissible, and sometimes required, by the common law. Hence where a plaintiff has a cause of action on contract, he must state the contract, and cannot properly state his cause of action without stating the contract. Also, in this state, a cause of action founded upon an implied contract, as well as a cause of action founded upon an express contract, may be the subject of set-off. *Fanson v. Linsley*, 20 Kan. 235. And the set-off may be for unliquidated damages, and in an action for unliquidated damages. *Stevens v. Able*, 15 Kan. 584; *Gardner v. Risher*, 35 Kan. 93; S. C. 10 Pac. Rep. 584. And, when cross-demands exist which may be set off against each other, neither party can deprive the other of his right of set-off by an assignment of his demand. *Leavenson v. Lafontane*, 3 Kan. 523; *Turner v. Crawford*, 14 Kan. 499; *Gardner v. Risher*, 35 Kan. 93; S. C. 10 Pac. Rep. 584. And where the holder of a claim which could properly be set off against the claim of another person, but under the circumstances such

holder can make his set-off available only by interposing it in an action of replevin,—an action founded upon an alleged tort,—he may interpose it in such action. *Gardner v. Fisher*, 35 Kan. 93; S. C. 10 Pac. Rep. 584. And, even in an action on a constable's bond, the constable may set off his fees due from the plaintiff. *Sponenbarger v. Lemert*, 28 Kan. 55. And to allow set-offs to be interposed in cases like the present comes within the spirit of the Civil Code, which attempts, as far as it is reasonably practicable, to have all controversies between the same parties determined in one action. *Stevens v. Able*, 15 Kan. 587. The following cases also tend to support the view that set-off may be allowed in cases of this kind: *U. S. v. Macdaniel*, 7 Pet. 1; *U. S. v. Ripley*, 7 Pet. 18; *Gratiot v. U. S.*, 15 Pet. 336, 370, *et seq.*; *Donelson v. Colerain*, 4 Metc. 430; *State v. Franklin Bank*, 10 Ohio, 92; *East Anglian Ry. Co. v. Lythgoe*, 2 Eng. Law & Eq. 331.

We do not think that the authorities cited by counsel for the railroad company are applicable under our statutes. The case of *Russell v. First Presbyterian Church*, 65 Pa. St. 9, is the principal case relied on by the railroad company. It must also be remembered that in this case the funds placed in the hands of Chenault were not set apart by the railroad company for the payment of any particular debts or claims. These funds were intended for the payment of debts and claims, in general, held against the railroad company, and just such debts and claims as Chenault held or holds. This fact, as well as our statutes, distinguishes this case from the cases principally relied on by counsel for the railroad company. We think the decision of the court below upon the question of set-off is correct, and that Chenault may, in this action, have his claims against the railroad company set off against their claim.

As this case comes to us, it must be admitted that all the claims of Chenault against the railroad company are legal and valid, and just and equitable, with the exception of his claim upon the above-mentioned promissory notes; and it must also be admitted that his claim upon these notes is legal and valid, and just and equitable, up to the amount which he paid for them, which was much less than their face value. But is not his claim good for the full amount of the face value of the notes? We shall now proceed to consider this question.

There were three of these notes. The first was due January 5, 1881; the next was due January 5, 1882; and the last was due January 5, 1883. Chenault purchased them a little before the time when the last one became due, and with his own money, but at a large discount. There is no showing that he was under any obligation to the railroad company to purchase them, or that he had any funds of the railroad company in his hands with which he could have purchased them or paid them; and probably he had not. However, on May 20, 1884, about one year and four months after the purchase, he had funds in his hands belonging to the railroad company, and with such funds he then paid them. They were payable originally to a fictitious payee, but still they were *bona fide* obligations of the railroad company for value, and to the extent of their face value, and were valid in the hands of any *bona fide* purchaser or holder thereof, (*Kohn v. Watkins*, 26 Kan. 691, 698, *et seq.*); and, although Chenault knew that they were executed to a fictitious payee, still he was a *bona fide* purchaser for value, and purchased them from the real owner and holder thereof, and obtained whatever right thereto, and to collect the same, that the original owner and holder had. But we need not pursue this subject further, for no question is raised upon the fact that the notes were executed to a fictitious payee. The real question is whether Chenault is entitled to their full face value, or only to the amount which he actually paid for them. Mr. Morawetz, in his work on Private Corporations, § 521, uses the following language: "A director or other agent of a corporation may * * * purchase property, and afterwards sell it to the corporation at an

advance, provided it was not his duty, when he made the purchase, to purchase on behalf of the company. So an agent of a corporation may purchase claims against the company at a discount, and enforce them in full, if he was not under obligation to make the purchase on behalf of the corporation,"—and he cites the following authorities in support thereof: *Parker v. Nickerson*, 137 Mass. 488, 497; *Bradly v. Williams*, 3 Hughes, 26; *Inglehart v. Thousand Islands Hotel Co.*, 32 Hun, 377. These authorities sustain the text of the author, and we think they fairly state the law.

This case does not come within the rule governing principals and agents, where the agent is under obligation to purchase for the principal, or to pay the debts or claims against his principal, or where the agent uses the funds of his principal in making the purchase or the payment; but it comes within the rule above stated by Mr. Morawetz. As above stated, and under the facts of this case, Chenault was under no obligation to the railroad company to purchase or to pay the said promissory notes, and he did not use the company's funds in purchasing the same, and in all probability he could not have done so; for, under the testimony and the findings of the trial court, he probably and presumably, at the time, did not have any of the company's funds, but the company, in fact, owed him.

The judgment of the court below will be affirmed.

(All the justices concurring.)

(71 Cal. 491)

LANG v. SUPERIOR COURT.¹ (No. 11,367.)

(*Supreme Court of California. December 11, 1886.*)

APPEAL—FROM JUSTICE'S COURT—DEMURRER—REHEARING.

A demurrer to a complaint having been sustained in the superior court upon appeal from a justice's court, and a motion for a new trial made and denied, it is not competent for the court to afterwards set aside the ruling upon demurrer, and make another order in the case upon a rehearing or otherwise.

In bank. Writ of review.

F. J. Castlehun, for petitioner. *Carl T. Graef*, for respondent.

MORRISON, C. J. The following statement of facts in this case is admitted to be true and correct: On January 9, 1882, Holcomb *et al.* brought an action in the justice's court of the city and county of San Francisco against George Lang, the petitioner herein. He demurred to the complaint, and the demurrer was sustained. The plaintiff declined to amend, and judgment final was entered on the demurrer, whereupon an appeal was prosecuted by the plaintiffs in said action to the superior court, and on the eighth day of May, 1882, said superior court (Judge ALLEN, presiding) sustained the demurrer, without leave to amend. On September 29, 1884, plaintiffs in that action gave notice of a motion for a new trial, and on October 8, 1884, filed a proposed statement. On November 7, 1884, said motion was, on due notice given, stricken off the calendar. This was equivalent to a denial of the motion. *Voll v. Hollis*, 60 Cal. 569. On November 14, 1884, plaintiffs gave notice of a motion for a rehearing of the issue presented by the demurrer of defendant to the complaint of plaintiffs interposed in the justice's court in said action, and of the issue or question of law upon which plaintiffs rested the appeal in said action. On December 12, 1884, the motion was granted by Judge FINN, the successor of Judge ALLEN, whose term had expired. On March 26, 1885, the same judge made an order overruling the demurrer, and on April 1, 1885, the court made two additional orders in the case, reversing the judgment of the lower court, and also an order remanding the cause to the lower court for a new trial. An application is now made to this court for a writ of review on the facts hereinabove set forth.

In the first place, the demurrer to the complaint was sustained by the su-

¹Modified. See *post*, 413.

terior court (Judge ALLEN, presiding) on the eighth day of May, 1882, and it "therefore became the duty of the clerk to enter the appropriate judgment in the records of the court." *Gallardo v. Reed*, 49 Cal. 346; *Barron v. Deleval*, 58 Cal. 95. This would have ended the case, but it appears that subsequently, on the eighth day of October, 1884, a proposed statement on motion for a new trial was filed in the case, which statement was afterwards, on due notice, stricken from the calendar. The next step in the case was taken on November 14, 1884, when notice was given of a motion for a rehearing of the demurrer to the complaint "upon which rested an appeal in the action," which rehearing was granted by Judge FINN, superior judge, who had succeeded Judge ALLEN. This was on December 12, 1884, more than two years after the demurrer was sustained, and the case stricken from the calendar, on motion for a new trial.

We are not familiar with the practice of rehearsings in the superior court; and what right or power the superior court had, on the twelfth of December, 1884, to order a rehearing in the case, we are at a loss to conceive. The demurrer and the motion for a new trial had been disposed of, and then, on what is called a "rehearing," the case was again brought before the court, and a new order made. This is a new practice with which we are not familiar, and we know of no statute authorizing it. When a motion for a new trial is made and passed upon,—either granted or denied,—it is not competent for the court afterwards to set its ruling aside, and make another order in the case. *People v. Center*, 61 Cal. 194; *Coombs v. Hibberd*, 43 Cal. 453. The subsequent orders in the case were equally unauthorized by law.

It follows from what has been said that the order of the court below, made December 12, 1884, granting the so-called "rehearing," and the subsequent orders in the case, must be set aside and annulled; and it is so ordered.

We concur: MCKEE, J.; THORNTON, J.; SHARPSTEIN, J.

(14 Or. 171)

In re Estate of HARVEY, etc., and another, Claimant, etc., v. CARDWELL, Adm'r, etc.

(*Supreme Court of Oregon. November 15, 1886.*)

1. WILL—CONSTRUCTION—RESIDUE TO WIFE FOR LIFE—MONEY—GIFT OF INCOME.

A bequest to a testator's wife for and during her natural life, so long as she remains single, subject to all lawful debts, taxes, and adjustments thereon, of the absolute use and control of all the rest and residue of testator's property, real and personal, whatsoever and wheresoever, for her comfort and support, and for the support and education, in her discretion, of their children during minority, to be divided equally between them, or the survivors of them, upon the decease of such wife, gives the wife the "use," and not the consumption, of the money or principal of notes comprising part of testator's estate, and allows her to use only the interest arising from such notes or other investments.

2. SAME—RIGHTS OF LIFE-TENANT—RESIDUE—INTEREST.

A residuary legatee, to whom is given the use or income of the residue for life, is entitled to such residue from the time of the settlement of the executor's final account, and is not thereafter chargeable with interest upon any part thereof, including her own notes held by the executor.

Petition for allowance of legatee's claim, based on a provision of the will of Daniel Harvey, the father of the claimant, and husband of Eloisa Harvey, deceased, which is set out in the opinion. The entire claim in this action is confined to the personal property, and is for one-third of the residue of such of testator's estate as was personal property. This personal property consisted largely of money loaned out at interest. The testator died prior to December 11, 1868, on which day his will was probated, and executors appointed. The estate was under administration from this date to 1878, after which there were no transactions in it but a litigation with the executor on his

accounts, and on the fourth November, 1880, the residue was judicially ascertained by the court. During this time the court granted the widow a monthly allowance. In 1873 the executor turned over to her one sum of \$5,100, proceeds of the sale of stock, for which he took her note, drawing interest at 12 per cent., and also the sum of \$974.40 for which she gave a like note. Judgment for petitioner. Administrator appeals.

Ellis G. Hughes, for Cardwell, Adm'r. *Jos. Simon*, for Leahy, Claimant, etc.

LORD, C. J. Daniel Harvey, father of the claimant, and husband of Eloisa Harvey, deceased, by a clause in his will provided: "I give, devise, and bequeath unto my said beloved wife, for and during her natural life, so long as she remains single, the same also to be accepted and received by her in lieu of dower subject to payment of all lawful debts, taxes, and adjustments thereon, the absolute use and control of all the rest and residue of my property, real, personal, and mixed, whatsoever and wheresoever, for her comfort and support, and for the support and education, in her discretion, of our beloved children, Daniel Harvey, Mary Angeline Harvey, and James William McLaughlin Harvey, during their minority, and to be divided equally between them, or the survivors of them, upon the decease of my beloved wife."

The respondent's claim is for one-third of the residue of her father's estate, and against her mother's estate. The administrator makes no question but that the respondent is entitled to one-third of the residue of the father's estate which, as such, came into the hands of her mother, and which was remaining in her hands at the time of her death. The inquiry is, what is meant by the "residue," under the will, and to what extent was she entitled to expend it for her own comfort and support, and the support and education of her children? It is the "use and control" of the "rest and residue" of such property which the wife of the testator was authorized to take for the purpose indicated. What, then, is the "residue" which she is authorized to use and control? As applied to the estates of decedents, "residue" means all that property which remains after paying charges and debts, and satisfying the devises and legacies. Blackstone defines it to be the surplus of the testator's estate remaining after all the debts and particular legacies have been discharged. 2 Bl. Comm. 514. "The term 'residue,'" said CARPENTER, J., in *Phelps v. Robinson*, 40 Conn. 264, "as uses in wills, ordinarily means that portion of an estate which is left after the payment of the charges, debts, and particular bequests." *Graves v. Howard*, 3 Jones, Eq. 302. It is the proper ascertainment of these, their payment and discharge, which creates the residue, and makes it tangible as such, to be held or received by the party authorized to take it, to be enjoyed, used, or applied according to the requirements of the will; and, under our practice, what such residue is, and in what it consists, is ordinarily ascertained and determined when the final account is presented and judicially acted upon by the court.

This, then, is the point of time, to be ascertained from the record, when the residue becomes an entity, and when Eloisa Harvey became entitled to the use and control of the residue of the property of whatever character. As a consequence, the note which she had personally given to the executor of the estate ceased to be chargeable with interest at this time. It was the same as the note of any third person turned over to her as a part of such residue, the interest upon which thereafter she would have been entitled to use for the benefit of herself and children, in accordance with the objects of the bill. In connection with all the facts, and the whole will, we are satisfied it was the "use," and not the consumption of the money or principal, of the notes which was intended. The interest from notes or other investments, like the rents arising from farm or other buildings, she was allowed to use for the purposes indicated. Nor do we understand there is much serious controversy

as to this point, the contention being mainly directed as to the time when the residue of the property, and in which this note was included, became hers to use and control. This, as appears by the record, was the fourth of November, 1880, when the residue was judicially ascertained, and Mrs. Harvey's right to it, as such, determined. No interest, therefore, of any of the notes, or the sum paid by the executor, should be allowed against her after this date.

(36 Kan. 48)

STATE v. SHENKLE.

(*Supreme Court of Kansas. December 9, 1886.*)

1. CRIMINAL LAW—APPEAL—RECORD.

In a criminal prosecution upon an indictment, it is claimed that the trial court erred in permitting a witness to testify whose name was not indorsed on the indictment; but it is not shown what the witness' testimony was, or that any objection was made to his testimony, or for whom he testified, if he did testify, and, from anything appearing in the record of the case, he may have testified on behalf of the defendant. *Held*, that no error is shown.

2. INTOXICATING LIQUORS, SALE OF—INDICTMENT—INSTRUCTIONS—APPEAL.

In such a prosecution, where the defendant was charged with selling intoxicating liquor in violation of law, and the court instructed the jury, among other things, that if they found that "the defendant sold, bartered, or gave any beer" to a certain person, without having a permit therefor, they should find the defendant guilty, but it is not shown what the evidence in the case was, nor was any objection made or exception taken to the instruction, and in the supreme court it is claimed that the trial court erred in using the word "gave," *held*, that no material error is shown.

3. SAME.

Where, in such prosecution, the instructions of the trial court to the jury seem to be sufficient, and no further or additional instructions were asked for, *held*, that the trial court did not err in failing to give further or additional instructions.

4. CRIMINAL LAW—PRINCIPAL—WHO IS.

And in such prosecution, where an instruction given by the court to the jury was that "any one who counsels, aids, or abets in the commission of any offense may be charged, tried, and convicted in the same manner as if he were the principal," *held*, that such instruction is not erroneous.

(*Syllabus by the Court.*)

Appeal from district court, Osage county.

R. C. Heizer and S. B. Bradford, Atty. Gen., for the State. Ellis Lewis and Waters & Chase, for appellant.

VALENTINE, J. This was a criminal prosecution upon an indictment, wherein the defendant, William Shenkle, was charged in three counts with selling intoxicating liquor in violation of law, and in keeping and maintaining a nuisance. He was convicted under the first and second counts for selling intoxicating liquors, but was not convicted under the third count for keeping and maintaining a nuisance; and he was sentenced to pay a fine of \$100, and to be imprisoned in the county jail for the period of 30 days, and from this sentence he now appeals to this court.

1. It appears from an inspection of the indictment that the name of no witness by the name of Franklin was indorsed on the indictment, and yet the court in its instructions stated that the state had elected to rely upon an alleged sale of beer delivered by the witness Franklin to the witness Albert Hoover; and the defendant now claims that error was committed by the court below in permitting the witness Franklin to testify. There is nothing further in the record that tends to show that any person by the name of Franklin testified on the trial, or what his testimony was, or that any objection was made to his testimony, or for whom he testified, if he did testify; and, from anything appearing in the record, he may have testified on behalf of the defendant. Such a record certainly does not affirmatively show error, and error is never presumed.

2. The court instructed the jury, among other things, that if they found that "the defendant sold, bartered, or gave any beer to the said Albert Hoover, delivered to him by the witness Franklin, without having a permit to sell intoxicating liquors as required by law, you [they] must find the defendant guilty," etc. The objection to this instruction is that it directs the jury to find the defendant guilty if he merely "gave any beer" to Hoover. Now, what the evidence in the case was is not shown, nor was any objection made or exception taken to this instruction. In all probability no material error was committed by the giving of this instruction. Certainly no material error is shown, and therefore the judgment of the court below will not be reversed because of this instruction.

3. The instructions of the court to the jury seem to be sufficient. Besides, the court was not asked to give any further or additional instructions, and therefore it did not err in failing to do so.

4. The court below instructed the jury, among other things, as follows: "Any one who counsels, aids, or abets in the commission of any offense may be charged, tried, and convicted in the same manner as if he were the principal." The defendant took no exception to this instruction at the time it was given, but he now complains that it is erroneous. We, however, think it correctly states the law. The statute provides as follows:

"Sec. 115. Any person who counsels, aids, or abets in the commission of any offense may be charged, tried, and convicted in the same manner as if he were a principal." Comp. Laws 1879, c. 82, § 115.

See, also, *State v. Cassady*, 12 Kan. 550; *State v. Brown*, 21 Kan. 50; *State v. Mosley*, 31 Kan. 355; S. C. 2 Pac. Rep. 782.

No material error having been shown in this case, the judgment of the court below will be affirmed.

(All the justices concurring.)

(36 Kan. 76)

STATE ex rel. CURTIS, Co. Atty., etc., v. CITY OF TOPEKA.

(Supreme Court of Kansas. November 15, 1886.)

1. CONSTITUTIONAL LAW—KEEPING AND LICENSING OF DOGS—STATUTE AND ORDINANCE.

Statutes and ordinances may be passed regulating, restricting, or even prohibiting the running at large of dogs in cities; and this, although dogs are unquestionably property. The owners, keepers, or harborers of dogs in cities may be required to register the same, and to pay a registration fee therefor, although this fee may in one sense be a tax, though not a tax within the meaning of section 1, art. 11, of the state constitution. Dogs in cities may be classified, and the owners, keepers, or harborers thereof may be required to register all the dogs of one class, and not the dogs of another class, and to pay a greater registration fee for the registration of the dogs of one class than for the registration of the dogs of another class; and such owners, keepers, or harborers of dogs may also be required to put collars around the necks of their dogs; and any dog found running at large in a city in violation of the statutes or ordinances may be summarily destroyed. All this is constitutional and valid, and is "due process of law," and by the same no one is denied "the equal protection of the laws."

2. SAME—INVOLUNTARY SERVITUDE—ROAD WORK.

Statutes and ordinances requiring two days' work on the streets of cities from each male person between 21 and 45 years of age, or three dollars in lieu thereof, are not unconstitutional or void, although the two days' work imposed may, in one sense, be "involuntary servitude," imposed upon persons not convicted of crime, and although such work or money may also be assessments or taxes, though not assessments or taxes within the meaning of section 1, art. 11, of the state constitution, and although the provisions of such statutes and ordinances can be enforced only by proceedings before the police judge without a jury, and although no appeal can be taken from the decision of the police judge to a court with a jury, except by entering into a recognition, with security, conditioned, among other things, for the payment of any fine and costs which may be adjudged against the appellant; nor are such statutes or ordinances void because they provide for tak-

ing private property for public use without compensation; nor because they place an embargo upon the right to vote; nor because the work or the payment of the money is imposed upon only a class of persons, and not upon all persons.

3. SAME—TRIAL BY JURY—CITY ORDINANCE.

Section 10 of the bill of rights of the state constitution, which provides, among other things, that "in all prosecutions the accused shall be allowed * * * to have * * * a speedy public trial, by an impartial jury," applies only to criminal prosecutions for violations of the laws of the state, and does not apply to prosecutions for violations of ordinary city ordinances, which have relation only to the local affairs of the city.

(*Syllabus by the Court.*)

Original proceedings in *quo warranto*.

This is an action in the nature of *quo warranto*, brought in this court in the name of the state of Kansas, to oust the city of Topeka from the exercise of certain powers. The provisions of the constitutions of the United States, and of the state of Kansas, and of the statutes and city ordinances, applicable to the case, read as follows:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Const. U. S. art. 13, § 1.

"Section 1. * * * Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Const. U. S. art. 14, § 1.

"Sec. 5. The right of trial by jury shall be inviolate." Const. Kan. Bill of Rights, § 5.

"Sec. 6. There shall be no slavery in this state, and no involuntary servitude, except for the punishment of crime, whereof the party shall have been duly convicted." Const. Kan. Bill of Rights, § 6.

"Sec. 10. In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face; and to have compulsory process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. No person shall be a witness against himself, or be twice put in jeopardy for the same offense." Const. Kan. Bill of Rights, § 10.

"Section 1. Every * * * male person, of twenty-one years and upwards, * * * shall be deemed a qualified elector." Const. Kan. art. 5, § 1.

"Section 1. The legislature shall provide for a uniform and equal rate of assessment and taxation. * * *" Const. Kan. art. 11, § 1.

"Sec. 11. The mayor and council * * * shall have power * * *. *Twenty-fifth.* To prevent or regulate the running at large of cattle, hogs, horses, mules, asses, fowls, sheep, goats, dogs, and all other animals, and to cause such as may be running at large to be impounded and sold; to discharge the costs and penalties provided for the violation of such regulations, and the expense of impounding and keeping the same, and of such sale; and to regulate and provide for the taxing of owners and harborers of dogs; and to destroy dogs found running at large contrary to any ordinance regulating the same. * * * *Thirty-fourth.* Each city shall constitute a separate road-district, and the mayor and council are authorized and empowered to compel each male resident of said city, between the ages of twenty-one and forty-five years, to perform two days' labor, of ten hours each, on the streets, alleys, or avenues of said city, or, in lieu thereof, pay to the street commissioner the sum of three dollars. The city clerk shall make out and certify to the street commissioner and city treasurer, on or before the first day of April of each year, duplicate lists of persons registered by him as vot-

ers, between the ages of twenty-one and forty-five years, and the street commissioner shall collect the sum of three dollars from each person so certified by the clerk, or compel such person to perform personally two days' labor on the streets, alleys, or avenues of said city. The street commissioner shall, every forty-eight hours, turn over to the city treasurer all moneys collected by him during said time, together with a list of the persons from whom said money was collected; and shall, once each week, make out and deliver to the city treasurer a list of all persons who have performed their two days' labor on the streets. The city treasurer shall place the money collected by the street commissioner in the general improvement fund. All work or labor done under the provisions of this section shall be under the superintendence of the street commissioner. Each city shall have power to pass all ordinances, and to enforce the same by fine, imprisonment, or both, necessary to carry out fully the provisions of this section." Laws Kan. 1883, c. 34, § 1, subds. 25, 34.

"Sec. 51. The police judge shall have exclusive original jurisdiction to hear and determine all cases for offenses against the ordinances of the city." Laws Kan. 1885, c. 98, § 1.

"Sec. 60. In all cases before the police judge, an appeal may be taken by the defendant to the district court in and for the county in which said city is situated; but no appeal shall be allowed unless such defendant shall, within ten days after such conviction, enter into recognizance, with sufficient security, to be approved by the judge, conditioned for his appearance at the district court of the county, at the next term thereof, to answer the complaint against him, and for the payment of the fine, and costs of appeal, if it should be determined against the appellant." Laws Kan. 1885, c. 98, § 5.

"Sec. 65. In all cases not herein specially provided for, the process and proceedings shall be governed by the laws regulating proceedings in justices' courts in criminal cases, except that no jury shall be allowed before police judge." Laws Kan. 1885, c. 98, § 7.

An ordinance of the city of Topeka (No. 568) reads as follows:

"Section 1. No person shall keep a dog in the city of Topeka after such dog has reached the age of six weeks, unless the said person shall comply with the following regulations: "The owner, keeper, or harborer of any dog shall cause his or her name, with the name and description of the dog, to be registered with the city clerk of said city in a book to be kept by him for that purpose, and shall pay each year to said city clerk, before any dog is registered, a registration fee of two dollars for each male dog, and five dollars for each female dog; and shall keep upon the neck of each dog so registered a suitable metallic or leather collar, with a metallic check qr tag, (to be furnished by said city,) and the number and year of registry to be distinctly marked thereon. The city clerk shall keep a suitable book for the registry of dogs, and, upon the payment to him of the fee aforesaid, he shall register the dogs upon which such fee is paid. Any person owning, keeping, or harboring any dog in the city of Topeka in violation of the provisions of this section shall, upon conviction thereof in the police court of said city, be subject to a fine of not less than four dollars, nor more than one hundred dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment.

"Sec. 2. That all registrations of dogs in the city of Topeka, as provided in section one of this ordinance, shall expire on the last day of April in each and every year after the registration of any such dog.

"Sec. 3. It shall be unlawful for any person to permit his or her dog to run at large in any public place in the city of Topeka at any time, without providing such dog with a registered collar, as provided by section one of this ordinance.

"Sec. 4. The marshal shall employ a suitable person or persons, whose duty it shall be to capture all dogs found running at large in any public place in

said city, not having a registered collar in compliance with section one of this ordinance, and place them in a pound, to be provided for that purpose; and if the owner does not appear in forty-eight (48) hours after such impounding, and claim and register such dog or dogs, then such persons so employed shall kill the same; the amount to be paid the dog-killers for their services to be fixed by the city council, and the number so killed by him to be reported weekly by the city clerk: provided, that the provisions of this section shall not apply to dogs not owned or harbored in this city, unless they be found at large without any owner or master. It shall be the duty of the city clerk to report and pay over to the city treasurer, once in each week, all moneys collected by him for the registration fee, he taking the treasurer's receipt therefor."

Sections 1, 2, and 3 of an ordinance of the city of Topeka, No. 426, reads as follows:

"Section 1. Every male resident of the city of Topeka between the ages of twenty-one and forty-five years is hereby required to perform two days' labor, of ten hours each, on the streets, alleys, or avenues of said city, or, in lieu thereof, to pay to the street commissioner the sum of one dollar and fifty cents per day; and no such person shall be allowed to furnish a substitute to do the work hereby required to be done by him: provided, that any person working one day with his team, under the direction of the street commissioner, shall be credited in full for two days' work.

"Sec. 2. The street commissioner shall give notice to all persons required by this ordinance to perform work or pay money, as aforesaid, of the time and place he will attend and direct the work to be performed, and he shall direct what implement such persons shall bring with which to perform such work; and whenever it shall happen, in consequence of sickness, absence from home, or other sufficient cause, that any person so notified shall not be able to perform such work at the time he is so notified, said street commissioner is hereby authorized, upon application being made to him by such person, to permit such person to perform such work at any time prior to the first day of October next ensuing.

"Sec. 3. Any person who, having been notified, shall refuse to do the two days' work, or pay the sum of one dollar and fifty cents per day, as provided by this ordinance, or who shall appear at the proper time and place in accordance with the notice of the street commissioner, and shall neglect or refuse to do a reasonable day's work, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in the police court of said city, be fined in a sum not less than five nor more than ten dollars for each offense."

Charles Curtis, Co. Atty., and G. C. Clemens, for plaintiff. J. H. Moss, for defendant.

VALENTINE, J. This is an action brought originally in this court in the name of the state of Kansas, to oust the city of Topeka from the alleged exercise of various powers. Before submitting the case to the court the parties entered into the following stipulation: "It is hereby agreed that all questions submitted by the petition in this case may be dismissed without prejudice, except the first and second allegations of said petition; being the alleged illegal exercise of power in requiring dogs to be registered, and to destroy dogs found running at large in said city, and the collection of a road or poll-tax from certain of the citizens of said city."

The petition, to the extent stipulated, was dismissed in accordance with the agreement of the parties. The defendant answered, denying that it has exercised any powers not conferred upon it by law, and setting forth its ordinances with respect to dogs and to road or poll-taxes; and the case was submitted to the court upon the petition and the answer.

The plaintiff's first claim is that the statutes and the ordinances regulating

the running at large of dogs are unconstitutional and void; and its counsel founds this claim principally upon the proposition that dogs are property, and its counsel cites many authorities to sustain this proposition; but the proposition has seldom, if ever, been questioned, and, so far as this case is concerned, it will be admitted. But it does not follow that because dogs are property that no statute or ordinance can be passed regulating, restricting, or prohibiting the running at large of dogs, or for their destruction in case they are permitted to run at large in violation of law. Bulls and stallions are also property, and property of a much higher grade than dogs; and yet their running at large may be regulated or prohibited. Even venomous reptiles, skunks, and hyenas may be made property; and yet when they are made property it does not follow that their running at large in populous cities cannot be regulated or prohibited. The plaintiff also cites many authorities to the effect that horses, hogs, cattle, and other like valuable property cannot be destroyed or confiscated without a judicial investigation and determination, upon proper and legal notice to the owner; but it does not follow from these authorities that the running at large of dogs may not be regulated, restricted, or prohibited, or that dogs may not be killed, if found running at large in violation of law; nor does it follow from these authorities that the killing of dogs found running at large in violation of law is not "due process of law," under both the state and the federal constitutions. As we have already stated, property in dogs is not of that high character that property in many other things is. *City of Independence v. Trouvalle*, 15 Kan. 73; *Woolf v. Chalker*, 31 Conn. 121, 127; *Blair v. Forehand*, 100 Mass. 140; *Ex parte Cooper*, 8 Tex. App. 489; *Leach v. Elwood*, 3 Bradw. 457; 4 Bl. Comm. 236. Mr. Blackstone, in his Commentaries, speaks of property in dogs as a "base property;" and dogs were not the subject of larceny at common law, and they are seldom assessed for taxation, and seldom have a market value.

It is also claimed that the registration fee required to be paid upon the registration of each dog is a tax, and that it is not levied at a "uniform and equal rate," as required by section 1, art. 11, of the constitution. We suppose it will be admitted that said registration fee is a tax; but clearly it is not that kind of tax contemplated in the aforesaid provision of the constitution. It is a tax levied for the purpose of regulation and restriction, and is not a tax levied merely for the purpose of raising revenue, as that provision contemplates. That it is not unconstitutional because it is a tax we think follows from the following decisions: *City of Newton v. Atchison*, 31 Kan. 151, S. C. 1 Pac. Rep. 288, and the numerous cases there cited; *Tulloss v. City of Sedan*, 31 Kan. 165, S. C. 1 Pac. Rep. 285, and cases there cited; *City of Cherokee v. Fox*, 34 Kan. 16; S. C. 7 Pac. Rep. 625; *Ex parte Cooper*, 3 Tex. App. 489; *Mitchell v. Williams*, 27 Ind. 62; *Tenney v. Lenz*, 16 Wis. 566; *Van Horn v. People*, 46 Mich. 183; S. C. 9 N.W. Rep. 246; *Hendrie v. Kalthoff*, 48 Mich. 306; S. C. 12 N. W. Rep. 191; *Com. v. Markham*, 7 Bush, 486; *Mowery v. Salisbury*, 82 N. C. 175; *Holst v. Roe*, 39 Ohio St. 340; *Cole v. Hall*, 103 Ill. 30.

It is also claimed that all dogs are not taxed alike, and therefore that the tax is invalid. The tax is "a registration fee of two dollars for each male dog, and five dollars for each female dog," where the dogs are more than six weeks old, and no fee where the dogs are less than six weeks old. Now, as before stated, this tax is imposed for regulation and restriction, and not merely for revenue, and therefore, under the authorities above cited, we think it is valid.

The plaintiff also claims that the statute and the city ordinance providing for the summary destruction of dogs found running at large in violation of the ordinance are unconstitutional and void; and it cites as authority many cases, only one of which, however, as we think, can fairly be said to sustain its view, and this authority is not entirely parallel with the present case.

This authority is the case of *Mayor of Washington v. Meigs*, 1 MacArthur, 53. On the other hand, we have numerons authorities which assert the opposite doctrine, and fully sustain the validity of the statute and the ordinance put in question in the present case. These authorities are the last nine cases previously cited, and also the following cases: *City of Independence v. Trouvalle*, 15 Kan. 70; *Woolf v. Chalker*, 31 Conn. 121; *Blair v. Forehand*, 100 Mass. 136; *Com. v. Palmer*, 134 Mass. 537; *Haller v. Sheridan*, 27 Ind. 494; *State v. Cornnall*, 27 Ind. 120; *Lowell v. Gathright*, 97 Ind. 313; *Morey v. Brown*, 42 N. H. 373; *Leach v. Elwood*, 3 Bradw. 453. See, also, *Bowers v. Fitzrandolph*, Add. 215; *King v. Kline*, 6 Pa. St. 318; *Marshall v. Blackshire*, 44 Iowa, 475.

Under the almost unbroken current of authority, we think that statutes and ordinances may be passed regulating, restricting, or even prohibiting the running at large of dogs in cities, and this, although dogs are unquestionably property; that the owners, keepers, or harborers of dogs in cities may be required to register the same, and to pay a registration fee therefor, although this fee may, in one sense, be a tax, though not a tax within the meaning of section 1, art. 11, of the state constitution; that dogs in cities may be classified, and the owners, keepers, or harborers thereof may be required to register all the dogs of one class, and not the dogs of another class, and to pay a greater registration fee for the registration of the dogs of one class than for the registration of the dogs of another class, and such owners, keepers, or harborers of dogs may also be required to put collars around the necks of their dogs; and that any dog found running at large in a city, in violation of the statutes or ordinances, may be summarily destroyed; and that all this is constitutional and valid, and is "due process of law;" and that by the same no one is denied "the equal protection of the laws."

The plaintiff also claims that the statutes and ordinances with reference to road or poll-taxes are unconstitutional and void. It is claimed that they are void for various reasons: *First*, because they impose "involuntary servitude" upon persons not convicted of crime; *second*, because they provide for taking private property for public use without compensation; *third*, because they place an embargo upon the right to vote; *fourth*, because their provisions are such that they can be enforced only by a proceeding before the police judge, without a jury, and that no appeal can be taken from the decision of the police judge to a court with a jury, except by entering into a recognizance with security, conditioned, among other things, for the payment of any fine and costs which might be adjudged against the appellant.

Of course, work upon the roads or streets, as provided for by these statutes and ordinances, is "involuntary servitude;" but it is not that kind of involuntary servitude which comes within the interdiction of section 6 of the bill of rights of the Kansas constitution, or section 1, art. 13, of the United States constitution. It is like service or "involuntary servitude" on juries, or in the militia, or in the army, or in removing snow or ice from sidewalks, gutters, etc.; and is not that kind of "involuntary servitude" which is akin to slavery, as the interdicted involuntary servitude mentioned in the state and federal constitutions is. Labor is also property, but it is not taken under these statutes or ordinances without compensation. Good public roads or streets is a sufficient compensation for the labor required to be performed by each individual in keeping them in good order and condition; and this labor, or the money paid in lieu thereof, is imposed and taken as an assessment or a tax, although it is not that kind of assessment or tax mentioned in section 1, art. 11, of the Kansas constitution; and, so far as compensation is concerned, the compensation in this case is just as good as the compensation is in any case where persons are taxed. And although the assessment or tax in this case is levied and imposed only upon a class of persons, to-wit, males between twenty-one and forty-five years of age, still it is valid.

Neither are the provisions of the foregoing statutes an embargo upon the right to vote, nor are they in contravention of those provisions of the constitution with regard to the right of trial by jury. All these questions, and others, were involved in the case of *In re Dassler*, 35 Kan. 678; S. C. 12 Pac. Rep. 130; and upon all these questions the decision of this court in that case was against the claims made by the plaintiff in this case. We shall follow that decision. We shall add a few words, however, with regard to the question of the right of trial by jury. The constitution provides that "the right of trial by jury shall be inviolate." Const. Kan. Bill of Rights, § 5. This means that the right of trial by jury shall be and remain as ample and complete as it was at the time when the constitution was adopted. But at that time parties who were charged with violating city ordinances, or with a failure to work on the streets of cities, were not entitled to a trial by jury. Hence this provision of the constitution has no application to this case.

But it is also claimed under section 10 of the bill of rights of the constitution that "in all prosecutions the accused shall be allowed * * * to have * * * a speedy public trial, by an impartial jury. * * *" Now, this claim is literally true; and yet it can hardly be supposed, and indeed it has never been supposed, that by this provision of the constitution all the summary remedies heretofore given or exercised in unimportant matters, and before inferior courts, tribunals, or magistrates, has been utterly obliterated and destroyed, and in their stead the more tardy, cumbrous, and expensive remedy of trial by jury substituted. It is true that the words "all prosecutions" are used in this section, and yet we can hardly suppose that even the plaintiff will claim that the words "all prosecutions," as above used, mean all kinds of prosecutions,—civil, criminal, and military. Other words are also used in said section which tend to show that all kinds of prosecutions were not intended. For instance, the words "accused," "accusation," "offense," and "defend," are also used, and *only accused defendants* are given the right to "a speedy public trial, by an impartial jury;" and this jury must be a "jury of the county or district in which the offense is alleged to have been committed." Cities, towns, and villages are not mentioned in this section. Now, if prosecutions for violations of city ordinances are to be tried only before a jury, at the election of the defendant, why should they not be tried *only before a jury of the city?* Why should city courts go beyond the city for jurors? And we might further say that, at common law, juries are always composed of 12 men; and such juries have seldom been allowed in courts of special, inferior, or limited jurisdiction,—such as police courts, justices of the peace or probate courts, or in courts of equity, or in reviewing courts. We suppose that the plaintiff will not claim that juries are required in *all* prosecutions, but only in all criminal or *quasi* criminal prosecutions. But will the plaintiff claim that juries are required before examining magistrates or in courts-martial, or in cases of impeachment before the legislature? We suppose not; but the plaintiff will undoubtedly claim that juries are required in all prosecutions before police courts or police magistrates for violations of city ordinances; for such is virtually the claim made in this case. But we do not think that even this claim of the plaintiff is tenable. In our opinion, the words "all prosecutions," as used in section 10 of the bill of rights, were intended to mean only all criminal prosecutions for violations of the laws of the state, and were not intended to mean or to include prosecutions for the violation of ordinary city ordinances which have relation only to the local affairs of the city.

This is the view that almost every court of the United States which has had the subject under consideration has taken concerning similar provisions in the constitutions of their states. It is well settled that one and the same act, committed by a person in a city, may constitute two offenses,—one against the laws of the state, and the other against the ordinances of the city; and

both may be prosecuted against the offender. 1 Dill. Mun. Corp. § 368 *et seq.*, and note, and the numerous cases there cited.

Now, this could not be the case if the language of said section 10 was intended to include prosecutions for violations of city ordinances as well as for violations of the laws of the state; for that same section not only provides that "in all prosecutions the accused shall be allowed * * * to have * * * a speedy public trial, by an impartial jury, * * *" but it also provides that the accused shall not "be twice put in jeopardy for the same offense." Hence, if a prosecution for the violation of a city ordinance is as much a prosecution within the meaning of said section 10 as a prosecution for the violation of a state law, and if both kinds of prosecutions can be had for one and the same act, then the accused would as effectually "be twice put in jeopardy for the same offense" as if both prosecutions were had strictly and exclusively under the laws of the state. As lending support to the proposition that the words "all prosecutions," used in section 10 of the bill of rights, were not intended to include prosecutions for violations of city ordinances, but were intended to include only prosecutions for violations of the laws of the state, we would refer to the following cases: *Byers v. Com.*, 42 Pa. St. 89; *Borough of Dunmore's Appeal*, 52 Pa. St. 374; *Shaffer v. Mumma*, 17 Md. 331; *Williams v. Augusta*, 4 Ga. 509; *Floyd v. Eatonton*, 14 Ga. 354; *State v. Gutierrez*, 15 La. Ann. 190; *Pursell v. Porter*, 20 La. Ann. 325; *McGear v. Woodruff*, 83 N. J. Law, 213; *Howe v. Treasurer*, etc., 87 N. J. Law, 145; *Trigally v. Memphis*, 6 Coldw. 382. See, also, 1 Dill. Mun. Corp. § 408 *et seq.*, and § 432, and notes, and cases there cited. Also, in this connection, see the following cases: *Murphy v. People*, 2 Cow. 815; *Boring v. Williams*, 17 Ala. 510; *Tins v. State*, 26 Ala. 165; *Work v. State*, 2 Ohio St. 297; *Ewing v. Filey*, 43 Pa. St. 384; *Rhines v. Clark*, 51 Pa. St. 96; *Johnson v. Barclay*, 16 N. J. Law, 1; *State v. Conlin*, 27 Vt. 318; *In re Dougherty*, 27 Vt. 325; *Vason v. Augusta*, 38 Ga. 542; *Frost v. Com.*, 9 B. Mon. 362; *State v. McCory*, 2 Blackf. 5; *Duffy v. People*, 6 Hill, 75; *Sill v. Corning*, 15 N. Y. 297; *People v. Daniell*, 50 N. Y. 274; *People v. Fisher*, 20 Barb. 652; *Prescott v. State*, 19 Ohio St. 184.

There are a few cases to be found in the reports which hold that constitutional provisions similar to those contained in section 10 of the bill of rights of the Kansas constitution apply to such offenses against the laws of the state as existed at the time of the adoption of the constitution, and not to subsequently created offenses. Whether these cases are correct expositions of the law or not it is not necessary for us now to determine. But, for the purposes of the case, we shall assume that the provisions of said section 10 apply to all prosecutions for offenses against the laws of the state, without reference to whether such offenses, or similar ones, were in existence at the time of the adoption of the constitution, or were subsequently created; also, for the purposes of this case, we shall assume that if the state should permit cities to pass ordinances attempting to regulate matters not coming within the legitimate scope or purpose of municipal regulation, but coming more properly within the scope and object of state regulation, a person accused of violating such ordinances would have the right to demand a jury trial; for in such a case the prosecutions would, to all intents and purposes, be state prosecutions, and not merely city prosecutions, and the state could not, by indirection, do what it could not do directly. In other words, offenses against the public in general must be prosecuted for the public in general, and with a jury, if the defendant demand it, while offenses against the ordinances of a city, regulating only city affairs, may be prosecuted for the city, and without a jury.

Now this case belongs to the latter class of cases. Streets within a city or other strictly municipal corporation are peculiarly within the management and control of such corporation. They are graded, paved, curbed, guttered, and kept in repair by the corporation, and not by the general public; and if

they are permitted to become unsafe or dangerous, and injury to individuals results thereby, the corporation itself is liable; and this kind of liability is peculiar to municipal corporations. Neither the state, nor any county, township, or road-district, is ever liable for injuries resulting from defective highways. Only municipal corporations proper are subject to such a liability, and therefore such corporations should have the fullest and most ample power for keeping their streets in good order, and in a safe condition; and for this purpose they should have ample power to tax the people residing or holding property within the corporate limits, and to enforce the collection of such taxes, and we think they have such power.

We do not think that the plaintiff is entitled to any relief in this case, and therefore its petition will be denied.

(All the justices concurring.)

(36 Kan. 1)

STATE v. BALDWIN.

(*Supreme Court of Kansas. December 9, 1886.*)

1. CRIMINAL LAW—APPEAL—SWEARING JURY—RECORD.

It is highly important and necessary that the oath should be administered to the jury in a criminal case with due solemnity, in the presence of the prisoner, and before the court, and substantially in the manner prescribed by law; but it is no part of the duty of the clerk to place on the record the formulay of words in which the oath is couched. He has performed his duty in that respect when he enters the fact that the jury was duly sworn, and, when that is done, the presumption will be that the oath was correctly administered.

2. SAME—SWEARING THE JURY—RECORD.

Where the recital in the judgment entry is that the parties appeared, "and issue being joined upon a plea of not guilty, came a jury, [naming them], twelve good and lawful men, having the qualifications of jurors, who, being duly elected, tried, and sworn well and truly to try the issues joined herein," it cannot be regarded as an attempt to set out in full the oath actually administered, but should rather be considered as a statement by the clerk that the jury had been sworn, and acted under oath; and the fact that there was no recital that the jury were required to give a true verdict, according to the law and the evidence, is not a ground for reversal.

3. SAME—IRREGULARITY IN OATH—NECESSITY OF OBJECTING.

Where a party desires to avail himself of irregularity in administering the oath to the jury, the attention of the court should be called to it at the time the oath is taken. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to irregularity in the form of the oath.

4. SAME—BILL OF EXCEPTIONS.

Not only must the objection be made when the irregularity is committed, but the form in which the oath is taken, as well as the objection, should be incorporated in the bill of exceptions, in order that this court may see whether or not it is sufficient.

5. HOMICIDE—EVIDENCE—THEORY OF SUICIDE.

Where there are some circumstances which suggest that a person charged to have been murdered committed suicide, it is competent for the prosecution, for the purpose of repelling the theory of suicide, to show by an ordinary witness, who was intimate with the deceased, and was with her the evening before her death, that she was then in good spirits, and appeared to be happy.

6. EVIDENCE—OPINION—FACTS MADE UP OF COMBINATION OF APPEARANCES.

Facts which are made up of a great variety of circumstances, or combination of appearances, that cannot be fully described, may be shown by the opinion of ordinary witnesses, whose observation is such as to justify it. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons and things. On the same principle, the emotions or feelings of persons—such as grief, joy, despondency, anger, fear, and excitement—may be likewise shown.

7. CRIMINAL LAW—DEMEANOR OF PRISONER.

The demeanor of one charged with crime, at or near the time of its commission, or of his arrest for the same, may always be shown; and the testimony of the officer who subpoenaed and took the defendant before the coroner's jury, that "he was very nervous and showed a great deal of fear," was admissible.

8. SAME—GRIEF.

Whether defendant manifested evidence of grief on account of his sister's death was a proper inquiry of the state. Such inquiry, however, must be confined to a reasonable time after the death, or its discovery; and where the inquiry relating to his conduct covered a period of four months thereafter, it is held to be an unreasonable time, but, under the testimony and circumstances of the case, it was not prejudicial error.

9. EVIDENCE—EXPERTS—WOOD-WORKERS.

A panel had been cut and taken from the outside door of the house where the offense was committed; and when the defendant, who was a carpenter, was arrested, a knife was found on his person. Witnesses who were skilled workers in wood were called, and testified that the panel had been cut out with a knife, and that the blade of defendant's knife exactly fitted the place where the panel had been pierced; that it had been cut from the outside by one skilled in the use of tools, and was evidently taken out by one who understood the construction of a door. *Held*, that the manner in which the cutting was done, and the effect of the tools upon the wood, involves skill and experience to judge of, and are not within common experience, and it was proper that the jury should be aided by the experience of experts.

10. HOMICIDE—EVIDENCE.

A check drawn by the defendant's mother, in favor of the deceased, for a sum of money, of which the defendant had no knowledge, was not admissible in evidence; but as it had no bearing upon the defendant, directly or remotely, it could not affect him injuriously.

11. SAME—THEORY OF SUICIDE.

A letter written by the deceased immediately preceding her death, which showed that she was in a healthful condition of body and mind, and contained nothing prejudicial to the defendant, was admissible in evidence to show the condition of her health and mind, and to repel the theory that she committed suicide.

12. WITNESS—CROSS-EXAMINATION—PREVIOUS STATEMENT.

Where the defendant produced a witness who, with a view of showing the conscious innocence of the defendant, testified what his conduct and appearance was soon after the death of his sister, it was proper to inquire, on cross-examination, if the witness had not stated at the preliminary examination that the conduct of the defendant impressed him at once as being guilty of the murder.

13. SAME—MEMORANDUM—INDEPENDENT RECOLLECTION.

A witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates; but it is only when the memory needs assistance that resort may be had to these aids, and, if the witness has an independent recollection of the facts inquired about, there is no necessity nor propriety in his inspecting any writing or memorandum.

14. SAME—PREVIOUS STATEMENT—FOUNDATION FOR IMPEACHMENT.

Where, with a view of impeaching a witness, he is asked if he did not make a certain statement on a previous examination, and he replies that "it amounts to about the same thing," he thereby practically admits the making of the statement, and his answer is insufficient as a foundation for impeachment.

15. EVIDENCE—SCIENTIFIC Books—EXPERTS.

Medical and scientific books cannot be admitted in evidence to prove the declarations or opinions which they contain; but a witness who is a medical expert is not confined wholly to his personal experience in the treatment of men, but may give his opinions formed, in part, from the reading of books prepared by persons of acknowledged ability; and it is not improper for him to give the source of his opinion, and that all the writers and authorities on the subject, so far as he knew, supported him in that opinion.

16. HOMICIDE—INSTRUCTIONS—POISONING.

The court charged the jury that, to convict the defendant, it must be shown that he purposely took the life of the deceased by administering poison to her. A murder that is committed by means of poison involves and presupposes the element of malice, premeditation, and deliberation, and hence it was needless for the court to state that they were prerequisites to a conviction.

17. SAME—COURT DEFINING WORDS.

The court takes notice of the meaning and force of the ordinary words of our language, and also of technical words, where their meaning is well settled by common usage; and the court may, where it is necessary, define and explain them to the jury. It was therefore not error for the court to instruct the jury as to the or-

dinary meaning and definition of "anæsthetic," "chloroform," and "poison," as given by Webster's Dictionary, and other works of standard authority, where it appears that the definitions were correct in every respect.

18. SAME—REVIEWING THE FACTS.

The court may review and present the facts in a criminal case, provided the jury are informed that they are the exclusive judges of every question of fact; and hence, where the definitions and comments of the court upon words that are technical and peculiar to a science are in keeping with the testimony given regarding such words, there is no error.

19. SAME—CHLOROFORM AS A POISON.

As the legislature has published and declared chloroform to be a virulent poison, by a law which all are presumed to know, it was not error for the court to say to the jury that, "in common parlance, chloroform is classed among the poisons," when he couples with the statement the direction that it was still necessary for the jury to find from the evidence that chloroform is a poison, before the defendant could be convicted.

20. SAME—REQUEST—MOTIVE.

The defendant cannot be heard to complain of an instruction requested by himself; and, with respect to motive, it was not error for the court to instruct that defendant should be judged by the information upon which he acted, rather than upon the accuracy of his information.

21. SAME—NEW TRIAL—FINDING OF LOWER COURT.

The finding of the court upon the question of fact presented in a motion for a new trial, which is made upon oral and conflicting testimony, is as conclusive upon this court as the verdict of a jury founded on like testimony, and which has received the approval of the trial court.

22. SAME—REVERSAL, FOR WHAT.

A judgment of the district court should not be reversed except for prejudicial error.

23. SAME—EVIDENCE REVIEWED.

The evidence in the record examined, and held to be sufficient to sustain a verdict finding the defendant guilty of committing murder by means of poison.

(*Syllabus by the Court.*)

Appeal from district court, Atchison county.

Information for murder. Judgment of conviction. Defendant appeals.

W. D. Gilbert and S. B. Bradford, Atty. Gen., for the State. Everest & Waggener, for appellant.

JOHNSTON, J. William Baldwin was informed against, tried, and convicted of the crime of murdering his sister, Mary Baldwin. The information consisted of two counts, in the first of which it was charged that the defendant, on or about the eighth day of July, 1885, administered to Mary Baldwin an anæsthetic, to-wit, chloroform, which is alleged to be a deadly poison, with the felonious intent to kill and murder her. In the second count the charge is that the death of Mary Baldwin was occasioned by the defendant pressing a pillow on, over, and against her mouth, nose, and face, thereby preventing respiration, and causing death. The jury found him guilty of murder in the first degree, under the first count of the information, and he was thereupon sentenced and adjudged to suffer death. From that sentence and judgment he appeals to this court, and in the elaborate brief filed by his counsel there are 47 assignments of error, many of which were not referred to in the oral argument, and some of which are unimportant. The alleged errors have all been examined, and such of them as are deemed worthy of notice will be considered and disposed of in their order of presentation here.

1. The first assignment is that the jury were not duly sworn. In the journal entry of the proceedings at the opening of the trial it is stated that the parties appeared, and, issue being joined upon a plea of not guilty, a jury came, (naming them,) "twelve good and lawful men, having the qualifications of jurors, who, being duly elected, tried, and sworn well and truly to try the issue joined herein, pending the introduction of testimony, the court adjourned until to-morrow morning," etc. The exact form of the oath to be

taken by the jury is not laid down in the statute, but, with respect to administering the oath, it is provided that "the jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give, according to the law and the evidence." Crim. Code, § 208; Civil Code, § 274.

The contention of the defendant is that the record undertakes to set out the oath actually administered to the jury, and that, as it omitted the essential part of requiring that they should a true verdict give according to the law and the evidence, the judgment should be reversed. It is highly important and necessary that the oath should be administered with due solemnity, in the presence of the prisoner, and before the court, substantially in the manner prescribed by law. It may also be conceded that the record should show that the jury were sworn, and, when the record does purport to set out in full the form of the oath upon which the verdict is based, it must be in substantial compliance with law; otherwise the conviction cannot stand. The assumption by counsel that the oath as actually administered is set out in full in the record, it seems to us, is unwarranted. What is stated in the record is but a recital by the clerk of the fact that the jury were sworn. The swearing was, of course, done orally, in open court; and it is no part of the duty of the clerk to place on the record the exact formulay of words in which the oath was couched. He has performed his duty in that respect when he enters the fact that the jury was duly sworn, and when that is done the presumption will be that the oath was correctly administered. The method of examining the jurors as to their qualifications, or whether the oath was taken by them while standing with uplifted hands, according to the universal practice in the state, or otherwise, is not stated. In making mention of the impaneling and swearing of the jury, there is no description of the parties between whom the jury are to decide, nor, indeed, is there any of the formal parts of an oath stated. The statement made is only a recital of a past occurrence; and it is manifest that there was no intention or attempt of the clerk to give a detailed account of the manner of impaneling the jury, or to set out the oath *in hac verba*. It may be observed that in the form of the verdict returned, and which was prepared and presented to the jury by the trial judge, it was stated that the jury were duly impaneled and sworn. Counsel for defendant have called our attention to the case of *Johnson v. State*, 47 Ala. 62, where the record entry of the swearing of the jury is substantially what it is in the present case. The court there treated the recital as stating the form and substance of the oath administered, and held that the omission of the injunction to render a true verdict, according to the law and the testimony, was fatal. The question was before the same court in a later case, and the ruling in *Johnson v. State, supra*, which had been followed in some other cases, was expressly overruled. *Mitchell v. State*, 58 Ala. 417. In the latter case the court held that recitals in the record relative to the swearing of the jury, like the one found in the record before us, are not to be regarded as an attempt to set out the oath actually administered, but should rather be considered as a statement of the fact that the jury had been sworn, and acted under oath. This view seems to us to be reasonable and right, and it is one which has been generally adopted. *Boose v. State*, 10 Ohio St. 575; *Dyson v. State*, 26 Miss. 362; *Bartlett v. State*, 28 Ohio St. 669; *Atkins v. State*, 60 Ala. 45; *Thomp. & M. Juries*, § 299, and note.

A still more conclusive answer on this point is that no objection was made to the form of the oath when it was administered, or at any other time prior to its presentation in this court. If there was any irregularity in this respect, it should, and probably would, have been objected to at the time it occurred. It is quite unlikely that there was any departure from the form of the oath so well understood, and which is in universal use in all of the courts of the state; but, if the form of the oath was defective, the attention of

the court should have been called to it at the time the oath was taken, so that it might have been corrected. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to an irregularity in the form of the oath. Not only must the objection be made when the irregularity is committed, but the form in which the oath was taken, as well as the objection, should be incorporated into the bill of exceptions, in order that this court may see whether or not it is sufficient, and this was not done.

2. The assignments of error from the third to the twentieth, inclusive, are based on the ruling of the court in the admission of testimony. The first six of these objections relate to the testimony of Albert H. Lewis. This witness was an intimate acquaintance of the Baldwin family, which consisted of the deceased, the appellant, and their mother, M. A. Baldwin. J. W. Baldwin, the father of Mary and William Baldwin, died in November, 1884, leaving an estate of considerable value, and the widow, M. A. Baldwin, was appointed administratrix of the estate. Lewis was a frequent visitor at the Baldwin homestead, was engaged to be married to Mary, and he was the confidential adviser of her mother in the management of the estate, and assisted in investing the money of the estate. In the course of the trial, Lewis was asked to state whether he had been frequently called on by Mrs. Baldwin, after the death of her husband, to counsel about the estate, and also whether the appellant was ever called on at these times to counsel with them. These questions, although not very material, were competent for the purpose of eliciting the relations existing among the members of the Baldwin family. The objection especially urged against the admission of the testimony is that the defendant had no knowledge that his mother counseled with Lewis about the estate, and that no such consultation was had with Lewis in the presence of the defendant. This claim is not borne out by the evidence in the record. In the answer to the question objected to it is stated that, in one instance, the defendant was called in to confer with Lewis and his mother in regard to the investment of funds belonging to the estate. On another occasion the appellant accompanied Lewis to inspect security that was offered upon a loan negotiated by Lewis for the estate, and, indeed, the conduct of the appellant in frequently applying for money from his mother, through Lewis, leaves no doubt about the question. The further evidence relating to Lewis transacting business at the banks for Mrs. Baldwin, in reference to deposits, as well as that showing that money was drawn from the banks upon checks signed by Mary and her mother, is unobjectionable, and cannot in any way be considered prejudicial to the defendant.

3. About two weeks prior to Mary's death, her mother, who was in ill health, went to an infirmary in Iowa for medical treatment, where she remained until notice was received of her daughter's death. The only occupants of the house during her absence were Mary and a male lodger. Occasionally some of her lady friends would stay over night with her, but on the night of her death she was alone. The evening prior to her death she spent in the company of Lewis, who remained with her until about 10 o'clock. On the next evening her dead body was discovered in her bed-room. She was found lying in bed, robed in a night-dress, with a pillow lying upon her face, and a small chloroform bottle was found near by her in the bed, upon which there was a poison label. With the evident purpose of repelling the theory of suicide, Lewis was asked by the state whether, on the evening prior to Mary's death, there was anything in her appearance that made him believe she was in grief or was dissatisfied. He stated that there was not, but that she was in good spirits, and, when he left her, she seemed to be happy. It is claimed that this testimony was incompetent, because it was but an opinion formed from her appearance. It is a well-known general rule that witnesses are not to give their individual opinions, but are to state the facts, from

which the jury are to form their opinions. There are, however, exceptions to this rule, which are as well defined as the rule itself. Whenever the question at issue is outside of the knowledge and experience of ordinary jurors, or where it so far partakes of the nature of science or trade as to require special and peculiar knowledge or skill in order to arrive at a correct conclusion, the opinions of experts are admissible. There is another equally well-recognized exception, founded in necessity, under which the opinions of ordinary witnesses are received. Facts which are made up of a great variety of circumstances, and a combination of appearances which, from the infirmity of language, cannot be properly described, may be shown by witnesses who observed them; and, where their observation is such as to justify it, they may state the conclusions of their own minds. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value, and such as relate to the condition or appearance of persons and things. *City of Parsons v. Lindsay*, 26 Kan. 426; *State v. Folwell*, 14 Kan. 105. On the same principle, the emotions or feelings of persons—such as grief, joy, hope, despondency, anger, fear, and excitement—may be likewise shown, and hence the testimony objected to was properly admitted. *Lawson, Exp. Ev. rule 64; 2 Best, Ev. § 517.*

Lewis was intimately acquainted with the deceased. He had visited her almost daily for many months, and was with her a few hours before her death. The relation in which he stood to her, and his opportunity to observe her, certainly enabled him to read her conduct, gesture, tone, and expression of eye and face, and to form an intelligent opinion with respect to whether she was depressed or in grief. By her appearance he could determine her condition of mind with almost unerring accuracy; and yet how futile it would have been for him to have attempted to portray to the jury the facial expression, the looks of the eye, or the inflexion of the voice which led him to believe that she was in a happy frame of mind. This species of evidence is admitted because it is the best which, in the nature of things, can be obtained, the value of which depends, of course, upon the capability of the witnesses, and the means that they had of forming an opinion, which may be ascertained and thoroughly tested upon cross-examination.

What has been said here disposes of the objection urged against the testimony of Frank Price, the city marshal, who was present at the Baldwin residence on the evening that Mary's death was discovered, and who attended upon the coroner's jury that was impaneled to inquire into the cause of her death. He stated, in response to inquiries made by the state, that the defendant "was very nervous, and showed a great deal of fear," when he was subpoenaed and taken as a witness before the coroner's jury. The conduct of one charged with crime about the time of its commission, or at the time of his arrest, may always be shown; and, under the rule which we have been considering, the opinion of the witness that the defendant appeared to be in fear at that time was admissible. *Brownell v. People*, 38 Mich. 732.

4. Objection is also made to the testimony of John Donahue, the jailor who had charge of the defendant from the time of his arrest, which was made about 10 days after the crime was discovered. He was asked what was the general demeanor and conduct of the prisoner during the time he had him in charge, as to grief and sorrow, or whether the defendant manifested any evidence of grief or sorrow. He answered that the defendant was unruly and quarrelsome, and that at times he was wrestling, scuffling, and boxing, and at other times was fussing and fighting, and making threats. This inquiry was evidently not made with a view to initiate an inquiry into the general character of the defendant, nor to show that he had committed other offenses, and therefore many of the authorities cited by counsel are inapplicable. The manifest purpose of the testimony was to show that he was apathetic regarding his sister's death, and did not evince that feeling and sensi-

bility to be expected of a brother. As has been said, the conduct and demeanor of the prisoner at the time of his arrest, or soon after the commission of the crime, may go to the jury as evidence of a guilty mind, and, so far as the testimony was confined to a reasonable time after the discovery of the crime and his arrest, it was certainly admissible. *Greenfield v. People*, 85 N. Y. 75. We are inclined to the opinion that the inquiry was too general, and extended over too great a period; as the defendant was in charge of the witness from the time of the arrest to the time of the trial, a period of about four months, and for this reason, as well as that the testimony was somewhat unresponsive and irrelevant, we think the motion to strike it out ought to have been sustained. However, the testimony shows that the defendant did not manifest evidence of grief at the loss of his sister at any time while he was in jail, and was not much affected by her unnatural death; and hence the fact that the inquiry concerning his demeanor covered too much time could not have injured him. And when we consider that the charge against which he was defending, and of which he was convicted, was that of poisoning his sister, the somewhat irrelevant statement of the witness that he was fussing and fighting while confined in jail did not operate, we think, to prejudice him in the minds of the jury.

5. There was no error, we think, in admitting the testimony of James and Warstall. They were carpenters with large experience as pattern-makers and workers in wood. It seems that the parties who discovered the dead body of Mary Baldwin at the same time found that a panel of an outside door of the Baldwin house had been cut and taken out. It appeared that the defendant was a carpenter also, and a knife was found on his person which, with the door and panel, were brought into court. These witnesses stated that the panel, which was one-sixteenth of an inch in thickness, had been cut out with a knife, and could have been cut by the defendant's knife; that the blade of the knife exactly fitted the place where the panel had been pierced; that the cutting was done by a person skilled in the use of tools; and, after explaining the peculiar manner in which the door was constructed, stated that the panel was evidently taken out by one who understood the construction of a door, and also that it was cut from the outside. The evidence offered to sustain the conviction in this case is wholly circumstantial, and the testimony of experts was more than ordinarily important. These men were skilled workers in wood, and their experience enabled them to judge, from the marks and impression left upon the door by the tool used, whether it had been cut with a knife, chisel, or saw; whether it had been cut by a thick or a thin bladed knife; whether it had been cut by one accustomed to the use of tools; and the marks or traces made upon the wood by the knife would indicate to the trained eye whether it had been cut from the outside or the inside. The manner in which the cutting was done, and the effect of the tools upon the wood, involve skill and experience to judge of, and are not within common experience; and it was therefore proper that the jury should be aided by the experience of these experts. *Com. v. Choate*, 105 Mass. 451.

6. A check drawn by Mrs. Baldwin in favor of the deceased was offered in evidence, of which the following is a copy:

"ATCHISON, July 7, 1885.

"The Atchison Savings Bank: Pay to Mary Baldwin, or order, five hundred and fifty dollars, (\$550.)

[Signed]

"MRS. M. A. BALDWIN."

This was admitted for the purpose of showing the dealings among the members of the Baldwin family. The consideration of the check, or the purpose of Mrs. Baldwin in making it, is not disclosed in the testimony. It is not shown that the defendant had any knowledge of its existence prior to the time it was offered in evidence, or was in any way concerned with it. It

was written on the blank check of a bank at Bloomfield, Iowa, where Mrs. Baldwin was staying; was written by her; and these facts, together with the date of the check, show that it could not have even reached Atchison prior to Mary's death. The check was not referred to in the letters of the defendant, or of the deceased, nor was it identified by any of the other testimony; and, as it was not shown to have been in any way connected with the defendant, it was incompetent. But, although erroneously admitted, it had no bearing upon the defendant, directly or remotely, and we fail to see how its admission could have affected him injuriously. It was therefore an unimportant and harmless error; and the legislature has stated that errors and defects that are unimportant, and which do not affect the substantial rights of the appellant in criminal cases, furnish no grounds for a reversal. Crim. Code, § 293.

7. A letter of the deceased to her mother, written just before her death, and post-marked afterwards, clearly showed that she was then in a healthful condition of body and mind. She described the occurrences in the town, and the affairs at home; spoke hopefully of the future; and referred with evident pleasure to the constant attention and devotion of him to whom she was betrothed. The letter indicates cheerfulness and contentment, and contains nothing prejudicial to the defendant. It disclosed her condition of health and mind, which were wholly inconsistent with the theory of suicide, and for this reason and purpose it was admissible. Roscoe, Crim. Ev. 30; 3 Greenl. Ev. § 135, and note. Her letter, written in 1882, long prior to her father's death, was too remote. It was not claimed by the state that other than friendly relations existed between the deceased and the defendant before his father's death, and therefore it was not error to exclude the letter.

8. The objections urged to the question asked the clergyman Mulford, on cross-examination, are not good. After stating in his examination in chief what the conduct and appearance of the defendant was soon after the death of his sister, with a view of showing the conscious innocence of the defendant, it was proper to inquire if the witness had not stated, before the coroner's jury, that the defendant impressed him at once as being guilty of the murder. It was allowable on cross-examination, and, besides, if denied, it afforded a foundation for impeaching the witness. He gave a qualified answer, saying that he would not deny or affirm that he had so stated, but did deny stating that he had a thorough impression of his guilt, and he added that the appearance of the defendant was that of painful surprise that any one should suspect him of the offense. We cannot agree that the ruling was erroneous.

9. Complaint is made of the ruling of the court in sustaining objections to the testimony of R. B. Spitzer. He is a stenographer who was in the employ of the defendant's attorneys at the time of the preliminary examination, and took a stenographic report of the evidence then given. He transcribed the report, and then destroyed his original notes. At the trial he was placed on the stand with his transcript in hand, and, with a view of impeaching the witnesses Price, James, and Warstall, he was requested to refresh his recollection from the transcript, and give the testimony of those witnesses on certain matters, when the objection of the state was sustained. That a witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates, is unquestioned. The writing and memorandum are used, not as evidence, but to aid the memory; as the facts must finally be stated by the witness from personal knowledge and recollection. If the witness has an independent recollection of the facts inquired about, there is no necessity or propriety in inspecting any notes or writing. It is only when the memory needs assistance that resort may be had to these aids. Now, Spitzer had an independent recollection of what was said by James and Warstall, and repeated it before the jury; and therefore there can be no objection to the ruling of the court, so far as it re-

lated to the testimony of those witnesses. So far as it related to the testimony of Price, Spitzer was not asked whether he had an independent recollection of what was said by him, and hence the necessity of resorting to the transcript was not apparent. It appears, however, that there was another sufficient reason for excluding the testimony. It was intended as impeaching evidence, which can only be used where a proper foundation has been laid. Spitzer was asked to refresh his memory, and see if Price did not state, on the preliminary examination, that, when the defendant was told that his sister was dead, "he seemed to be considerably broke up over it." Looking back at the testimony of Price, we observe that the question was: "Did you not say, in answer to a question of Mr. Gilbert, that he seemed to be considerably broke up over it?" The answer of Price was: "I think it amounts to about the same thing." Having admitted the making of the statement, the impeaching question was wholly immaterial, and had no foundation on which to rest.

10. It is contended that the testimony of John M. Crowell was erroneously admitted. The point of objection is that he testified as an expert,—as one skilled and experienced in detecting crime from the appearance of those charged with it. It is true, the prosecution seemed, from the questions, to have attempted to use the witness as an expert, but without success. He stated that for 15 years he had been a post-office inspector, had had considerable to do with criminals; that he saw the defendant at the Baldwin House while his sister was lying dead there, and observed and conversed with him; and the witness was then asked if, in his experience in dealing with criminals, it was his opinion that the defendant had the appearance of being a guilty man. This was very properly excluded by the court; and in another part of the examination, where the witness volunteered the opinion that the defendant looked guilty, the court promptly admonished the jury that the statement was not evidence, and should not be considered by them. It is true that the witness was permitted to state that the defendant did not appear to be grieved. This testimony, as we have already seen, is allowable; and the fact that the witness was an intelligent and observing man, with a knowledge of physiognomy, certainly could not make his testimony that the defendant showed no signs of grief incompetent, or any the less valuable. It seems to us that the judge was careful and alert in guarding the interests of the defendant, in excluding the illegal testimony of this witness, and by allowing him to speak only as an ordinary witness.

11. The only remaining objection to the rulings upon the evidence is to the testimony of Dr. Campbell, who was a practicing physician of more than 12 years' experience. He testified as an expert, and, after showing some of the effects of chloroform upon the human system, was asked: "How is it regarded by medical authority upon that subject, and by medical men who are authority upon that subject?" He answered: "It is regarded by writers on that subject, and by all men who have used it to any great extent, and by all universally, so far as I know, as a very dangerous agent, and an agent, if pushed beyond a certain point, which will produce death,—that is, in danger always of producing death. To be sure, a great many men have used it a great deal, and have had no bad results from it." Although the courts are not uniform in their holdings upon the admissibility in evidence of medical and scientific books, the great weight of authority is that they cannot be admitted to prove the declarations or opinions which they contain. This upon the theory that the authors did not write under oath, and that their grounds of belief and processes of reasoning cannot be tested by cross-examination. But while the books are not admissible, an expert witness is not confined wholly to his personal experience in the treatment of men, but his opinions formed in part from the reading of treatises prepared by persons of acknowledged ability may be given in evidence. So, also, may a witness refresh his recollection by reference to

standard authorities; but the judgment or opinion which he gives must be his own, and not merely that of the author. In an early case it was proposed to show what the received opinion of the medical profession was in a certain matter by introducing medical books. The ruling was that they were not admissible, but that the witness might state what he had found laid down in the books in the course of his reading. The witness, who was Sir Henry Halford, president of a college of physicians, stated that he considered the medicine in question proper, and that it was sanctioned by the books and authorities; and also stated that the writings of certain authors were considered authority by the medical profession. It was then objected that the medical books could not be cited, but the authors themselves should be called. Chief Justice TINDALL responded: "I do not think the books themselves can be read, but I do not see any objection to your asking Sir Henry Halford his judgment, and the ground of it, which may be in some degree founded upon books, as a part of his general knowledge." *Collier v. Simpson*, 5 Car. & P. 73. The present case falls within this authority. Dr. Campbell is shown to be a man of large experience and extended reading in his profession, who had given his own opinion; and it was not improper for him to state that the opinion was formed from the study of books and men, and also that all the writers and authorities on the subject, so far as he knew, supported him in that opinion. *Carter v. State*, 2 Ind. 617; *Lawson, Exp. Ev.* 176; *Rodg. Exp. Test.* 234; *Whart. Crim. Ev.* § 538.

12. The defendant's counsel prepared and requested the giving of a series of instructions, which the court declined to give, and the refusal of these constitutes 16 of the alleged errors, although a few of the instructions requested were incomplete and inaccurate statements of the law. In the main, the requests were correct and applicable; but the court, instead of adopting the phraseology and order of those requested, as seems to be its custom, prepared an elaborate charge, in language of its own choosing. The charge given was clear and symmetrical, and embraced the law of all proper requests made by the defendant, in language, to say the least, equally as apt and accurate as that employed in the instructions requested; and, indeed, it seems to us that the court advised the jury upon and illustrated every element of the law applicable to the case. It would be unprofitable to extend this opinion so far as to point out in detail where each proper request is included in the charge given, as the difference is one of words merely, and those not included are so obviously improper as to require no special notice.

13. We will notice some of the objections urged against the instructions that were given. In the nineteenth instruction the court stated that, "before the defendant can be convicted of murder in the first degree, under the first count of the information, the following facts must be established by the evidence beyond a reasonable doubt: (1) That said Mary Baldwin came to her death by an anesthetic called 'chloroform;' (2) that chloroform is a poison; (3) that said poison was administered to said Mary Baldwin by the defendant in the county of Atchison and state of Kansas; (4) that said poison was administered by the defendant willfully, knowingly, and with the intention of taking the life of said Mary Baldwin, on or about the eighth day of July, 1885; (5) that said Mary Baldwin actually died from the effects of the chloroform so administered to her. If, however, you find that chloroform is poison, and that its administration to the said Mary Baldwin produced *asphyxia* resulting in death, this would be a death from poison, within the meaning of the law. If you find the existence and concurrence of each and all of the five foregoing propositions beyond a reasonable doubt, then it is your duty to find the defendant guilty of murder in the first degree, as charged in the first count of the information herein; but if you have a reasonable doubt of the existence of any one of said five propositions, then it will not be your duty to find the defendant guilty of murder in the first degree under said first count."

To this instruction two objections are made, the first of which is that the elements of malice and premeditation were omitted, and not held to be essential to a conviction. It will be observed that the court told the jury that it must be shown that the defendant purposely took the life of the deceased by administering poison to her. The act described, and, in fact, any murder committed by means of poison, as well as by lying in wait, involves and presupposes the elements of malice, premeditation, and deliberation; and hence it was needless for the court to state that they were prerequisites to a conviction. One of the five general facts stated by the court to be necessary, in order to establish the guilt of the defendant, was that chloroform is poison; and because the court, in stating the third and fourth prerequisites to a conviction, used the words "said poison," it is argued that it assumed it to be a fact that chloroform is a poison; and this is the other objection to the instruction. It may well be doubted whether it would be error to assume the existence of a fact of such universal knowledge as that chloroform is a poison; but, however that may be, it is clear that the instruction will not admit of that interpretation. The jury were told that this fact was essential, and one of the first to be found; and having found chloroform to be a poison, then they were, in effect, told that it must appear that said poison so found was administered by the defendant at the time and place charged, and with the intention of taking the life of his sister. Then, in the concluding sentences of the instruction, the jury were reminded again that this was one of the essential facts to be found, and that the existence and concurrence of each and all of the five propositions must be found by them beyond a reasonable doubt before they could convict.

14. The twentieth instruction is the subject of considerable criticism. Its language is: "It may be necessary to explain to you, to a certain extent, some of the terms used in the information, and others of a kindred nature. An 'anæsthetic' is defined by Webster in his Dictionary as 'that which produces insensibility to pain.' 'Chloroform' is defined by him as 'an oily liquid, of an aromatic ethereal odor, consisting of carbon, hydrogen, and chlorine. It evaporates speedily, and has a specific gravity of 1.5. It is an important anæsthetic agent, and is also used externally, to alleviate pain. It is also a powerful solvent, dissolving easily wax, spermaceti, resins,' etc. '*Aphyxia*' is defined by the same authority as, 'originally a want of pulse, or cessation of the motion of the heart and arteries,' as now used, apparent death or suspended animation, particularly from suffocation or drowning, or the inhalation of irrespirable gases. Recently applied, also, to the collapsed state in cholera, with want of pulse.' 'Poison' is also defined by Webster as 'any substance which, when introduced into the animal organization, is capable of producing morbid, noxious, or deadly effect upon it.' In some of the editions of his work he makes the following comments: 'All medicines possessing sufficient activity to be of much value are always poisonous inordinate or excessive quantities, and everything poisonous is capable of proving medicinal in suitably reduced quantities. There are as many different modes in which poisons operate as there are different and distinct medicinal powers of any material activity.' In the American Cyclopaedia poison is defined as 'any substance which, introduced in small quantities in the animal economy, seriously disturbs or destroys the vital functions. Under this head are obviously included a vast number of bodies belonging to the mineral, vegetable, and animal kingdoms, some solid, others fluid, and others gaseous, and deleterious vapors and miasmata, imperceptible to the senses;' and in the same article the same authority also stated that, 'among the multitude of substances that rank as poisons, are many, some possessing the most active qualities, which are also useful drugs, and which, administered in suitable quantities, are recognized among medicines in universal employment, and of the most beneficial character. The difference between a medicine and a poison is frequently a mere question of dose, and the line which divides them is

sometimes narrow.' As the question is raised by the evidence in this case whether chloroform is a poison or not, the court also deems it proper to state that it is a powerful anæsthetic agent, having been discovered so recently as 1831, and, not having come into use by the medical profession until 1847, there may be some room for a difference of opinion as to its powers, properties, and effects. In common parlance, however, 'chloroform' is classed among the poisons; and, by the pharmacy act passed by the legislature of this state in 1885, it is expressly named as one of the things which it is unlawful for any person to sell, (except to physicians, photographers, or upon prescriptions,) without being labeled as a 'poison.' The lawful and general use of chloroform is for the purpose of producing insensibility to pain during surgical operations, and other painful processes; and in such cases it is generally administered by physicians and surgeons, and their assistants."

In regard to the foregoing instruction, it is stated that the court, in quoting the definitions given in the books, transgressed the rule which forbids the introduction in evidence of books of authority, or of any citation therefrom. It is the duty of the court to advise the jury what questions are submitted for their consideration, and the rules of law applicable in determining the same; and it may also review the facts of the case, provided the jury are informed that they are the exclusive judges of the facts. Crim. Code, § 236. In charging the law it falls within the province and duty of the court to determine the sufficiency of the indictment or information, and to define and make plain the words used in charging the offense. By section 107 of the Criminal Code it is provided "that the words used in the indictment or information must be construed in their usual acceptation and common language, except words and phrases defined by law, which are to be construed according to their legal meaning." Testimony is necessary where the words have a local meaning different from their ordinary acceptation, or where they have acquired a peculiar meaning in some science, art, or trade. But the court takes notice of the meaning and force of the ordinary words of our language, and also of technical words, where the meaning is well settled by common usage, and may, where it is necessary, define and explain them to the jury. The supreme court of Massachusetts held that "the general rule of law is that the construction of every written instrument is matter of law, and, as a necessary consequence, that courts must, in the first instance, judge of the legal force and effect of the language. The meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of language, are *prima facie* matter of law, to be construed and passed upon by the court." *Brown v. Brown*, 8 Metc. 573. See, also, 1 Greenl. Ev. § 5; Thomp. Char. Jur. § 18; Rog. Exp. Test. § 121; *Rodgers v. Kline*, 56 Miss. 818; *Haley v. State*, 63 Ala. 89; *Gibson v. Cincinnati Enquirer*, 5 Cent. Law J. 380.

The words "anæsthetic," "chloroform," and "poison" were used in the information and by the court in other parts of its charge. They are words in common use in the vernacular of the language, and have a well-settled meaning which is not local, and cannot be regarded as technical or peculiar. It was therefore proper for the court to aid and enlighten the jury by defining the words, and giving their usual meaning and acceptation in common language. It is true the court quoted the definitions given in Webster's Dictionary and American Cyclopedias, but there is no claim that the definitions were incorrect in any respect; and what cause, then, is there for complaint? By incorporating the definitions and comments of those authorities in the instructions, the court approved them, and made the language employed in them his own; and, as the definitions were in no way faulty, the defendant has no reason to complain that the language employed by the court had formerly been used by others. It may be stated that what was said regarding these words, as well as of "*asphyxia*," is not at all at variance with the testimony;

and if the words defined were all treated as technical terms in science, and what was said of them as facts, still the court, as we have seen, had a right to sum up and present the facts of the case, so long as the jury were told that they were the exclusive judges of all the questions of fact; and this was done. Neither do we think there was error in the statement of the court that, in common parlance, chloroform is classed as a poison. There may be some difference of opinion respecting some of its properties and effects; but it seems to us that it is regarded by the masses of the people as a poison. In addition to the fact that it is so classed in the books, the legislature of the state has published it as a poison, and required that it shall not be sold except upon prescription, or to physicians or photographers, unless the vessel in which it is contained, as well as the outside wrapper, shall be distinctly labeled "Poison," nor unless, upon due inquiry, it is found that the purchaser is aware of its poisonous character. Section 12, c. 150, Laws 1885. This law, which all are presumed to know, places the same restrictions upon the sale of chloroform as is done in the case of arsenic, corrosive sublimate, and strychnia; and classes it with aconite, belladonna, digitalis, oxalic acid, "and other virulent poisons." In view of these facts, it cannot be well claimed that the court erred in telling the jury that, in common parlance, chloroform was classed among the poisons. The court, however, did not take from the jury the question as to whether it was a poison; but, when the instructions are read together, it will appear that what is complained of is beneficial, rather than otherwise, to the defendant. It was only saying that, although chloroform is generally regarded by the masses of the people as a poison, yet they must not take that for granted, but, before the jury could convict, they must, from the evidence, find it to be a poison beyond a reasonable doubt.

15. The court instructed the jury upon the law of descents and distributions, stating fully what would be the rights of the defendant, under the law, upon the death of his father, the direct and remote effect of his sister's marriage, and his rights as heir of his mother, if he should survive her. In closing the instruction the court stated: "Whether the defendant had knowledge of all these rules of descents and distributions does not clearly appear; and, if he committed the crime charged against him, he may or may not have been mistaken as to the direct or the remote probabilities of gain from his sister's death, and his motive should be judged from his supposition as to the law of descents and distributions, rather than from the accuracy of his views upon that subject." It is urged that by the giving of this instruction the jury were sent into the field of conjecture and speculation, to find a motive of the defendant for the commission of the offense. It should be remembered that the father of the defendant had died leaving a large estate, and his only heirs were the widow, the deceased, and the defendant. The deceased was about to be married, and the mother was well advanced in years and an invalid. The defendant had spent a large part of the money he had received from the estate, and was in great need of money. Upon the inquiry of the defendant, the probate judge testified that he explained to the defendant the law of descents and distributions, but just what he said the law was, is not shown. The defendant asked the court to instruct the jury regarding motive, and upon the law of descents and distributions, and this request, together with the circumstances of the case, certainly justified an instruction upon that subject. Nor was there error in the last part of the instruction, where the jury were, in effect, told, with respect to motive, that the defendant should be judged by the information upon which he acted, rather than upon the accuracy of his information.

16. It is next contended that the verdict is contrary to the evidence. In respect to the evidence, we need only to quote from the able opinion given by the trial judge in overruling the motion for a new trial: "Was the jury justified in finding the defendant guilty upon the evidence adduced? The

theory of suicide was extremely improbable, and the jury were perhaps fully justified, upon the evidence, in believing that the entering of the dwelling was not for the purpose of rape, robbery, or larceny. With these motives and theories eliminated, the jury was almost driven to one of two conclusions: Either that Mary Baldwin was murdered by an enemy for the purpose of revenge, or by some person who hoped to gain by her death. In this view the range of probabilities as to her murderer is narrow and circumscribed. The circumstances do not point towards any person other than the defendant. Do they point to him with sufficient precision to justify the jury in saying that he is guilty beyond a reasonable doubt? It is reasonably certain that Mary Baldwin died from the effects of chloroform which had been purchased of Benjamin F. Binswanger at Brokaw's pharmacy, in St. Joseph, Missouri, at some time after January 12, 1885. The defendant told Lewis H. Haynes, in April, May, or June, 1885, that he was going to St. Joseph. Mr. Binswanger was not asked in the court if he recognized the defendant as the person who purchased the chloroform, but only stated, when the photograph (admitted to be that of the defendant) was shown to him at St. Joseph, that it made an impression that he had seen the same face before. There is no testimony that any person saw the defendant near his mother's house on the night of July 7 or the morning of July 8, 1885; but he resided only three or four blocks away, and he admitted to two persons that he was out that night, and to one of them that his wife was crying when he returned. Some marks in and about the panel seem to have been made by a knife having a blade like the one in the pocket-knife which the defendant carried. The door was probably open when the panel was cut. This is indicated by the small cuttings which Mrs. Farres took from the sawdust lying about 18 inches inside of the door. This fact, together with some others, probably justified the jury in believing that the murderer resorted to a ruse to create the false impression that the house had been entered by a burglar for the purpose of robbery or larceny. These are substantially all of the circumstances tending to connect the defendant with the crime. A motive on the part of the defendant for the commission of the crime was perhaps sufficiently shown, if it be admitted that a man could be base enough to murder his own and only sister, for the direct or remote prospect of adding a few thousand dollars to his fortune. Much of the testimony related to his conduct and manner after the tragedy, and the jury perhaps believed that his actions ill comported with his innocence, and the cause of his sister's untimely death. It must be admitted that the evidence of the defendant's guilt is not entirely conclusive, but it is of such a nature that honest and intelligent men might differ in opinion as to its sufficiency to justify a verdict of guilty." 2 Kan. Law J. 326. Although the testimony written in the record is not so full and satisfactory as we would wish, after a careful reading, we are constrained to the opinion of the trial judge that it was sufficient to uphold the verdict.

17. The effort of the defendant to show that the jury were influenced by the alleged prejudice and conduct of the people who attended the trial is a failure; and the same may be said of his attempt to show that some of the jurors were disqualified, and had expressed opinions prior to the trial that the defendant was guilty of murdering his sister. Upon this question the testimony was oral and conflicting, and, in such a case, the finding of the trial judge, like the verdict of the jury, is conclusive upon this court. *State v. Bohan*, 19 Kan. 56; *State v. Tatlow*, 34 Kan. 80; S. C. 8 Pac. Rep. 267.

In concluding this opinion, we will say that the gravity of the offense, the peculiar circumstances surrounding the case, and the great earnestness and ability with which counsel for defendant has pressed his points upon the court, have led us to examine the record with great care. The testimony given, as well as every point made and authority cited, have been considered with that anxious attention which the consequences of a conviction demand;

but we are forced to the conclusion that the case has been well and fairly tried, that the errors committed are technical and unimportant, and not such as would justify a reversal of the conviction. We will therefore affirm the judgment of the district court.

(All the justices concurring.)

(36 Kan. 34)

CITY OF WICHITA v. BURLEIGH and another.

(*Supreme Court of Kansas. December 9, 1886.*)

1. CONSTITUTIONAL LAW—REASONS FOR ACT OF LEGISLATURE.

It cannot be shown, for the purpose of avoiding an act of the legislature, that the act was passed for insufficient or improper reasons.

2. SAME—STATUTE—TWO SUBJECTS.

Where the subject of an act of the legislature is the vacation of streets and alleys, the fact that the streets and alleys to be vacated are not contiguous, nor all in the same town or city, will not make the subject of the act two or more subjects, nor render the act void.

3. STATUTES—INACCURACY IN—EFFECT.

A slight inaccuracy in the description of a thing in an act of the legislature, or in the title to the act, will not render the act void, where it may be known, both from act and the title thereto and the circumstances then existing, what was meant and intended by the legislature.

4. CONSTITUTIONAL LAW—SPECIAL LEGISLATION.

The legislature may pass a special act where a general law cannot be made applicable; and this, although the special act may to some extent affect the uniform operation throughout the state of other laws; and, generally, it is a question for the legislature to determine whether a general law can be made applicable or not.

(*Syllabus by the Court.*)

Error to district court, Sedgwick county.

Suit for injunction. Judgment for plaintiffs. Defendant brings error.

This was an action brought by H. O. Burleigh and M. L. Burleigh, his wife, against the city of Wichita and others, for a perpetual injunction to restrain the city of Wichita, its officers and agents, from opening certain streets through the plaintiffs' premises. A trial was had before the court without a jury; and the court found generally in favor of the plaintiffs and against the defendants, and granted the injunction prayed for; and the city of Wichita, as plaintiff in error, now seeks to reverse such judgment. The court, in deciding the case, delivered the following opinion, to-wit:

"The plaintiffs present an application for an injunction to restrain the city from opening certain streets through their premises. The facts on which it turns are as follows: On May 20, 1872, C. F. Gilbert was the owner of a tract of land, which included plaintiffs' present premises, lying adjacent to the site of the city of Wichita. The original site of this city was the town of Wichita, and was platted by L. S. Munger and Wm. Griffenstein conjointly. Adjacent to this, on the east, was platted an addition known as Hilton's addition to Wichita, and adjacent to this, on the north and east, was the Gilbert tract. On the day mentioned Gilbert filed a plat of his tract as an addition, which he denominated 'Gilbert's Addition to Wichita, Sedgwick County, Kansas.' The document which he filed as such plat contained, upon its face, a map, which explained in the usual form of a town plat, showing the division of land into lots, streets, and alleys. The streets were named Park and Walnut, running east and west, and Topeka, Emporia, and Fourth avenues, running north and south. It also contained a written declaration, signed and acknowledged by Gilbert, stating, among other things, 'the streets and alleys, as shown by the plat herewith, are hereby set apart and dedicated to the public forever.' By this plat, Park and Walnut streets and Emporia and Fourth avenues were made to traverse the plaintiffs' present premises. No part of either of these streets were ever traveled by the public as a highway, or used for any public purpose. At that time, as now, our statute provided that the

recording of such a map and plat 'shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses in the county in which such city or town or addition is situate, in trust, and for the uses therein named, expressed, or intended, and for no other use or purpose.'

"On April 3, 1878, an act of the legislature was passed, the object of which was to vacate the streets and alleys of this addition. The title to the act reads: 'An act to vacate certain streets and alleys in the towns of Lecompton and Wichita.' The first section of the act attempted to vacate certain streets in Lecompton, which is in Douglas county, Kansas. The second section of the act reads: 'That the streets and alleys in Gilbert's addition in the city of Wichita are hereby vacated.' Afterwards, Gilbert made conveyances of different portions of the property to different persons, describing it by metes and bounds, and without reference to the plat of the addition.

"About five years ago Burleigh, the first-named plaintiff, the other plaintiff being his wife, purchased from Gilbert's grantee the premises in controversy in this case, and took possession of them, and since that time has occupied the same as his homestead, and has placed permanent and valuable improvements thereon where the streets as shown by Gilbert's plat were located, and will sustain serious loss if the city has the right to open streets through it without compensation, as it proposes to do. During all the time up to the present year the premises have been assessed and taxed as unplatte^d land; and, until about the time the city passed the ordinance now to be mentioned, Burleigh had no actual knowledge of the fact of the land having been platted, or the act of the legislature vacating the streets.

"On April 27, 1885, the city council passed an ordinance, extending the corporate limits of the city so as to include all the land which had been platted as Gilbert's addition, which it did upon the assumption that the land was legally platted as an addition, and that the act of the legislature vacating the streets and alleys was void; and it is about to open said streets through plaintiffs' premises without in any way providing for compensation either for the land taken or improvements destroyed. The question for decision is whether the city has the right to open the streets without compensating Burleigh. I will not discuss here many of the questions raised upon the argument, but will confine myself to what I conceive to be the controlling question in the case: Was the act of the legislature vacating these streets and alleys a valid exercise of legislative power?

"The first objection to the act is that it invades vested rights. The evidence does not disclose, nor is it a fact, that any individual had acquired any rights in the streets prior to the passage of the act. It is argued that the county, under our law, had a vested right; but the fact is that the county was a naked trustee for the benefit of the public, and a naked trustee never is supposed to have any vested right in the trust-estate. The only right that ever vested in any one was the right of the use of streets, which vested solely in the public as the beneficiary of the trust. If the public have reconveyed or released its beneficial interest, then the right of the county as trustee has ceased, and, by the very act of such release by the public, the title to the soil reverts to the proprietor. Now, the legislature unquestionably is the representative of the public, with absolute power to release the interest of the public in any highway, whether it be a state or county road or a street in town or city. If, therefore, the legislature, within the methods limited by the constitution, has released the right of the public to the use of these streets, there is no one who can contest Burleigh's right to the soil.

"The second objection to the act is that the subject embraced in the second section—that is, the vacation of these streets—is not clearly expressed in the title to the act. The constitution provides that the subject of every bill shall be clearly expressed in the title; and, of course, if the subject of

vacating these streets was not sufficiently expressed in the title, the second section of the act fails. The section reads: 'The streets and alleys in Gilbert's addition in the city of Wichita,'—while the expression of the title is to vacate certain streets in the town of Wichita. It is claimed that at that time there was no Gilbert's addition in the city of Wichita, while there may have been another town of Wichita. It has been settled that the constitutional requirements in question are sufficiently complied with if the title to a bill is such as fairly to apprise persons of ordinary intelligence of the subject proposed to be legislated about in the bill. Now, the streets of a city or town exist as a part of the site or survey of the ground, and are usually created and evidenced by the several plats of the original site and additions thereto. The law, in providing for the platting the sites and additions, uses the words 'city' and 'town' interchangeably, so that to call it a city site or a town site the same idea is expressed. In other word, there is but one kind of a site, and whether it is called city or town it is one and the same thing. The term 'city of Wichita' may be used in different senses. It may express the corporate entity or personality; it may express the boundary lines,—the corporate authority and jurisdiction; but it has a broader sense in common use, by which it expressed the idea of the site of surveyed and platted territory for the occupancy of the collective body of citizens, without as well as within the boundaries of the corporate jurisdiction. Evidently the term 'city of Wichita' as used in the act, did not mean the corporation or boundary lines, but was used for the purpose of description, and meant the site surveyed and platted, original and additions, as a whole. By the use of the term 'town of Wichita' in the title to the act the mind is instantly directed to the city of Wichita,—not to the corporation, but to the collective body of citizens occupying a certain surveyed and platted territory, which constitutes the real city. So clear is it that a wayfaring man could not be misled thereby.

"A third objection to the act is that it embraces two distinct subjects of legislation, and is therefore void. The constitution provides that 'no bill shall contain more than one subject,' so that if there are two or more subjects embraced in this act it is void, and the streets in question are in no way affected by it. This presents a very serious and difficult question. There is no misunderstanding the meaning of the constitutional provision, for it is plain and emphatic, and must be obeyed whatever the consequence. The difficulty arises in applying the test of this provision to the particular act in question. Our supreme court has given us many examples of the proper application of this test, but none in a case precisely like this. There is a rule, however, recognized as sound, and followed by all courts, which is that no legislative enactment will be declared void if it can be upheld upon any reasonable ground. If its invalidity is a matter of any reasonable doubt, the doubt must be resolved in favor of the act.

"In this state the legislature is all powerful over the subject of highways, and highways is made to mean streets, alleys, and roads. It may establish them or vacate them, its only limit being the vested rights of individuals. The highways of the state belong to the public. By this it is not meant that the highways in a locality belong to the public in that locality. So far as the highways of the state are concerned there is no locality, but all the highways of the entire state belong to the whole public of the state. As to that public, and in the eyes of the law, and for the purposes of legislation, the highways of the state are an entirety, constituting a single system or body. As to the public represented by the legislature, any legislation which affects a part affects the whole.

"In this respect our system of highways does not differ from our system of county boundaries. The boundary lines of the counties exist as a matter of public convenience, and in the interest of the public of the whole state, so

that legislation affecting one affects the system as a whole. In 1873 the legislature passed an act containing separate provisions changing materially the boundary lines of two separate and distinct organized counties; and our supreme court upheld the act as not obnoxious to the constitutional provision under consideration, holding that these matters constituted really but one subject of legislation, and could be joined in one act. *Philpin v. McCarty*, 24 Kan. 393.

"The supreme court of Iowa have decided a case more nearly like this case than any I can find reported. The constitution of that state contains the same provisions as ours. The legislature passed an act establishing forty-six different highways, and also vacating a number of others. The act was resisted on the ground that it embraced more than one subject, and violated the constitutional provision. The supreme court, after a thorough consideration of the question, upheld the act upon the ground that, although there were apparently several distinct highways legislated about, yet, after all, they were but related parts of an entire subject, which was the real subject of legislation,—the highways of the state. *State v. County Judge*, 2 Iowa, 280.

"The supreme court of Illinois have upheld an act, containing provisions for the construction of two separate bridges on distinct and separate highways, on similar grounds. *City of Ottawa v. People*, 48 Ill. 233.

"Against these decisions, the supreme court of Michigan apparently take a different view. The legislature of that state passed an act providing for the expenditure of a certain class of taxes, collected in a particular district of country, in the construction of certain roads therein, and for the expenditure of the same class of taxes collected in another district of country in the construction of certain other roads in that district. And the supreme court held that the act embraced more than one subject, and was void. *People v. Denazy*, 20 Mich. 349.

"In reference to the act in question in this case, the fact that some of the streets are in Wichita and some in Lecompton can make no substantial difference. If the vacation of streets in Wichita cannot be accomplished in the same act with the vacation of streets in Lecompton, it must be because there is no unity or relation whatever between highways, as such, and the vacation of one street in Wichita cannot be accomplished in the same act with the vacation of another street in Wichita."

W. P. Campbell and E. C. Ruggles, for plaintiffs in error. *Houston & Bentley*, for defendant in error.

VALENTINE, J. The judgment of the court below in this case must be affirmed, and, as furnishing sufficient reasons therefor, we would refer to the able opinion delivered by the judge of the trial court. See, also, *Weyand v. Stover*, 35 Kan. 545, S. C. 11 Pac. Rep. 355, and *State v. Barrett*, 27 Kan. 213. Perhaps, however, a few of the questions involved in this case require some additional comment. It is claimed that the act of the legislature attempting to vacate the streets and alleys in question is unconstitutional and void. It is not claimed, however, that it is unconstitutional and void because of any violation of that provision of the constitution which requires that "the legislature shall pass no special act conferring corporate powers," (Const. art. 12, § 1;) for the act in this case, so far as it applies to the land in controversy, did not confer any corporate powers, nor affect any corporate powers. The land in controversy was not at the time of the passage of the act held or owned by any corporation, nor was it within the limits of any incorporated city, town, or village. It was land belonging to private individuals, but it had been previously surveyed and platted, and was surveyed and platted, as the plat and field-notes on file in the register's office show, as "C. F. Gilbert's addition to Wichita, Sedgwick county, Kansas," and also as Gilbert's "addition to the city of Wichita," in said county and state. It is claimed that the

act is void because it was passed by the legislature for insufficient and improper reasons; because it was passed in violation of section 16, art. 2, of the constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title;" and also because it was passed in violation of section 17, art. 2, of the constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state, and in all cases where a general law can be made applicable no special law shall be enacted."

The defendant below, the city of Wichita, attempted to prove that the act vacating the streets and alleys in question was passed for insufficient and improper reasons; but the court excluded the evidence. There was certainly no error in this. The title to the act in question reads as follows: "An act to vacate certain streets and alleys in the towns of Lecompton and Wichita." The first section of the act provides for vacating certain streets and alleys in the town of Lecompton. The second section reads as follows: "Sec. 2. The streets and alleys in Gilbert's addition in the city of Wichita are hereby vacated." Section 3, which is the only remaining section, provides for the publication of the act. This act was approved March 5, 1873, and took effect April 3, 1873, more than 13 years ago. When the act was passed the land in controversy was in an "addition to the city of Wichita," but it was not *in* the corporate limits of the city of Wichita; and for this reason the city of Wichita, the plaintiff in error, now claims that at the time when the act was passed there was no "Gilbert's addition *in* the city of Wichita," or *in* the town of Wichita, upon which the act could operate. This addition, however, to the city of Wichita, may *in fact* at that time have been in the town or city of Wichita, considering the collective body of people in that vicinity as the town or city, and not merely the corporate limits; for the town or city as thus considered may in fact have extended beyond its corporate limits, and it does not appear that there was any other Gilbert's addition in or near to the town or city of Wichita. And from the fact that the legislature passed the act as it did, and from the fact that the individuals owning the land in controversy, and all the people in that vicinity, seemed to know what the title to the act and the act itself meant, and have for 13 years acted as though they knew what the act was intended to operate upon, and believed that the act was valid, we would think the description of the land and of the streets and alleys to be vacated was sufficient. As to whether this act is in violation of section 17, art. 2, of the constitution, we would refer to the case of *Knowles v. Board of Education*, 33 Kan. 692, 699, S. C. 7 Pac. Rep. 561, and the cases there cited.

Our decision of the questions presented in this case is as follows: (1) It cannot be shown for the purpose of avoiding an act of the legislature that the act was passed for insufficient or improper reasons. (2) Where the subject of an act of the legislature is the vacation of streets and alleys, the fact that the streets and alleys to be vacated are not contiguous nor all in the same town or city will not make the subject of the act two or more subjects, nor render the act void. (3) A slight inaccuracy in the description of a thing in an act of the legislature, or in the title to the act, will not render the act void where it may be known, both from the act and the title thereto and the circumstances then existing, what was meant and intended by the legislature. (4) The legislature may pass a special act where a general law cannot be made applicable; and this, although the special act may to some extent affect the uniform operation throughout the state of other laws; and generally it is a question for the legislature to determine whether a general law can be made applicable or not.

The judgment of the court below will be affirmed.
(All the justices concurring.)

(71 Cal. 400)

BABCOCK v. WELSH. (No. 11,546.)*(Supreme Court of California. December 13, 1886.)*

**WAYS—ALTERATION—MISTAKE IN VIEW AND SURVEY—ESTABLISHMENT BY PRESCRIPTION
—POWERS OF COUNTY SUPERVISORS—INJUNCTION—POL. CODE CAL. §§ 2618, 2681—2692.**

The board of supervisors of a county in California has no authority to correct a mistake in the view and survey of a public road which has become a highway, without proceedings had under sections 2681—2692, Pol. Code Cal., to change or alter such road; and when, by mistake, a road is laid out on a line other than that intended, and used by the public for more than 10 years, it becomes a highway, (section 2618, Pol. Code,) and the road overseer, acting under orders from the board of supervisors of his county, without such proceedings had, will be restrained from opening the road on the line on which it was originally intended it should run.¹

In bank. Appeal from superior court, Butte county.

H. V. Reardon, for appellant. *Hundley & Gale* and *John C. Gray*, for respondent.

MCKEE, J. This action was brought by the plaintiff, as owner in fee, and in the actual possession, of a tract of inclosed land in Butte county, to enjoin the defendant from taking down his inclosure, and entering upon the land for the purpose of opening upon it a public road. By his answer to the complaint the defendant admits that he claims the right to enter upon the plaintiff's land for that purpose; and that, unless enjoined by the court, he will enter upon it, in pursuance of an order made by the board of supervisors of Butte county on the eleventh day of April, 1885, which commands him, as road overseer of the district in which the land of plaintiff is situated, "to remove all obstructions on a road as originally established and declared a public highway, and to open the same."

It is found as a fact that, on the third day of November, 1875, a strip of land 30 feet wide, within the inclosure of the plaintiff, was condemned for a public road; that the condemnation was made in a proceeding commenced for that purpose by the plaintiff himself and other real property owners; and that compensation was duly awarded and paid to the plaintiff for the land which was to be taken from him for the road. In law, payment of the compensation awarded vested in the public the right of way over the land; and, under the law, the public, acting by its authorized agents, had the right to proceed to locate and open the road upon the land, and, in the execution of that right, to remove any obstructions which might be upon it. Section 2631, Pol. Code. But the road was never, in fact, located and opened upon the land. The fact is, as the court finds, that the strip of land, within the plaintiff's inclosure, which was intended to be taken for the road, was situated south of a line "between sections 6 and 7 and 5 and 8, to the north-east corner of the north-west quarter of the north-west quarter of section eight, in township seventeen north, range four east, M. D. M.," and "has never been opened, used, worked, or traveled as a highway, except at a point on the east terminus of said line." The reason why the road was not opened and located upon the land is that the viewers appointed in the condemnatory proceedings laid out and opened the road on a strip of land 30 feet wide, from "a point on the township line between ranges 3 and 4 east, about 9 rods north of the line of road petitioned for, and thence running east, inclining south until it intersected the section line between 5 and 8, in said township and range;" and it is contended that the location was a mistake.

But the road, as laid out and opened by the viewers, has been used and traveled by the public as the true road since November, 1875, and has been graded and kept in repair by the road overseer of the district in which it is

¹See *Kripp v. Curtis*, (Cal.) 11 Pac. Rep. 879, and note; *McKay v. Doty*, (Mich.) 30 N. W. Rep. 691; *Howard v. State*, (Ark.) 2 S. W. Rep. —.

situated, as part of the public highway. No objections have ever been made by the owners of the land over which the road runs, to the public use; and, as it has been used and traveled by the public for more than 10 years, the legal presumption is that the owners abandoned the possession of the land for the road, and therefore the road established upon the land is *the* public highway. "Public highways," as defined by the Code law, are "roads, streets, alleys, lanes, * * * land laid out or erected as such by the public, or, if laid out and erected by others, dedicated or abandoned to the public." Section 2618, Pol. Code.

A highway thus created continues to exist until it is vacated or abandoned by order of the board of supervisors of the county in which it is situated, or by operation of law, or judgment of a court of competent jurisdiction, (sections 2619, 2621, Pol. Code,) or it may be changed, altered, or discontinued in the mode prescribed by article 6, c. 2, of that part of the Political Code which regulates the subject of highways in the counties of the state. Sections 2681-2692, Id. But there was no proceeding commenced under that law for changing, altering, or discontinuing the road. After discovering by a survey of the line of the road, made in 1885, that the road, as it has been used and traveled for over 10 years, was originally located and opened by mistake of the road viewers, it was attempted to have the supposed mistake corrected by having the road relocated and reopened upon the true line, as disclosed by the survey.

But boards of supervisors have no jurisdiction of a proceeding to correct a mistake in the view and survey of a public road which has become a highway. They have only such jurisdiction and general supervision over roads within their respective counties as are given them by section 2643, Pol. Code. The order of the eleventh of April, 1885, by which the board of supervisors commanded the defendant, as road overseer, to open said road to the public on its true line, was therefore an excess of the jurisdiction of the board, and conferred no authority on the defendant to enter upon the plaintiff's inclosure for the purpose of locating and opening upon the plaintiff's land a new road in place of the road which has been opened and used for 10 years as the highway.

Judgment reversed, and cause remanded.

We concur: MORRISON, C. J.; MYRICK, J.; MCKINSTRY, J.; SHARPSTEIN, J.

(36 Kan. 99)

KANSAS FARMERS' MUT. FIRE INS. CO. v. AMICK.

(*Supreme Court of Kansas*. December 9, 1886.)

ERROR—NOTICE OF SETTLING CASE MADE—NECESSITY OF—DISMISSAL.

A petition in error will not be dismissed because the case for the supreme court was settled and signed without notice to defendant in error, if the latter acknowledged service of the case made, and afterwards suggested amendments, all of which of any importance were made.

Error to district court, Franklin county.

Motion to dismiss cause overruled.

Stambaugh, Hurd & Dewey and *J. R. Burton*, for plaintiff in error.
Alonzo Dishman, for defendant in error.

PER CURIAM. The defendant in error moves the court to dismiss the petition in error upon the ground that the case was settled and signed without notice to her or her attorneys; and, in support of the motion, *Missouri, K. & T. Ry. Co. v. Roach*, 18 Kan. 592, and *Weeks v. Medler*, Id. 425, are cited. From the record it appears that the motion for a new trial was overruled, and judgment entered on October 8, 1885, when 60 days was allowed in which to make and serve a case for the supreme court. On November 30th an or-

der was made duly extending the time in which to make and serve the case to the sixteenth day of December, 1885. On December 4, 1885, the attorney for the defendant in error acknowledges service of the case made, and afterwards suggested amendments. The case was settled and signed on the fourteenth day of December, 1885, and in the certificate the judge certifies that the case was duly presented to him for signing and settling. It does not affirmatively appear in the record that the defendant in error was present, or had notice of the time when the case would be settled and signed. It does appear, however, that amendments were suggested by the defendant in error, some of which were allowed by the judge, and others disallowed. The reason that notice is required to be given to the defendant in error is that he may appear, and have the case made amended in accordance with his suggestions. If the amendments suggested by the defendant in error are made by the judge, he cannot complain of the want of notice; nor is there cause for complaint if the amendments disallowed are immaterial. We find that only a few of the amendments suggested by the defendant in error were disallowed, and that they were wholly unimportant. The cases cited, therefore, do not control, and the motion must be overruled.

(36 Kan. 27)

KOESTER, Sr., v. STATE *ex rel.*, etc.

(Supreme Court of Kansas. December 9, 1886.)

INJUNCTION—AGAINST SALE OF LIQUOR—CONTEMPT—LANDLORD NOT IN POSSESSION.

Where a landlord leases his premises to a tenant for a term of years at a stated rent, and thereby loses all control over the premises while the tenant is in possession, and subsequently a temporary injunction is granted against him and a subtenant forbidding them from opening, or keeping a saloon upon the premises for the sale of intoxicating liquors in violation of law, and afterwards, and while the original lessee is in possession of the premises under the lease, a subtenant opens a saloon therein and sells intoxicating liquors, without having any permit therefor, the mere knowledge of the landlord that his premises are used for the sale of intoxicating liquors in violation of law, and his failure or omission to take steps to avoid the lease, and to re-enter the premises, is not sufficient to justify his punishment for contempt for disobedience of the temporary injunction.

(*Syllabus by the Court.*)

Appeal from district court, Atchison county.

On June 22, 1886, the following petition, omitting court, title, and verification, was filed in the district court of Atchison county:

"I, J. T. Allensworth, assistant attorney general of the state of Kansas for Atchison county, for and on behalf of the state of Kansas, come now, and give to the court the information, that it may be informed and understand, that on the first floor of the building commonly known as '105 and 107 North Fifth Street,' and located on the south thirty-five (35) feet of the north one-half lots thirteen and fourteen, (13 and 14,) in block fifteen, (15,) in 'Old Atchison,' a part of the city of Atchison, in Atchison county, Kansas, is a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are, and have been for several months last past, bartered, sold, and given away, and where intoxicating liquors are kept for barter, sale, and gift, in violation of law; that the said place, in consequence thereof, is a common nuisance to the people of the state of Kansas, and especially to the people of the city of Atchison, in the county of Atchison, in the state of Kansas; that the defendant William T. Temme is the keeper, and maintains and operates said place as a place where spirituous, vinous, fermented, malt, and other intoxicating liquors are sold, bartered, and given away, and are kept for sale, barter, and gift; that the defendant William T. Temme has no permit granted or issued by the probate judge of Atchison county, Kansas, authorizing the said defendant William T. Temme to sell, barter, or give away, or keep for barter, sale, or gift, any intoxicating liquors; that the defendant Frederick

Koester, Sr., is the owner of the premises above described, and has full knowledge of the purpose for which said place is being used as a place where intoxicating liquors are sold, bartered, and given away, and are kept for barter, sale, and gift, and that the defendant William T. Temme has no permit issued according to law by the probate judge of Atchison county, Kansas, and, knowing the fact, permits the defendant William T. Temme to conduct and carry on the said illegal business therein, and maintain the said common nuisance; that said place is a common nuisance, of great injury to the public, which injury is irreparable, and cannot be compensated in damages.

"Wherefore the said J. T. Allensworth, as assistant attorney general of the state of Kansas for Atchison county, for and on behalf of the state of Kansas, prays:

First. That the premises, to-wit, on the first floor of the building commonly known as '105 and 107 North Fifth Street,' and located on the south thirty-five (35) feet of the north one-half of lots thirteen and fourteen, (13 and 14,) in block fifteen, (15,) in 'Old Atchison,' a part of the city of Atchison, in Atchison county, Kansas, may be adjudged to be a common nuisance, and that an order may issue directing the sheriff or other proper officer to shut up and abate said place.

Second. That the defendants may be perpetually enjoined from using, or permitting to be used, the said premises as a place where intoxicating liquors are sold, bartered, or given away, or are kept for barter, sale, or gift, otherwise than by authority of law.

Third. That, in the mean time, the said defendants may be enjoined, until the further order of the court, from keeping open, or permitting to be open, the said first floor of the building commonly known as '105 and 107 North Fifth Street,' and located on the south thirty-five (35) feet of the north one-half of lots thirteen (13) and fourteen, (14,) in block fifteen, (15,) in 'Old Atchison,' a part of the city of Atchison, in Atchison county, Kansas, and from selling, bartering, or giving away, and from keeping for sale, barter, or gift, or use in or about said premises, any malt, vinous, spirituous, fermented, or other intoxicating liquors, and from permitting such liquors to be sold, bartered, or given away, or to be kept for sale, barter, or use, at, in, or about said premises.

Fourth. And said J. T. Allensworth, as such assistant attorney general of the state of Kansas for Atchison county, for and on behalf of the state of Kansas, prays that such other and further relief may be given as may be warranted at law, and the exigencies of the case may require."

On June 28, 1886, the application for a temporary injunction came on for hearing, and thereupon the court granted the temporary injunction against Frederick Koester, Sr., and William T. Temme, the defendants, and the following order was made: "It is therefore ordered, adjudged, and decreed by the court that said defendants, and each of them, be, and they are hereby, restrained and enjoined from keeping, or permitting to be open, the first floor of the building commonly known as '105 and 107 North Fifth Street,' and located on the south 35 feet of the north half of lots 13 and 14, in block 15, in 'Old Atchison,' a part of the city of Atchison, in Atchison county, Kansas, as a saloon, and from selling, bartering, or giving away, and from keeping for sale, barter, gift, and delivery, in and about said premises, any malt, vinous, fermented, spirituous, or other intoxicating liquors, and from permitting such liquors to be sold, bartered, or given away, or kept for sale, barter, gift, or delivery, in and about said premises, without a permit and as authorized by law."

On August 9, 1886, in vacation, a motion was filed on the part of the plaintiff that Frederick Koester, Sr., be punished for contempt for violating and disobeying the temporary injunction granted against him on June 28th. Thereupon the court issued an order against said Koester to appear before him at

chambers on August 10, 1886, to show cause why he should not be punished as for contempt. The defendant read in evidence a lease dated June 13, 1883, between himself and H. S. Taylor, to continue to June 13, 1884, at \$135 per month in advance, and giving said Taylor the option of continuing the lease, and remaining in possession of said premises, for four years from June 13, 1884. After the reading of the lease it was admitted that the same was in full force and effect, and that H. S. Taylor was in possession of the premises under the lease, and that the property therein described was the same property mentioned in the petition for the injunction and in the affidavits read upon the hearing. On August 16, 1886, the district judge, in vacation, made and signed the following order, omitting court and title:

"Now, on this tenth day of August, 1886, this cause coming on to be heard before Hon. D. MARTINSONE, judge of the above-entitled court, at chambers, at the court-house, in the city of Atchison, in Atchison county, Kansas, in the matter of the motion of the plaintiff for an order of attachment against the defendant, Frederick Koester, senior, for violation of the order of injunction herein, and the state appeared by J. F. Tufts, assistant attorney general of the state of Kansas for Atchison county, and the defendant appearing in his own proper person, and without objecting to want of formal return, and without making any objection at the time to the authority of the said judge at chambers, and asking for a continuance of said matter, the same was accordingly continued, by consent of parties, to Saturday, August 14, 1886, at the same place, for further hearing; and said matter coming on for further hearing, upon same matter, at same place, upon August 14, 1886, said plaintiff appearing by J. F. Tufts, its attorney, and defendant appearing in person and by Everest & Waggener, his attorneys, and the said judge having heard the evidence and argument of counsel thereon, and having taken the same under advisement, the further hearing and decision of said matter was adjourned until Monday, August 16, 1886, at same place; and the said matters coming on for further consideration and decision, at the same place, upon August 16th, and the state appearing by J. F. Tufts, its attorney, and the said Frederick Koester appearing in person and by his attorneys, Everest & Waggener, and said judge, being fully advised in the premises, doth find that said Frederick Koester, senior, has violated the order of injunction herein, and committed contempt of the order and authority of this court. It is therefore ordered that said Frederick Koester, senior, pay a fine of \$100 for the use of the state, as well as all costs of this proceeding, taxed at \$_____, and that he be, and is hereby, committed to the jail of Atchison county, Kansas; till said fine and costs are paid."

The defendant excepted, and appeals to this court.

Everest & Waggener, for appellant. *J. F. Tufts*, Asst. Atty. Gen., for the State.

HORTON, C. J. The facts in this case are substantially as follows: Frederick Koester, Sr., is the owner of a two-story brick building, situate on lots 13 and 14, in block 15, in Atchison city. On June 13, 1883, he rented the premises to Heber S. Taylor, for the period of one year, at the rate of \$135 per month, payable in advance, Taylor having the option to continue the lease for four years from its termination upon the same terms. Afterwards, Taylor sublet the first floor of the building to William T. Temme, who opened a saloon, and, without having any permit, sold intoxicating liquors therein, in violation of law. On June 22, 1886, this action was brought against Koester and Temme to shut up and abate the place. On June 28, 1886, a temporary injunction was granted, restraining them from opening or keeping any saloon in the building for the sale of intoxicating liquors. On August 9, 1886, a motion was filed on the part of the plaintiff asking that Frederick Koester, Sr., be punished for contempt for violating the injunction granted against

him. On the hearing of the motion it was proved that, after the granting of the temporary injunction, a party from St. Joseph, Missouri, reopened a saloon in the room formerly occupied by Temme, and continued to sell intoxicating liquors in violation of the law; that Koester lived within a few blocks of this saloon; that the saloon was open to the public, so that any person could enter and see that intoxicating liquors were sold in violation of law. It was also proved that, at the time, Koester was a subscriber for two Atchison newspapers, in which appeared a notice that a St. Joseph man had gone into the saloon business in the Koester building, formerly kept by W. C. Temme. It was admitted upon the hearing, by the plaintiff, that the lease of the premises from Koester to Taylor, during all said time, was in full force and effect, and that Taylor, the lessee, was in possession of the premises under the lease.

1. It is insisted, upon the part of the appellant, that the legislature has no right to place any restrictions or limitations upon the sale of intoxicating liquors if offered for medical, scientific, or mechanical purposes only, and therefore that the legislature has no right to confine the sale of intoxicating liquors, for these purposes, to a class of men called druggists. This point was commented upon and disposed of in the *Intoxicating Liquor Cases*, 25 Kan. 751. In those cases, Mr. Justice BREWER, in speaking for the court, said: "We pass, then, to the second objection; and that is that this portion of the statute must be pronounced unconstitutional and void because it is class legislation, because it restricts the privilege of dealing in liquor to one class, the druggists, and thus debars many from engaging in a business which is profitable, and by some desired. This objection is not very strenuously urged, and cannot be sustained. It will not be doubted that the police power of the state is broad enough and strong enough to uphold any reasonable restrictions and limitations on the keeping, use, or sale of any substance whose keeping, use, or sale involves danger to the general public. The storage of powder or explosive and highly inflammable oils may be forbidden within city limits. The legislature may require railroads to fence their tracks, dangerous machinery to be everywhere inclosed, poisons to be labeled when sold, the practice of any profession requiring skill and knowledge to be confined to those who have passed a certain examination, or pursued a prescribed course of study. By virtue of the same power it may prohibit the sale of liquor to any particular class of persons which, by reason of its special training and habits, it may deem peculiarly fit for such duty."

2. We do not think the evidence presented upon the hearing justified the district judge in punishing Koester for contempt. The lease of the premises to Taylor was in full force and effect, and it is conceded that Taylor, as the tenant of Koester, had full possession of the premises. Temme was an occupant under Taylor, and so, also, was the party from St. Joseph who reopened the saloon after Temme left. There is no evidence in the record tending to show that Koester leased the premises to Taylor with any knowledge they would be unlawfully used by the lessee. There is no connection shown between Koester and Temme, or Koester and the person who opened the saloon after the same was closed by the temporary injunction. By the lease, Koester parted with all control over the premises for the term granted to Taylor. It is true that the sublessees, during a part of the term, used the premises in violation of law, but there is no evidence that Koester assented in fact to such use, or in any way advised or participated in the operation of the saloon. There is no evidence that he had any personal control of the saloon, or was in any way interested therein. His rent was neither greater nor less on account of the saloon. *Crofton v. State*, 25 Ohio St. 249; *State v. Pearsall*, 43 Iowa, 630. The most which the evidence establishes is that, after Koester leased his building to Taylor, he had knowledge that from June, 1886, to August of the same year, the lower room thereof was used as

a place for the sale of intoxicating liquors, in violation of law, and that he omitted taking any steps to close the saloon, or to oust his tenant. He might have taken steps to avoid the lease, and re-enter the premises. This, perhaps, was his moral duty; but his sanction and consent to the operation of the saloon in the building which he had leased ought not to be inferred from the mere fact of his non-interference with his tenant. Any stranger, having knowledge that a saloon was operated in the building, could have taken steps to close the same. *State v. Williams*, 30 N. J. Law, 102. If Koester had knowingly rented his building as a saloon, or if he had some interest in the operation of the same, or had advised or participated in its operation, a very different case would be before us for our determination. *State v. Abrahams*, 6 Iowa, 117; S. C. 4 Iowa, 541.

The order of the district judge will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

LEVINS v. ROVEGNO and others. (No. 9,055.)

(*Supreme Court of California*. December 15, 1886.)

In bank.

Amendment of judgment. See, for original report of case, *ante*, 161.

BY THE COURT. In the above-entitled cause it is hereby ordered that the judgment heretofore rendered therein be so amended as to direct the court below to enter judgment in favor of plaintiff for the recovery of the one undivided one-half of the land and premises described therein, and for the rents and profits thereof, as found by the court.

(2 Cal. Unrep. 718)

RIDGWAY v. BOGAN. (No. 9,654.)

(*Supreme Court of California*. September 30, 1886.)

PLEADING—AMENDMENT OF COMPLAINT AFTER DEMURRER.

If a demurrer to the complaint is sustained, the plaintiff is entitled to leave to amend, unless the complaint is so defective that it cannot be made good by any amendment.

Department 1. Appeal from superior court, Mariposa county.

Action to recover the proceeds of a note claimed to have belonged to plaintiff's decedent, and to have been wrongfully disposed of by defendant. Defendant demurred to the complaint, (1) because it did not state a cause of action; (2) because of defect or misjoinder of parties; and (3) because of ambiguity and uncertainty. The demurrer was sustained. Plaintiff moved for leave to amend, which motion was denied, whereupon plaintiff appealed, on the ground that he was entitled to leave to amend unless his complaint was so defective that it could not be made good by any amendment.

J. W. Congdon and *G. G. Goucher*, for plaintiff and appellant. *L. F. Jones*, for defendant and respondent.

BY THE COURT. We are of opinion the court should have granted plaintiff's motion to set aside the judgment, and for leave to file an amended complaint. The order appealed from is reversed, and the cause remanded, with directions that the motion of plaintiff be granted.

(2 Cal. Unrep. 722)

ALHAMBRA ADDITION WATER CO. v. RICHARDSON and others. (No. 11,509.)

(*Supreme Court of California*. November 30, 1886.)

WATERS AND WATER-COURSES—IRRIGATING DITCH—INJUNCTION—ESTOPPEL.

Plaintiffs derive title to the water of a canon from W., who, while owner, represented to one of the defendants, who he knew was thinking of purchasing certain

land, that the right to use water from said canon therefor was appurtenant thereto. Defendant therefore purchased the land. Subsequently plaintiff's grantors, in order to save waste, proposed to run a pipe across defendant's land. Defendant assented on condition that the pipe should be so laid that he should be enabled to use therefrom the quantity of water to which he had theretofore been entitled. This was done, and defendants used the same until the bringing of this action. Held, that the plaintiff was estopped from interfering with the rights acquired by the defendants to the use of the pipe, and its appurtenances, as long as the same remain as conduit of the water over their land.¹

Commissioners' decision.

Department 2. Appeal from superior court, Los Angeles county.

The court below adopted findings of the jury, and made findings of its own, to the following effect: That plaintiff is the owner of all the water rising and flowing in that canon, in the county of Los Angeles, known as the "Kewen Mill" or "Lake Vineyard Canon," as alleged in the complaint, and of the right to use and appropriate the same, except that portion thereof belonging to the defendants; and, further, is the owner of the dams, ditches, reservoirs, and pipes that convey said water, subject to the right of the defendants to use the same for the purpose of taking the waters belonging to them; that the principal aqueduct used by plaintiff for conveying the water is an iron pipe passing through defendants' land; that J. H. Carpenter, a prior occupant of the Richardson place, asserted a right to use water from Kewen canon, and had a license from B. D. Wilson, under whom plaintiff claims; that Richardson used the water from 1867, uninterruptedly, under a claim of right, peaceably, adversely, exclusively, and continuously; that plaintiff and its grantor have known of defendants' claim, and have acquiesced therein; that defendant Richardson, before purchasing his lands, inquired of B. D. Wilson whether the water-right claimed by defendant was appurtenant to the land, for the purpose of determining whether he would buy the premises; that Wilson, knowing that such was Richardson's purpose, and being then the owner of all the rights claimed by plaintiff, stated that such water-right was appurtenant to said land, and Richardson, because of that admission, purchased the land, and made valuable improvements thereon; that but for that statement he would not have made the purchase; that defendants, since 1870, used the water in question for the purpose of irrigation, and for domestic and stock purposes; that the quantity requisite therefor is two and one-third inches, under a pressure of four inches; and that defendants' claim has been asserted and maintained by defendants, and their predecessors, openly, notoriously, under a claim of right, and adversely to all the world, for 20 years.

On which findings of facts the court found this conclusion of law: That "the plaintiff is the owner of all the water-rights set out and claimed in the complaint herein, and also of all pipes, ditches, aqueducts, and reservoirs appertaining thereto, as described in the complaint, except a constant flow of the waters of said canon of two and one-third inches, measured under a four-inch pressure, on defendants' said premises, which said quantity of water belongs to defendants for uses upon the lands belonging to them, as hereinbefore found; and that defendants are entitled to the use of said pipes, ditches, aqueducts, and reservoirs for the purpose of storing, preserving, and conducting the same upon their said land, for the purposes aforesaid, and the right to take said water from said pipe, as now constructed, at any point upon their said land;" and directed a decree accordingly.

The appellants, on their appeal, relied on the following points:

(1) The findings did not cover all the issues, since defendants, in their answer, claim under an agreement made in 1875, when the pipe was put through defendants' land, that defendants might tap the pipe, and use the

¹See Johnson v. Connecticut Fire Ins. Co., (Ky.) 2 S. W. Rep. 161, and note.

water; and also that plaintiff is barred by section 318, Code Civil Proc. Cal.

(2) The findings were not justified by the pleadings, since defendants' utmost claim was that plaintiff's grantors agreed that defendants might tap the pipe, and use water therefrom, while the findings make plaintiff's ownership subordinate to defendants' right to use the dams, etc., for the purpose of taking water from Kewen canon.

(3) The findings are contradictory since at one place it is found that defendants' grantors used the water under a license from B. D. Wilson, and at another that defendants and their grantors, for more than 20 years, (which carries us back to a time anterior to Carpenter's selling out to Richardson,) have had the open, notorious use of the water, under a claim of right, and adversely to the whole world.

(4) The judgment is not warranted by the findings, nor the pleadings. It adjudges ownership of the waters and dams, etc., used in diverting the same, excepting that defendants own two and one-third inches of water, and are entitled to use the plaintiff's dams, etc., for the purpose of conducting, storing, and preserving the same, while the prayer of the answer asks for no such judgment; and the answer sets up the agreement that defendants might use the water, made at the time the pipe was laid, which was simply a license. The judgment is not warranted by the findings, because the court does not find that defendants owned the pipe, dam, etc.

(5) The findings are not supported by the evidence, which is discussed at great length.

(6) Errors of law at the trial, excepted to by plaintiff. Defendants Richardson and Hutchinson claimed that they had a right to the water, under Mr. Wilson's deed to Hutchinson, as appurtenant to the land conveyed. Plaintiff offered to prove declarations of Mr. Wilson concerning the water-right of the place prior to the making of the deed. Defendants objected, and the objection was sustained.

Chapman & Hendrick, Glassell, Smith & Patton, and T. B. Bishop, for appellant. Wells, Van Dyke & Lee and Bicknell & White, for respondents.

FOOTE, C. This action was brought with a view of obtaining a judgment affirming to the plaintiff the whole of the right, title, and interest in and to certain waters mentioned in the complaint, as well as to the pipe which conducted said waters over the defendants' land, as also to the water-works and appurtenances thereto belonging. An injunction was prayed for, restraining the defendants from tapping the pipe and taking water therefrom, or in any other manner interfering with or diverting the same.

The defendants' demurrer to the complaint was overruled, and then they answered, stating substantially that they owned a certain tract of land over which the pipe was conducted, and were entitled to take a sufficient amount of water therefrom to irrigate said land, and that such privilege they have exercised for more than 16 years, adversely, openly, notoriously, and uninterrupted, under a claim of right. And with a view, evidently, to show an estoppel *in pais* as to the plaintiff's right to dispute the defendants' claim as aforesaid, the answer sets forth, in brief, this state of facts:

That before Richardson, one of the defendants, purchased the land upon which he claims the right to the use of said water, he asked Mr. Wilson, upon whose land the spring was situated from which the water took its rise and naturally flowed, whether that land, now called the "Richardson Place," was entitled to sufficient of that water for the purposes of its irrigation, and for the domestic uses of its occupants, and that Mr. Wilson, with a knowledge and understanding of the object of the inquiry and of the surroundings, stated that such land was entitled to such water, and that, relying upon this statement of Wilson, Richardson purchased from Hutchinson, his co-defendant, an interest in the "place" in good faith, and put thereon various valua-

ble improvements; that for many years after that time, and up to the year 1875, the water in question flowed to the said premises in and through an open ditch; that this resulted in a waste of water; hence, for the purpose of preventing such waste, the plaintiff's predecessors in interest, who were entitled to all the waters flowing from said source on Wilson's land, except that acquired by defendants as aforesaid, concluded to dispense with the exposed conduit, and to run the water through an iron pipe; to this desire, expressed to them on the part of the plaintiff, the defendants assented, upon condition that the pipe should be so laid as that the latter would be enabled to use therefrom a quantity of water sufficient to irrigate their lands, which was the portion thereof to which they had theretofore been entitled; that upon this agreement the pipe was put down in 1875, and hydrants attached thereto for the defendants' use; and that such hydrants have ever since been used by them for the taking from the pipe the amount of water which they then, and for many years before had, claimed as their own.

The issues thus raised were submitted to a jury, and were passed upon by them favorably to the defendant. The trial court adopted such findings, and added others as to matters not fully covered by the interrogatories upon the subject submitted to the jury.

Upon all the findings, judgment was rendered for the defendants, upholding their claim to a certain portion of the water in dispute, and, as an incident thereto, the use, and an interest in it, (so long as the pipe should remain as constructed; that is, so long as it should remain as a conduit of the water over and through their land, and to the water-works, which were necessary to its being run through said pipe,) sufficient to enable the defendants to take from the pipe, and make use of it, at any point on their land, the quantity of water which of right belonged to them. At least, such is the proper construction of the language of that judgment as it appears to us.

The evidence, conflicting as it is, does not warrant a disregard of those findings. From the record, it appears in evidence, on the part of the defendants, that, under an agreement between the parties to this action, the defendants consented to discontinue the wasteful use of the water through the ditch, and allow the same to be conducted over their land by the plaintiff in a pipe, upon condition that the former might tap the pipe, and take the water which they then were, and had for many years been, the owners of, at any point on their said land, that this agreement was executed by both parties thereto, and that such execution has been continuous and uninterrupted for many years.

The findings of the court, as we think, are sufficient at least to show that it passed upon the issue raised, and believed such facts to be true. Hence it would appear that, as a matter of law, the plaintiff should be *estopped* from any interference with the rights acquired by the defendants to the use of the pipe, and its appurtenances, as long as the former remains a conduit for the water over the defendants' land, and that the defendants are entitled to tap said pipe, and use the water, which they are declared to be owners of, so long as said pipe remains, with its appurtenances, as "now constructed." It therefore becomes unnecessary to pass upon any of the other questions arising upon the record, as the issue thus properly made by the pleadings, and found in favor of the defendants, entitles them to the judgment, as we understand its meaning.

The judgment and order denying a new trial should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 418)

MCCOMB v. SPANGLER. (No. 9,813.)

(Supreme Court of California. December 18, 1886.)

1. MORTGAGE—FORECLOSURE—DECREE, AND ITS EFFECT—ADVERSE TITLE—COMMUNITY PROPERTY—CIVIL CODE CAL. § 170.

A title adverse to that of the mortgagor cannot be litigated in an action to foreclose the mortgage; and therefore a decree foreclosing a mortgage given by a wife does not estop one claiming under her husband from showing that the lands mortgaged were community property, and an adverse title in the husband under section 170, Civil Code Cal., although he was a party defendant in the foreclosure proceeding, and the decree bars and forecloses all rights of the defendants, and those claiming under either of them, to the mortgaged premises.

2. HUSBAND AND WIFE—COMMUNITY PROPERTY—DEED OF LANDS FOR WIFE'S SEPARATE ESTATE—PRIMA FACIE TITLE.

The fact that a deed of lands was made to a wife "for her separate estate," even if construed to mean that the consideration money was paid from her separate property only, creates a separate estate in her *prima facie*, and does not preclude one claiming under her husband from showing that the purchase money was paid from community funds.¹

3. SAME—SEPARATE PROPERTY OF THE WIFE—LANDS MORTGAGED BY HER WHILE LIVING APART FROM HUSBAND—CIVIL CODE CAL. § 169.

"The earnings and accumulations" of the wife living separate from her husband are her separate property, (Civil Code Cal. § 169;) but the fact that a note and mortgage were given by a wife while living apart from her husband does not, of itself, prove that the lands described in the mortgage were her separate property.

Department 1. Appeal from supreme court, Alameda county.

This is an action of ejectment for certain lands in Alameda county, California. Plaintiff claims title by deed from John W. Brumagin to trustees, in 1872; from the trustees to Elizabeth McComb, wife of John McComb, and mother of plaintiff, July 19, 1878; from John McComb and Elizabeth, his wife, to William G. Hamilton, March 10, 1883; and from William G. Hamilton to plaintiff, March 16, 1883. Defendant claims under a foreclosure and sale under a mortgage on the premises executed by Elizabeth McComb, Sr., on October 12, 1878, and pleads the decree in that action in estoppel. Defendant introduced in evidence a deed from John W. Brumagin to Elizabeth McComb, Sr., dated July 2, 1878, which purports to convey the lands in question to her for her separate estate.

Chapman & Slack, for appellant. *J. C. Plunkett*, for respondent.

MCKINSTRY, J. The plaintiff deraigned title, through mesne conveyances, from John McComb and Elizabeth, his wife; the defendant, through purchase at a sale under a decree foreclosing a mortgage executed by Elizabeth McComb, his wife. The mortgage was executed prior to the deed by John McComb and wife, under which plaintiff claims.

The principal question to be considered on this appeal, and the question on which, apparently, the decision turned in the court below is whether the plaintiff is estopped from asserting herein that the demanded premises were community property of John McComb and his wife, Elizabeth, when the mortgage was executed by her, which was foreclosed in the action, *Reid, Adm'r, etc., v. Elizabeth McComb and John McComb*. The complaint in that action contained no averment either that the defendant John McComb had or asserted any claim adverse to the title of the mortgagor, or that any claim he had was subject or subordinate to the lien of the plaintiff's mortgage. It alleged him to be the husband of Elizabeth, and that she mortgaged property which was her separate property. But he was not called on to take issue on either of these averments. He could not, to any purpose, assert his adverse legal title in that action, since its validity could not properly be determined therein; and he was not required, for the protection of his rights, to make an issue

¹See *Harris v. Harris*, (Cal.) 12 Pac. Rep. 274, and note.

which the court of equity would have refused to try in the suit for foreclosure. Nor could he say, as against the mortgagor, that the mortgage did not operate a lien on her estate, if she had any. The question whether she had any interest or estate, as between herself and the mortgagee, or whether she could or could not deny, as against the mortgages, an interest or estate, was one with which John McComb personally had no concern, inasmuch as his paramount title would not be affected by the decree.

The husband has the management and control of the community property, with the like absolute power of disposition, (other than testamentary,) as he has of his separate estate. Civil Code, 170. The community title, if it exists, is adverse and paramount to the asserted or pretended claim of separate property in the wife. For convenience, and we think accurately, the community title may be designated as his title, since the estate of the wife in any portion of the community property is but contingent,—an estate which never becomes absolute until she ceases to be wife by reason of the dissolution of the marriage. The default of the defendant, John McComb, did not admit any fact on which could be based a judgment or decree adjudicating the invalidity of the community title.

In an action to foreclose a mortgage, a person who sets up a claim to the land adverse and paramount to that of the mortgagor, and who, therefore, denies the efficacy of the mortgage as a lien on his own title, cannot properly be joined as a co-defendant. Such an adverse claim to the land, in opposition to the mortgage, cannot be tried in the equitable action to foreclose. So far as the mere legal rights are concerned in such an action, the only proper parties are the mortgagor and mortgagee, and those who have acquired rights under them subsequent to the mortgage. The mortgagee, or holder of the mortgage, cannot make one who claims prior and adversely to the title of the mortgagor a defendant for the purpose of trying his adverse claim. Pom. Rem. § 334.

The object of a suit to foreclose a mortgage, under our law, is to obtain the sale of the estate which the mortgagor held at the time he executed the mortgage. All persons beneficially interested in the estate mortgaged are proper parties to the suit. Titles adverse to that of the mortgagor are not the proper subject of determination in the suit. Such titles must be settled in a different action, giving rise, as they generally do, to questions of purely legal cognizance. *San Francisco v. Lawton*, 18 Cal. 474. "Where a party has a right under the mortgage, and also a right prior to it, he is not precluded, in respect to the prior right, by a judgment of foreclosure, though the terms of it are broad enough to cover both rights. Only the rights and interests under the mortgage, and subsequent to it, can properly be litigated upon a bill of foreclosure. One claiming adversely to the title of the mortgagor cannot be made a party to the suit for the purpose of trying his adverse claim. If he has a claim under the mortgage also, his claim prior to it cannot be divested by the decree. This prior claim is not a subject-matter of litigation in the foreclosure suit, and remains unaffected by it. The decree is final only within the proper scope of the suit, which is to bar interests in the equity of redemption." Jones, Mortg. § 1589; *Rathbone v. Hooney*, 58 N. Y. 463.

The decree can have no effect upon the rights of persons having priority, *whether they are made parties to the action or not*. Jones, Mortg. 1439, and decisions cited. In the exceptional cases, where prior mortgagees are made parties, this is done that the court may order a sale of the whole estate, and thus make a complete title in the purchaser. Id. In such cases the complaint may be treated as in the nature of a bill to foreclose, and to redeem from the prior mortgage. If the debt secured by the prior mortgage is past due, it would seem that the prior mortgagee may be compelled to accept the full amount of his claim from the proceeds of the sale of the mortgaged premises, without any interference with the obligation of his contract.

Moreover the decree in *Reid v. McComb*, does not purport to adjudicate any title of John adverse to that of Elizabeth McComb, nor does the decree, in terms, adjudicate that the mortgage is a lien on the lands. The only clause which can be claimed to affect the right of John McComb is "that the defendants, and all persons claiming by, from, or under either of them, * * * be forever barred and foreclosed of and from all equity of redemption, and claim of, in, and to said mortgaged premises," etc. It may be conceded (although the complaint did not aver that he had any claim subject to the mortgage) that the defendant, John McComb, would have been barred of his equity of redemption, if he ever had had any. But it would be giving a meaning to the expression "mortgaged premises" which the scope and purpose of the action, and of the judgment taken as a whole, do not contemplate, to say that the decree by its terms bars John McComb of and from any claim based on a title adverse and paramount to that of the mortgagor. That which was mortgaged was the estate of the mortgagor, and as the purpose of the action was to secure the sale of that estate, and the foreclosure of all claims subsequently derived from the mortgagor, the portion of the decree which bars and forecloses all claims of, in, or to the "mortgaged premises," refers to the subject of the instrument of mortgage, to-wit, the interest of the mortgagor. It bars any claim in or to the estate mortgaged.

It is insisted that John McComb was a proper party to the foreclosure suit under section 370 of the Code of Civil Procedure. But, although he was a proper and necessary party under that section, he was such only because his wife was a party, and for the purpose of aiding in the protection of her rights. It was his duty, as husband, to prove on her behalf that the mortgage was never executed, or that the debt, to secure which it was given, had been paid, or to establish any other fact which would constitute a defense for her. In face of the default, we must assume that she had no defense to the suit. He was a party, made such by virtue of the provisions of the Code that he should have notice of the suit against her, with an opportunity to make a defense on her behalf. He would have the right to make such defense in her name if the law did not require him to be made a defendant for that purpose. Sued simply in his capacity of husband, and for the purpose referred to, he could not be compelled, in that suit, to litigate the independent legal title of the community.

It is suggested by respondent that if the judgment in *Reid v. McComb* fails to establish that the demanded premises were the separate property of Elizabeth McComb, such separate property was hers, because she and her husband were living separate and apart when she made her note, and the mortgage to secure its payment. We find no evidence of the fact in the record, but, had it been proved, it would not, of itself, have shown separate property in the wife. "The earnings and accumulations" of the wife, living separate from her husband, are her separate property. Civil Code, 169.

It is contended by respondent that we must hold the title to have been in Elizabeth McComb, as her separate property, when she executed the mortgage, for the reason that the deed from John W. Brumagin, in which she is named as grantee, contains the *habendum* clause: "To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns forever, *for her separate estate*, and her sole and separate use, benefit, and behoof." All the cases hold, the deed being silent as to the source of the consideration, that when property is conveyed for a valuable consideration to either spouse, the presumption is that it belongs to the community. The claim of respondent is that, by reason of the clause in the deed above quoted, not only was the presumption of community property overcome, and a presumption created that the property was hers separately, but that the clause established indisputably a separate property in her.

Even if it should be conceded to the respondent (conceded for the purposes of this decision only) that the legal title was acquired—by the community or by Elizabeth, as the case may be—through the deed from Brummagim, and not through the deed from the trustees, to whom Brummagim had conveyed it, and if it should further be conceded that the clause in the deed from Brummagim, whereby, it would seem, the grantor attempted to limit the estate conveyed to the separate use of the wife, is the equivalent of a recital that the consideration money was paid out of funds which were the separate property of the wife, (*Morrison v. Wilson*, 13 Cal. 500,) the clause in the deed, giving to it the very greatest effect which can be claimed for it, only creates a separate estate in Elizabeth McComb, *prima facie*.

In *Peek v. Brummagim*, 31 Cal. 448, it is said: "The question presents the same features as it would if it arose between husband and wife, and related to a deed that recited that the purchase money was paid out of the separate estate of the husband or of the wife, and must receive the same solution. Neither the husband nor the wife is estopped from showing, against the other, the true nature of the consideration of the deed, or from whom it proceeded. Between them, or between one of them and the heirs of the other, no question of notice can arise."

In *Ransdell v. Fuller*, 28 Cal. 38, it was decided that parties purchasing of the husband real estate deeded to the wife, for a money consideration, during coverture, do so at their peril. The record of the deed to the wife is notice to all the world that the land *may be* the separate property of the wife, and is sufficient to put purchasers on inquiry; and this, notwithstanding the presumption that the land is community property. By parity of reason, parties purchasing from the wife real estate deeded to her for a money consideration do so at their peril, notwithstanding the presumption arising from a clause like that in the deed from Brummagim, that the land is her separate property,—if, indeed, the clause creates any such presumption,—since they take with notice that the land may be community property.

At the very most, then, the clause in the Brummagim deed established *prima facie* only a separate estate in the wife, and the court below erred in refusing to permit the plaintiff to prove that the land was paid for out of community funds. Whether the clause in the deed from Brummagim was *any* evidence of separate property in the wife is a question which the exigencies of the present case do not demand of us to decide. We remark, however, that what was said in *Morrison v. Wilson*, with respect to the effect of a recital in a deed that the consideration was paid by a third party for the exclusive benefit of the wife, was *dictum*. See opinion on rehearing in the same case, 30 Cal. 344. In *Peek v. Brummagim* the deed contained no such recital. It may be that the consent of the husband to a deed containing a clause like that from Brummagim, indicated by his knowledge of it, and his failure to object to it when it was made, is some evidence of an intended *gift* by the husband to the wife of the community funds paid for the conveyance. But whatever its effect, if any, the clause in the deed, disconnected from other evidence, cannot be *more* than evidence *prima facie* that the land conveyed became the separate property of the wife, and it was clearly error to sustain an objection to evidence offered to prove "the true nature of the consideration," and that it proceeded from the community.

Judgment and order reversed, and cause remanded for a new trial.

We concur: MYRICK, J.; THORNTON, J.

(2 Cal. Unrep. 728)

PARTRIDGE v. SHEPARD and others. (No. 9,403.)

(*Supreme Court of California. December 15, 1886.*)

EJECTMENT—DEFENDANT NOT IN POSSESSION.

Ejectment will not lie against one not in possession of the land sought to be recovered.

In bank. Appeal from superior court, city and county of San Francisco. *E. A. & G. E. Lawrence*, for appellant. *Daniel Rogers*, for respondent.

BY THE COURT. In this cause, which is ejectment, the court found that defendants were not in possession when the action was commenced. This finding is sustained by the evidence. Judgment passed for defendants. The finding above mentioned is conclusive of the cause, and no other point need be determined.

Judgment and order affirmed.

(71 Cal. 404)

SMITH v. TREFRY. (No. 11,876.)

(*Supreme Court of California. December 15, 1886.*)

APPEAL—TRANSCRIPT NOT FILED IN TIME—PENDING OF MOTION FOR NEW TRIAL AND SETTLEMENT OF BILL OF EXCEPTION IN COURT BELOW.

When no transcript on appeal is filed within the prescribed time, but it appears that a motion for a new trial, and the settlement of a bill of exceptions to be used on the hearing of that motion, are pending in the court below, the effect of such proceedings will be considered, if an appeal is taken from the ruling on the motion; but the appeal from the judgment will be dismissed without prejudice.

In bank. Appeal from superior court, Sacramento county. *J. T. Carey*, for appellant. *C. T. Jones*, for respondent.

MYRICK, J. Motion to dismiss appeal. Judgment was rendered in favor of plaintiff, November 7, 1885. Notice of appeal from the judgment was filed and served June 18, 1886. No transcript on appeal has been filed, and we have the certificate of the clerk of the court below that the appellant has not requested the clerk to certify to any transcript. Under such circumstances, the motion must be granted. If, as is stated in a subsequent certificate of the clerk, a motion for new trial is pending in the court below, together with a settlement of a bill of exceptions to be used on such motion, the effect of such proceedings will be considered, if an appeal should hereafter be taken from the ruling, when made, on the motion for new trial. Until then we must regard the appeal, as the appellant has characterized it, an appeal from the judgment; and, no transcript having been filed or prepared within the time prescribed therefor, the appeal is dismissed, but without prejudice.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKEE, J.; THORNTON, J.

(36 Kan. 97)

MIKESELL v. DURKEE and another, Partners, etc.

(*Supreme Court of Kansas. December 9, 1886.*)

MUNICIPAL CORPORATIONS—USE OF STREETS FOR PRIVATE RAILROAD—GRAIN ELEVATOR.

A city has no authority to permit a railroad, for merely private purposes, to be operated upon its streets; and a railroad used in connection with a grain elevator is such a one, although the business for which the grain elevator is used may be so far public as to authorize the regulation of its charges by law.

Error from Bourbon county.

Motion for rehearing. See, for original report, 9 Pac. Rep. 278.

A. A. Harris, for plaintiff in error. *Ware & Ware*, for defendants in error.

PER CURIAM. This case was decided by this court at its January term, 1886, (*Mikesell v. Durkee*, 34 Kan. 509; S. C. 9 Pac. Rep. 278,) and the defendants in error have now submitted a motion for a rehearing. They seem to admit that no city has any authority to permit a private railroad, or a railroad for merely private purposes, to be constructed or operated upon the public streets of such city, and that, if any attempt were made to construct or operate any such railroad on the public streets of a city, any abutting lot-owner, whose property would be injured thereby, could maintain an action to perpetually enjoin the same: and they seem further to admit that the railroad, in the present case, is a private railroad, and a railroad for merely private purposes, unless it is public by virtue of its being used in connection with the defendants' grain elevator. They claim, however, that this use of the railroad makes it a public railroad, and a railroad for public purposes. The only authority, however, which they cite as furnishing any support to this claim is the case of *Munn v. Illinois*, 94 U. S. 113. Now, the only thing contained in this *Munn Case* which can furnish any support to the defendants' claim is that portion of the decision which holds that a grain elevator is so far a public purpose that the state may regulate the charges made in connection with its use, and fix maximum charges. The right of the state to regulate charges, or to fix maximum charges, is not only true with regard to grain elevators, but it is also true with regard to ferries, and to the business of hackmen, draymen, bakers, millers, wharfingers, innkeepers, and various other kinds of business. But it does not follow from the fact that a grain elevator is public, to the extent that the charges made in connection with its use may be regulated by law, that everything which may have any connection with it must also, and for all purposes, be public. It does not follow from the fact that a grain elevator is public, to the extent that its charges may be regulated by law, that a private railroad, operated only for the purpose of carrying grain to and from the elevator, is a public or common carrier; and only railroads of that character are entitled by law to be operated upon the public streets of a city, and the present railroad is not a railroad of that character. A railroad which carries only grain for only the proprietors of a grain elevator, and only to and from the elevator, lacks many of the essential elements of a public or common carrier. Indeed, it is no more a public or common carrier than the farmer who transports his own grain, by his own wagon, from his own farm, to the elevator. It is only such railroads as are operated by *public or common carriers*, and such only as are required by law to carry *all kinds of carriable goods*, and for *all persons or corporations* who may desire to have goods carried, that can be permitted by a city, under the statutes, to be operated upon the public streets of the city; and it is not claimed that the railroad now in question is that kind of railroad.

The motion for a rehearing will be overruled.

(36 Kan. 58)

MISSOURI PAC. RY. CO. v. DWYER.

(*Supreme Court of Kansas*. December 9, 1886.)

1. MASTER AND SERVANT—FELLOW-SERVANTS—CAB-REPAIRER AND BRAKEMAN.

A car-repairer or inspector in the employment of a railway company is not a co-employee or fellow-servant with a brakeman operating the brakes of a car, within the meaning of that rule of the common law which exempts the master from liability for negligence between co-employees or fellow-servants.¹

2. SAME—NEGLIGENCE OF INSPECTOR OF MACHINERY.

A railway company is liable to a brakeman for injuries received, in the performance of his duties, through the negligence of the company's inspector of machinery

¹ As to who are such fellow-servants as to relieve the master from liability for injuries caused by the negligence of each other, see *Trihay v. Brooklyn Lead Min. Co.*, (Utah.) 11 Pac. Rep. 612, and note; *Kelley v. Chicago, St. P., M. & O. R. Co.*, (Minn.) 29 N. W. Rep. 173, and note; *The Islands*, 28 Fed. Rep. 478.

in failing to discover and remedy a defect in a brake-staff, when the defect, by the exercise of reasonable and proper diligence, might have been known before the infliction of the injuries.

3. DAMAGES—EXCESSIVE—PERSONAL INJURIES—\$10,000.

The plaintiff, who was 24 years of age, and by occupation a brakeman in the employ of a railway company, received a personal injury, resulting in the amputation of his leg about 10 inches below the knee, while attempting to set a brake upon one of the cars of his train, in consequence, as he alleged, of the negligence of the company. There was no evidence in the case as to what the plaintiff was earning at the time of the injury, or that he had paid out, or contracted to pay out, anything by reason of the injury, or that he lost any time thereby, or to what extent his liability to earn money was impaired by the injury received. No allowance was made for his pain and suffering. *Held*, that the verdict returned by the jury for \$10,000 as damages is excessive.

4. SAME—REMITITURE BY SUPREME COURT.

Where a judgment is reversed upon the sole ground that the damages awarded are excessive, this court may indicate the excess, and allow it to be remitted, and judgment entered for the balance.

(*Syllabus by the Court.*)

Error from Wyandotte county.

On June 30, 1883, John T. Dwyer filed the following petition in the district court of Wyandotte county against the Missouri Pacific Railway Company: "Plaintiff, for his cause of action, states that the defendant is, and was at the date hereinafter mentioned, a railroad corporation, operating, running, and maintaining a railroad, and doing business in the state of Kansas, from the state line between Missouri and Kansas, at the Missouri river, to Atchison, in said state of Kansas,—its said railroad passing and being operated in and through the county of Wyandotte, in said state of Kansas; that on the eleventh day of December, 1882, plaintiff was in the employ of defendant as a brakeman on its said railroad; that it was defendant's duty then and there to furnish plaintiff with suitable cars, machinery, and appliances, upon and by means of which, as such employe, he might safely discharge his duties by the use of ordinary care and prudence; that on said date defendant, disregarding its duty, negligently and carelessly placed in the train on which plaintiff was engaged to perform services as such brakeman a car having an insecure, unsafe, and defective brake-staff, in this: that said break-staff was cracked and broken, all of which facts were known, or by the use of ordinary care and prudence might have been known, to defendant, and were unknown to plaintiff; that plaintiff, while at the place on said car which his duty as such employe required him to be, on the night of said December 11th, near Pomeroy, a station on defendant's said railroad, and while then and there in the careful performance of his duty, in attempting to set the brake having said defective, insecure, and unsafe brake-staff, said brake-staff broke and separated, precipitating the plaintiff violently to and upon the track of said railroad, the trucks of one of the cars passing over his right leg, then and there breaking, crushing, and mangling it to such an extent as to render its amputation necessary to save his life, which was done; that plaintiff has suffered, and still suffers, great pain, and is permanently disabled by reason of said injury. Wherefore plaintiff says he is damaged in the sum of twenty-five thousand dollars, for which sum and costs he demands judgment."

On November 26, 1884, the defendant filed the following amended answer:

"Now comes said defendant, and for its amended answer to the petition of plaintiff filed herein, says: (1) That it denies each and every allegation, statement, and averment in said petition contained not hereinafter expressly admitted and confessed. (2) For further answer this defendant says that, if the said plaintiff sustained any injury as alleged in his said petition, such injury was the result wholly of his own carelessness and negligence, and his failure to exercise reasonable and ordinary care and prudence under the circumstances, and not by reason of any negligence on the part of said defendant."

ant, or any of its servants, agents, or employes other than the said plaintiff; that the failure of the said plaintiff, at the time, and under the circumstances, to exercise reasonable, ordinary, and proper care, was the sole cause of all injury by him at the time sustained. (3) Defendant further says that said car, from which it is alleged that said John T. Dwyer, the plaintiff, was thrown at the time he received the injuries complained of, did not belong to this defendant company, but was a foreign car, and had only been received by this defendant for the purpose of transporting the contents thereof, and that the defect, if any, in said car, was a latent defect, and not susceptible of ascertainment by the exercise of reasonable and ordinary care, and was not a defect known to the said defendant, or any of its officers, agents, or employes other than the plaintiff, and could not have been discovered by the exercise of reasonable and ordinary care; and that on said eleventh day of December, 1882, and prior and subsequent thereto, this defendant had in its employ competent and careful inspectors of cars, stationed at State Line, near Kansas City, Missouri, and, if there was any defect in said car which resulted in the injury to the plaintiff complained of, such defect was a latent one, and could not, by said inspectors, have been discovered by the reasonable and ordinary care and diligence; that said defendant used reasonable and proper care in having all cars by it received from other companies, as well as its own cars, inspected at all proper hours, and used all reasonable and proper diligence in having the said car, in plaintiff's petition alleged to have been defective, inspected, and the same was in a proper and safe condition for all purposes for which the same was being used at the time of such injury. Wherefore defendant prays judgment for costs of suit."

On December 2, 1884, the plaintiff filed his reply, as follows: "Now comes the above-named plaintiff, and, for reply to the amended answer of the defendant filed herein, says he denies each and every allegation and averment therein contained inconsistent with the averment of his petition, and prays judgment as in his petition prayed."

Trial at the December term of the court, 1884. The jury returned a verdict for plaintiff, and assessed his damages in the sum of \$10,000.

The jury also answered the following particular questions of fact submitted by the plaintiff: "(1) Was the plaintiff injured on the eleventh day of December, 1882, on the line of the Missouri Pacific Railroad in Kansas? Answer. Yes. (2) Was said injury caused by defective brake-staff on one of the defendant's cars, in Kansas, on its road? A. Yes. (3) Was that defect such a one as was known to the defendant, or could have been known by the exercise of ordinary care? A. Yes. (4) Did the plaintiff, by any neglect or fault of his, contribute to the injury? A. No. (5) Was the plaintiff, at the time of the injury, in the usual, proper, and careful discharge of his duty? A. Yes."

And they also answered the following particular questions of fact submitted by the defendant:

"(1) On December 11, 1882, was the plaintiff injured by reason of falling from car of defendant, marked 'M., K. & T., coal car No. 4,657?' Answer. Yes.

"(2) Was said fall of plaintiff occasioned by the breaking of the brake-staff on said car just below the ratchet-wheel of said brake? A. Yes.

"(3) Was said car No. 4,657 rebuilt at Sedalia, Mo., in April, 1880? A. Generally rebuilt.

"(4) When said car had been so rebuilt in April, 1880, was it then in apparent good order and proper condition? A. Yes.

"(5) Was it thereafter used by the defendant in the prosecution of its business? A. Yes.

"(6) On September 13, 1882, was said car repaired at the shop of the defendant at Atchison, Kansas? A. Yes.

"(7) If question 6 is answered 'Yes,' state in what respect the same was so repaired at Atchison, Kansas, on September 13, 1882. A. By increasing the box or bed of the car from 16 to 24 inches in depth.

"(8) After being so repaired in Atchison on September 13, 1882, was said car in proper condition and in good repair, so far as the use of reasonable and ordinary care could discover? A. No evidence in regard to the condition of the brake.

"(9) If question 8 is answered 'No,' state in what respect said car was not in proper condition after being so repaired at Atchison, Kansas, September 13, 1882. A. Same as No. eight.

"(10) If question nine is answered by stating that said car was not in proper condition after being so repaired September 13, 1882, state if such improper condition was known to any employe of the defendant company. A. No evidence to the jury.

"(11) If question ten is answered "Yes," give name of such employe who had such notice. A. No answer.

"(12) On December 10 and 11, 1882, was said car No. 4,657 loaded with coal at Rich Hill, Mo., which coal was to be delivered at Leavenworth, Kansas? A. Yes.

"(13) Did said defendant then have in its employ, at Rich Hill, Missouri, careful and competent car inspectors? A. No. * * *

"(15) Was it the custom of said inspectors to inspect all cars of defendant taken in train at said station? A. Yes.

"(16) Did said car 4,657, on its way to Leavenworth, Kansas, with said coal, pass through Pleasant Hill, Missouri? A. Yes.

"(17) At said Pleasant Hill, Missouri, did defendant have in its employ careful and competent car inspectors? A. If so, they failed to perform their duty.

"(18) Was it the custom of said inspectors to inspect all cars of defendant which passed through said Pleasant Hill, Missouri? A. Yes.

"(19) On its way to Leavenworth, Kansas, on December 11, 1882, did said car pass through Kansas City, Missouri? A. Yes.

"(20) At Kansas City, Missouri, did defendant, at said time, have in its employ careful and competent inspectors of cars? A. No.

"(21) Was it their custom to inspect all cars which passed through Kansas City, Missouri, on defendant's road? A. No.

"(22) At Pomeroy station, on the night of December 11, 1882, did said brake-staff break about 5-8 of an inch below the ratchet-wheel on said brake? A. Yes.

"(23) When fastened to the car, how far was said ratchet-wheel above the ground? A. About four feet.

"(24) About how many inches did said ratchet-wheel project out from the brake-staff? A. About three and one-half inches.

"(25) Was said brake-staff fastened to the end of the car by an iron clasp below the ratchet-wheel? A. Yes.

"(26) Could a person of ordinary height, standing on the ground by said car, have seen underneath said ratchet-wheel where said brake-staff separated or broke, without stooping down for that purpose? A. Yes; by stooping over a little, and close examination.

"(27) Did said brake-staff break and separate by reason of a defect therein? A. Yes.

"(28) If question 27 is answered 'Yes,' state what there was, if anything, about said brake-staff, prior to the breaking of the same, to indicate that there was any defect in the same. A. There was a crack, which could have been seen by a careful and ordinary inspector.

"(29) Was there anything in the appearance of said brake-staff, before the same broke, to indicate that the same was defective? A. Same as 28.

"(30) If question 29 is answered 'Yes,' state fully what there was in the appearance of said brake-staff, before the same separated, to indicate that there was any crack or defect therein. A. There was a flaw about five-sixths of an inch, indicating such a crack.

"(31) Did any officer, agent, or employe of the defendant company have any knowledge or notice that there was any defect in said brake-staff before the same separated at the time plaintiff was injured. A. They could have known by proper inspection.

"(32) If question 31 is answered 'Yes,' give name of any such officer, agent, or employe of the defendant who had such knowledge or notice, and when and where he or they acquired or received the same. A. _____.

"(33) How long was plaintiff confined to his room by reason of the injuries by him sustained? A. About three months.

"(34) At the time plaintiff was injured, how much was he earning per month? A. No evidence. [By agreement.]

"(35) Was the plaintiff's leg amputated some ten inches below the knee. A. Yes.

"(36) For twelve months preceding the present time, has the plaintiff had an artificial leg or foot. A. Yes.

"(37) In the use of the same, does he require any other support or assistance than a cane carried in one of his hands? A. No.

"(38) By reason of said injury, has his general health been impaired? A. Yes, to some extent.

"(39) If question 38 is answered 'Yes,' state to what extent, and in what manner. A. By change of weather, and ulceration of the leg.

"(40) What amount, if any, has plaintiff paid out, or contracted to pay out, by reason of such injury? A. No evidence. [By agreement.]

"(41) If the jury find a general verdict for the plaintiff, what amount should such general verdict allow to plaintiff by reason of his loss of time as a result of said injury? A. No testimony. * * *

"(43) To what extent has plaintiff's ability to earn money been impaired by reason of such injury? A. Don't know.

"(44) Is not the plaintiff at this time, and has he not been for more than one year last past, a healthy and active man? A. No.

"(45) If question 44 is answered 'No,' state in what respect he is at this time unhealthy? A. From the effects of the injury.

"(46) Was the injury to the plaintiff the result of the negligence, in the state of Missouri, of a fellow-servant of the plaintiff? A. It was the negligence of the defendant.

"(47) Was it not the usual and ordinary custom of defendant to have its cars inspected at all reasonable and proper times, by careful and competent inspectors? A. It was the custom, but defendant failed to perform his duty in this case.

"(48) On December 11, 1882, and prior thereto, did not the defendant have in its employ careful and competent car inspectors? A. No.

"(49) If the jury find that the defendant failed to exercise reasonable and ordinary care, by reason of which the plaintiff was injured, state fully wherein the defendant failed to use reasonable and ordinary care. A. By negligence of ordinary and improper inspection.

"(50) Was the injury to the plaintiff the result of one of the ordinary risks and hazards of the business in which he was then employed? A. No.

"(51) Prior to said injury to the plaintiff, did any agent, servant, or employe of the defendant have any notice or knowledge of the defect, if any, in said brake-staff? A. Yes; they could have known by careful and ordinary inspection.

"(52) If question 51 is answered 'Yes,' give name of such agent, employe, or servant who had such notice. A. Unknown to the jury.

"(53) Was the injury to the plaintiff the result solely of the failure of the said defendant to exercise extraordinary care and diligence? *A.* Yes; it was the result of the defendant failing to exercise ordinary care.

"(54) At the time of and prior to such injury to the plaintiff, was said brake-staff in any manner out of repair otherwise than such defect or flaw therein just below the ratchet-wheel? *A.* No evidence of any other defect.

"(55) If question 54 is answered 'Yes,' state in what manner the same was otherwise defective and out of repair. *A.* No answer.

"(56) Was such flaw or defect in said brake-staff below the ratchet-wheel a latent flaw or defect? *A.* No.

"(57) If question 56 is answered 'No,' state in what manner the same could have been discovered by the use of ordinary and reasonable care. *A.* By a careful and ordinary inspection.

"(58) At the time of and shortly before the injury to the plaintiff, was said brake-staff apparently in good order? *A.* No.

"(59) At the time said car passed through Kansas City, Missouri, on December 11, 1882, on its way to Leavenworth, Kansas, was the brake-staff thereon apparently in proper condition? *A.* No; it could not have been.

"(60) If question 59 is answered 'No,' state in what particular the said brake-staff was not then apparently in good order and proper condition. *A.* By being cracked below the ratchet-wheel.

"(61) If question 59 is answered 'No,' state the name of the officer or employe of the defendant to whom said brake-staff appeared to be in bad order and condition. *A.* Not known to the jury.

"(62) For what length of time had such flaw or defect in said brake-staff existed prior to December 11, 1882? *A.* It might have been weeks or months prior to the accident.

"(63) Had said car been in constant use by the defendant for several months prior to December 11, 1882? *A.* Cannot answer to what extent.

"(64) If question 63 is answered 'No,' state what portion of the time it had not been in use by the defendant? *A.* Cannot answer."

The jury was asked, if they found a general verdict for the plaintiff, to state what sum was allowed for personal injury, and also was asked what sum they allowed for pain and suffering as the result of the injury. These questions were not answered.

The defendant filed its motion for judgment upon the answers of the jury to the particular questions of fact submitted, the general verdict of the jury to the contrary notwithstanding. This motion was overruled. Thereupon the defendant filed its motion for a new trial, which motion was also overruled. Judgment was then entered against the defendant, and in favor of the plaintiff, upon the verdict of the jury, for the sum of \$10,000 and all costs. Defendant excepted, and brings the case here.

Everest & Waggener, for plaintiff in error. *Hale & Miller, Thos. P. Fenlon, and Warner & Dean*, for defendant in error.

HORTON, C. J. This was an action brought by John T. Dwyer against the Missouri Pacific Railway Company for damages for personal injuries alleged to have resulted from the negligence of the defendant. The case was tried by the court and a jury, and judgment was rendered for \$10,000, and costs of suit. From this judgment the defendant prosecutes a writ of error to this court.

The principal error complained of is that the court refused to sustain the demurrer of the defendant to the evidence of the plaintiff, and also refused to instruct the jury to return a verdict for the defendant. On the trial the following facts appeared:

At the time of the injuries complained of, December 11, 1882, Dwyer was in the employ of the railway company as a brakeman on a freight train from

the state line to Atchison. The injuries occurred near Pomeroy, a station on the railway, 17 miles from the state line in this state. Dwyer came into Kansas City, on train No. 24, at 4:10 P. M.; was to go back at 6:30 P. M., expecting to reach Atchison at 11:10 P. M. On the night of December 11th, on account of waiting for a special to be started out, Dwyer's train, going to Atchison, No. 37, was a little late. The special started ahead of the regular freight train, but, after it had gone a little distance, it was noticed there was a broken draw-head on one of the cars of that train. Upon a signal, Dwyer went forward, and helped set the car out on a side track. When he got back to his train, it was found that one of the cars on his train had a broken draw-head, and a chain was sent for. The engineer pulled his engine up, and let the switch-engine pull out the car with the defective draw-head. With the train were two Iron Mountain cars loaded with lumber. These two cars were set out with a switch-engine. After this was done, the train coupled up again. Orders had been given for the train to take cars to Wyandotte, Pomeroy, and Young. The train stopped at Wyandotte, and a car was taken off. The train then started, and continued on until the engine whistled to stop at Pomeroy. This was about 8:40 P. M. Dwyer set the caboose brake, and went forward to set the brake on a coal car next to him. The number of that car was "4,657, M. K. & T." The brake-staff was on the north of the center of the end of the car. When Dwyer took hold of the brake-staff to twist it around, it twisted off in his hands, and he fell clear over the south side of the car; two wheels of the car running over his right leg, crushing his ankle and foot. When the brake-staff broke, and Dwyer fell off the car, he held fast to the staff, and carried it with him to the ground. He was taken up, put into the caboose, and brought back to the state line, reaching there at 12 o'clock at night. The next day, Dr. Griffith, a surgeon in Kansas City, Missouri, amputated his leg about 10 inches below the knee.

In 1881 and 1882, the Missouri, Kansas & Texas Railway was under the management of the Missouri Pacific Railway Company, and Missouri, Kansas & Texas cars were run over the road of that company. Car No. 4,657 was loaded with coal at Rich Hill, Missouri, December 10th or 11th; and, at the time Dwyer fell under the wheels by the breaking of the staff or rod, it was being drawn along with the train, to be taken off at Leavenworth. It is probable, from the evidence, that the car and brake-staff had been in use by the company for six or seven years, and the staff or rod upon the car was similar to those on all the Missouri, Kansas & Texas cars. In April, 1880, at Sedalia, Missouri, a new body was put upon the car, and new trucks under it. At that time it was the practice to make careful examination of all cars being repaired, for all rotten timbers or defective irons; and, when found, these were replaced by new timbers or iron. On September 13, 1882, at Atchison, the sides of this car were raised from 16 to 24 inches.

It was not the duty of Dwyer to look over and inspect the brake-staffs on the cars of his train to ascertain if everything was in order, as that duty was imposed upon the car repairers or inspectors in the employ of the company at Atchison, Wyandotte, Sedalia, Rich Hill, and other stations. It does not appear that the railway company, or any of its employes, had actual notice or knowledge of the defect in the brake-staff before Dwyer fell under the wheels; and it is insisted by the counsel for the railway company that the defect was a latent one only, and could not have been discovered before the injury by the exercise of ordinary care and diligence.

The brake-staff was used in setting the brakes of the car to which it was attached, by the brakeman taking hold of the wheel at the top, with his hands, and using force to turn it around. The ratchet or cog wheel of the brake-staff rested on the top of the floor of the freight car, four feet from the ground, and projected out from the brake-rod some three and one-half inches. The brake-staff was one and one-half inches in diameter, and the ratchet-wheel six

inches. There was a bracket or clasp to hold the staff or rod on the end of the car, five-eighths of an inch thick, and two and one-half inches wide. This was fastened on the end of the car with bolts and nuts against the bottom of the floor; the ratchet or cog wheel being about three inches from the top of the iron bracket or clasp. The brake-staff or rod on the car, at the time Dwyer attempted to set the brake, was so defective as to be unsafe and dangerous to operate.

It has already been decided by this court that, as between a railway company and its employes, the railroad company is not necessarily negligent in the use of defective machinery not obviously defective, but it is negligent in such cases only where it has notice of the defects, or where it has failed to exercise reasonable and ordinary diligence in discovering them and in remedying them. *Railroad Co. v. Wagner*, 33 Kan. 660; S. C. 7 Pac. Rep. 204.

The jury found, among other things, that a person of ordinary height, standing on the ground by the car, and stooping over a little, could have seen underneath the ratchet-wheel by close examination, where the brake-staff separated or broke, without stooping down for that purpose; also, that the crack or brake in the staff could have been seen by a careful and ordinary inspector before the same broke off, and that the old crack or break in the brake-staff was such a one as could have been known by the railway company by the exercise of ordinary care. As a verdict must be founded upon evidence, and as the jury can find no fact not established by or fairly inferable from the testimony given, the question before us resolves itself into this: Was there evidence before the jury to support the special findings of fact? If there was evidence to support these findings, then there was also evidence to support the general verdict in plaintiff's favor.

It appears that the trial court has, by overruling the motion for a new trial, approved of the verdict and findings. Therefore these must be accepted as just, if founded upon competent evidence. *Railway Co. v. Kunkel*, 17 Kan. 145; *Railroad Co. v. Holt*, 29 Kan. 149.

If there was evidence to support the special findings of fact and general verdict, the court committed no error in refusing to sustain the demurrer of the defendant, or in refusing to instruct the jury to return a verdict for the defendant. It is not a question of the weight of evidence, or whether the trial court might not have set aside the verdict on a motion for a new trial. The inquiry is whether there was sufficient evidence before the jury tending to prove the liability of the defendant.

A careful examination of the record satisfies us that there was evidence in support of the special findings sufficient to justify them. There was evidence before the jury tending to show it was necessary for the brake-staffs upon the cars to be kept in good order, that they might be operated with safety; that these staffs or rods are a very important part of the machinery of the train; that it was the duty of inspectors of freight cars to examine carefully the trucks, draw-heads, and brake-staffs; that it was also the duty of the inspectors at Wyandotte to inspect the cars more thoroughly than at way-stations; that the crack or break in the brake-staff was one-half an inch below the ratchet-wheel, and between the wheel and the bracket or clasp; that, immediately after the injury to Dwyer, it was discovered the old crack or break was from two-thirds to five-sixths of the staff or rod,—the jury placing it at five-sixths; that one-sixth only of the rod was a new break or c...ck; that this was fresh and bright; that the others, the old break, all rusty; that an inspector standing between two cars, or passing between them, could see under the brake-staff if it was daylight; that the part of the brake-staff between the ratchet-wheel and bracket was exposed to view; that a crack or break like the one in the defective brake-staff would grow more and more visible with use; and that it was possible for the defect in the brake-staff to have been detected by the naked eye, even if the staff was straight.

W. H. Young arrived upon the ground shortly after the injury happened. Soon after, he took charge of the broken brake-staff, and kept it securely boxed up until the trial. The broken brake-staff was before the jury, upon the trial, for examination. Young described to the jury the appearance of the brake-staff when he first saw it, and the jury had full opportunity to inspect the staff or rod.

Again, the evidence tends to show that there were not sufficient inspectors at Wyandotte, considering the number of cars to be examined, to make proper inspection of the cars passing through that station; that the thoroughness of the work depended upon the amount of time they had at their disposal, and the labor to be done; that, as better inspection was required there than at way-stations, it was fairly inferable from the evidence that the inspectors at Wyandotte did not have sufficient time at their disposal to discover the defects in cars and machinery examined by them.

A large amount of evidence was introduced on the part of the defendant tending to show that, if brake-staffs attached to cars are straight and apparently all right, it is the custom or practice of the inspectors to do nothing more than to make a casual examination, and that with such an inspection it was not probable a crack or break of the kind stated would be observable. We do not think that this practice or custom would relieve the defendant from liability, if the inspectors might have known by the exercise of reasonable and proper care on their part, in examining the brake-staff before the injury, that the defect existed. Upon the grounds of public policy a practice or custom which would permit the inspectors to let a car be operated with a defective brake-staff, when, by the exercise of reasonable and proper care on their part, the defect could have been discovered and remedied, can hardly be sustained as a valid custom. *Railroad Co. v. Holt, supra*; *Berg v. Railway Co.*, 50 Wis. 419; S. C. 7 N. W. Rep. 347. If a brake-staff is not to be examined for visible defects or cracks until it is bent or broken, inspection would be almost useless. In any event, it would be no protection for the safety of the employees using the brake. We do not intend to intimate that a railway company is responsible for hidden defects in its cars or machinery which cannot be discovered by careful inspection. We simply declare the right of the plaintiff to recover upon proof tending to show that, by the exercise of reasonable care, the company could have ascertained the break or crack in the brake-staff prior to the injury complained of.

In the case at bar the jury were expressly instructed that "the defendant was not required to exercise extraordinary care and diligence to discover defects in its machinery, but only ordinary care." They were further expressly instructed that "if they found from the evidence that the defect in the brake-staff, if any existed at the time of the injury, was a latent defect, and not discoverable by the use of ordinary care, then the jury must find for the defendant."

The case of *Railroad Co. v. Wagner, supra*, has been referred to as conclusive against the right of the plaintiff. The distinction between the facts proved in that case and this is marked. In that case the switchman had full knowledge of the defects in the coupling pins; but the defects in the spring, or appurtenances connected with the draw-bar, if any existed, were wholly unknown, and could not have been known by the exercise of reasonable and ordinary care. No negligence whatever was shown on the part of the railroad company.

The case of *Smith v. Railroad Co.*, 42 Wis. 520, is confidently cited as authority for the reversal of the judgment of the trial court. In that case the brakeman injured was required, in his employment, "to look after and inspect the cars of his train every day, and see if everything was in order, and to report and repair defects, if he found any." The car upon which the brake shaft or rod broke was a new one, which had been taken into the train but

two or three days prior to the accident, and the only negligence that the jury found the railroad company guilty of "was in not applying a proper and sufficient test to the brake-rod." The court decided there was no testimony tending to show that the tests applied were inadequate, or not in accordance with the most approved methods, and therefore it was held that the verdict was not founded upon any evidence. In that case the question whether there was proper inspection after the car had been put upon the railroad for use was not before the jury for decision. See, in this connection, *Long v. Railway Co.*, 65 Mo. 225.

In the latter case, while a brakeman was in the act of drawing the brake of a freight car which was in motion, the upright rod broke, the brake-wheel came off, and the brakeman fell to the ground. At the point in the rod where it broke there was a crack, which, however, was concealed. There was a conflict of evidence as to whether this crack was new or of long standing, and as to the diligence used by the railroad servants to discover the defect. The brakeman recovered damages, and the supreme court of Missouri affirmed the judgment.

It is also urged, for a reversal of the judgment, that as the petition alleged a cause of action at common law, if the railway company had in its employ careful and competent inspectors, it is not liable, even though the injury complained of was the result of their negligence. This, upon the ground that the inspectors were fellow-servants or co-employees of Dwyer. The law is declared otherwise in this state. *Railroad Co. v. Moore*, 29 Kan. 633; *Railroad Co. v. Weaver*, 35 Kan. 412; S. C. 11 Pac. Rep. 408.

"In all cases at common law, a master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow-servants to work with him; and, when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow-servants and co-employees, and, at common law, whenever the master delegates to any officer, servant, agent, or employee, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employee stands in place of the master, and becomes a substitute for the master,—a vice-principal,—and the master is liable for his acts or his negligence, to the same extent as though the master himself had performed the acts, or was guilty of the negligence." *Railroad Co. v. Moore, supra*.

In this case, the railway company—the master—delegated to inspectors the duty of inspecting the freight cars,—which included the trucks, draw-heads, and brake-staffs thereon,—to see if everything was in order, and to repair defects if any were obvious or visible. Therefore the inspectors represented the company, and were not fellow-servants of the plaintiff, who was only a brakeman. *Railway Co. v. Weaver, supra*; *Long v. Railroad Co., supra*; *Condon v. Railway Co.*, 78 Mo. 567.

Complaint is also made that the jury were not required to answer what sum they allowed for personal injury, and what they allowed for pain and suffering. The refusal to answer these questions, under the theory upon which the case was tried and the verdict rendered, is not material error.

The only element of which the verdict is composed was the personal injury—nothing else. For this the jury returned \$10,000 as damages. The pain and suffering of Dwyer seem not to have been included therein. Under this aspect of the case the verdict is excessive. There was no evidence that Dwyer was earning anything at the time of the injury, or that he had paid out, or contracted

to pay out, anything by reason of the injury, or that he lost any time thereby. There was no evidence whatever as to what extent his ability to earn money was impaired. The judgment must therefore be reversed on the sole ground that the damages awarded are excessive.

In many of the states, appellate courts have adopted the practice, where the damages are excessive, but the plaintiff is entitled to something substantial, of indicating the excess, and of giving, or directing the trial court to give, the plaintiff the option to remit the excess, and allow him to take judgment for the residue. Such action on the part of the appellate court is no invasion of the province of the jury, or of the rights of the defendant. Section 542, Civil Code; *Branch v. Bass*, 5 Sneed, 366; *Baker v. City of Madison*, 62 Wis. 137; S. C. 22 N. W. Rep. 141, 583; *McIntyre v. Railroad Co.*, 47 Barb. 515; *Murray v. Railroad Co.*, Id. 196; S. C. affirmed, 48 N. Y. 655; *Kinsey v. Wallace*, 36 Cal. 462; *Hahn v. Sweazea*, 29 Mo. 199; *Belknap v. Railroad Co.*, 49 N. H. 358; *Collins v. City of Council Bluffs*, 35 Iowa, 432; *Town of Union v. Durkes*, 38 N. J. Law, 21; *Haselmeyer v. McLellan*, 24 La. Ann. 629; *Boyd v. Brown*, 17 Pick. 453; *Watson v. Railroad Co.*, 38 Leg. Int. 138.

We have considered all of the other questions presented in the briefs and upon the arguments, but do not think them important, and therefore make no comment thereon.

Adopting the practice now so universally followed by the appellate courts where the damages are considered excessive, to permit the plaintiffs to elect to reduce his damages to a reasonable and proper sum, rather than be required to accept a new trial, this cause will be remanded, with directions that if, within 30 days after the mandate of this court shall be filed in the trial court, the plaintiff below remits \$3,000 of the amount awarded by the verdict, judgment shall be rendered in his favor, on the verdict, for \$7,000 and costs. Failing so to do, there must be a new trial.

(All the justices concurring.)

(36 Kan. 45)

WICHITA & W. R. CO. v. FECHHEIMER.

(Supreme Court of Kansas. December 9, 1886.)

1. RAILROAD COMPANIES—RIGHT OF WAY—AUTHORITY OF CITY COUNCIL.

A city council has no authority to grant to a railroad company a right of way over private property, nor over a proposed extension of a street which has not yet been opened or extended.

2. SAME—TAKING LAND WITHOUT AUTHORITY—REMEDY OF OWNER.

Where a railroad company enters upon land, and constructs its road, without the consent of the land-owner, and without making compensation for the land taken and injured, the owner may pursue any one of the several appropriate remedies, and may, where the road is, in its nature, design, and use, of a permanent character, elect to bring an action for a permanent appropriation and injury; but in such a case it should appear that the verdict and judgment included damages for the entire injury, and it should also clearly appear, from the pleadings, or from the evidence, findings, and judgment, what interest in the land the owner has parted with, and also what interest has been acquired by the company.

3. TRIAL—SPECIAL VERDICT.

It is the right of the parties to have important questions of fact, that are based on competent testimony, and which are within the issues of the case, submitted to the jury and answered upon request; and, under the facts and circumstances of this case, the refusal of this right was material error.

(*Syllabus by the Court.*)

Error from Sedgwick county.

Gette Fechheimer brought an action against the Wichita & Western Railroad Company, alleging that it was a corporation organized and existing under the laws of the state of Kansas, and that on the first day of August, 1883, she was the owner of a tract of real estate situated in Sedgwick county, the boundaries of which were described. She then alleged "that on or about

the fifteenth day of August, 1883, the said defendant, without the license or consent of the plaintiff, by its agents, servants, and contractors, took possession of a strip of land forty rods in length, and of twenty-five feet in width, off the south side of the said described piece of land, for the purpose of building and constructing the line of defendant's railroad; that defendant cut down and destroyed a valuable hedge growing thereon, fifteen large shade trees, twenty cottonwood trees, twenty-five fruit trees, twelve hundred head of cabbage, two acres of tomatoes, pulled up and injured a wire fence, all the property of the plaintiff, and erected wide and high embankments on said strip of land so wrongfully taken by it as aforesaid, put down its own track, and since said fifteenth day of August, 1883, and now, is running and operating its railroad upon, across, and over said land of plaintiff; that plaintiff's residence is situated on said described land, and is about twenty feet from the north line of said twenty-five foot strip of land, and, by defendant's operating and running its engines and cars along and over said land, that its noise, dirt, smoke, and obstruction and shocking of the ground, whistling, and ringing of bells, plaintiff's peace, quiet, and comfort is disturbed, and residence and home greatly injured, and said property depreciated in value, and water by said embankments raised and floated back upon her land,—whereby she is, by said wrongful acts of the defendant, damaged in her property, house, and comfort in the sum of twenty-five hundred dollars; by defendant's wrongfully appropriating said twenty-five foot strip of land, and using it as aforesaid, she is damaged in the sum of one thousand dollars; by the defendant's destroying the said trees, cabbage, tomatoes, fence, and hedge she is damaged in the sum of five hundred dollars; wherefore she claims damages of the said defendant in the sum of four thousand dollars, with interest at seven per cent. from the fifteenth day of August, 1883, and costs of suit."

The answer of the defendant was—*First*, a general denial; and, *second*, that the defendant's property was situated within the city of Wichita, a city of the second class, and that, before the grievances complained of by the plaintiff, the city council of the city of Wichita opened and extended Orme street beyond, and in front of, the plaintiff's property, and that prior to the alleged grievances the mayor and council of that city granted to the railroad company a right of way over Orme street, and in front of the plaintiff's premises, with the right to construct its railroad, and maintain and operate the same, along the street, and in front of the premises of plaintiff. The railroad company denied that any part of the plaintiff's land was taken or used by the defendant, and denied that she was injured or damaged in any manner by reason of the construction of the road.

The case was tried with a jury, and a verdict returned against the company for \$1,400. A motion for a new trial was overruled, and judgment given in favor of the plaintiff, and the defendant brings the case here for review.

Geo. R. Peck, A. A. Hurd, Robert Dunlap, and Houston & Bentley, for plaintiff in error. *Hatton, Ruggles & Parsons*, for defendant in error.

JOHNSTON, J. Gette Fechheimer is the owner of a tract of land within the limits of the city of Wichita. The mayor and council of that city granted the Wichita & Western Railroad Company a right of way over Orme street, and the ordinance, by its terms, also granted a right of way over a proposed extension of that street, from its western terminus to the Arkansas river. The so-called "extension" would pass over and along the south side of the premises of the defendant in error; but the fact is that the extension was only in contemplation, as the street had not yet been opened or extended through or past her land. It was shown in the evidence that the railroad company entered upon her premises, and built its road, before any steps had been taken to extend the street. It also appears that the company went upon the land, erected

embankments, cut down hedges and trees, destroyed vegetables and other property, without her consent, without having taken any steps to legally appropriate it or condemn a right of way over it, and without making compensation. It cannot be claimed that the action of the city council gave the railroad company any right beyond the then terminus of Orme street, or justified in any degree its trespass upon and taking of the property of the defendant in error without compensation.

The first objection urged here is that the court tried the case upon the theory of a permanent appropriation, while the issue raised by the pleadings was a temporary injury, resulting from the trespass committed by the plaintiff in error. The allegations of the petition do not very clearly indicate the purpose of the pleader. Some of them are framed upon the apparent theory of a recovery for only such damages as had accrued up to the commencement of the action, while others are stated upon the theory of an appropriation of, and permanent injury to, the land of defendant in error. If it is a simple action of trespass to recover for past injury, then much of the evidence admitted, and the instructions of the court, were improper. The verdict and judgment in such a case would not include the value of the land, and would not bar an action for future injuries, or an action in ejectment to recover the possession of the premises taken. The action of the company in going upon her land, and constructing its road, without authority, and without making compensation, was without justification, and the trespass furnished grounds for maintaining an action of ejectment, or injunction, or to recover damages for the injuries consequent upon the trespass. The defendant in error was at liberty to choose any one of several appropriate remedies; but, if the pleadings only warranted the recovery of compensation for the damages occasioned by the company down to the time of bringing the suit, the judgment would not operate to transfer any title or easement to the company. She now says that she elected to bring her action for a permanent appropriation and injury, and tried the case upon that theory; and, probably, the allegations of the petition may be regarded as sufficient to accomplish that purpose. The railroad, in its nature, design, and use, is of a permanent character. Besides, the construction of the railroad bridge over the Arkansas river, near the injured premises, shows that the company treated and intended the road as a permanent structure, and, as most of the injuries complained of are permanent in their nature, we think she could elect to bring her action for all present and future damages. The manner in which she conducted the case, and testimony offered by her, indicate that she was seeking a recovery of compensation for the entire injury, present and prospective. The rulings of the court in the admission of testimony, and the instructions given in regard to the measure of damages, indicate that the court proceeded upon the same theory. In order to bar any future actions for damages, and to make the present action conclusive between the parties, it should clearly appear, either by the admissions in the pleadings, or from the evidence and judgment, just what interest the land-owner has parted with, and what has been acquired by the company. If, from the record, we could ascertain the quantity and boundaries of the land taken and interest acquired by the company, and that the value thereof was included in the verdict and judgment, we might be justified in holding the case one for permanent appropriation and injury. An examination of the record, however, leaves us in considerable doubt on this question.

But if we take the view of the defendant in error, that she could and did elect to treat the trespass as a permanent appropriation and injury, we are still compelled to reverse the judgment.

The defendant below asked twenty-seven questions of fact, all but six of which the court directed the jury not to answer. Quite a number of the questions asked might well have been allowed; but, in view of the testimony, the disallowance of some of them was not material error. Among those that

were disallowed, and are deemed material, we quote the following: "Question 19. What portion of the defendant's premises, if any, was actually occupied by the defendant at the commencement of this action and before, if any?" "Q. 22. What portion of damages do you allow the plaintiff in your general verdict by reason of the occupation of a portion of the premises of the defendant, if any?" "Q. 25. What damages do you allow in your general verdict by reason of the alleged overflow of the plaintiff's premises?" Question 19 related to one of the essential matters in dispute. There was testimony upon the question, and, if the theory of the defendant in error is to be adopted, it is highly important to both of the parties that the quantity of land taken should be found and stated. The inquiry embraced in question 22 is of equal or greater importance. The defendant in error alleged in her petition that, by reason of the taking and occupation of a portion of her premises, she was damaged in the sum of \$1,000. This is one of the chief elements of damage upon which she offered proof, and the testimony of the respective parties on this question is contradictory. Another of the principal facts upon which testimony was given, was whether the construction of the road resulted in an overflow of the plaintiff's premises, and much testimony was received in an attempt to establish the damage caused by the overflow. According to the testimony of the defendant in error, this was one of the principal elements of damage in the case, while the plaintiff in error claimed, and sought to show, that no overflow had been occasioned by the embankments which it had erected, and no damage accrued to the defendant in this respect from the building of the road. The question, therefore, embodied a material question in the case, which was based on the evidence, and the defendant had a right to know what amount of injury, if any, was done in that way. It was the right of the plaintiff in error to have important questions of fact like these submitted and answered by the jury. They were based on competent testimony, and were within the issues of the case; and in view of the theory on which the case was tried, and the doubt respecting what damages are included in the verdict and judgment, we think the refusal to submit the questions is material error. *Bent v. Philbrick*, 16 Kan. 190; *City of Wyandotte v. Gibson*, 25 Kan. 243; *Atchison, T. & S. F. R. Co. v. Plunkett*, Id. 198; *Morrow v. Commissioners Saline Co.*, 21 Kan. 484.

The judgment of the district court will therefore be reversed, and the cause remanded for another trial.

(All the justices concurring.)

(14 Or. 82)

FAIN v. SMITH and others.

(Supreme Court of Oregon. November 8, 1886.)

1. DEED—DELIVERY—DEATH OF GRANTOR—INFANCY OF GRANTEES—GUARDIANSHIP OF GRANTOR.

Where a person signs, seals, and acknowledges a deed in due form of law, purporting to convey certain property to his children, who are infants of tender years, but retains possession of it until his death, and during that time manages the property, and receives its rents and profits, such deed is not operative without delivery, and the grantor remains seized of the property until the time of his death, notwithstanding the fact that he is the father and natural guardian of the grantees.¹

2. DOWER—UNDELIVERED DEED.

In such circumstances, the grantor's widow is entitled to the enjoyment of a life-estate of one-third of the lands as her dower thereof.

Ejectment. Judgment for plaintiff. Defendant appeals.

W. Lair Hill, for appellants, Smith and others. *W. H. Adams*, for respondent, Fain.

¹Delivery of a deed is essential to give it effect. *Hibberd v. Smith*, (Cal.) 8 Pac. Rep. 46; *S. C. 4 Pac. Rep. 473*; *Bank of Healdsburg v. Bailhache*, (Cal.) 4 Pac. Rep. 106; *Ireland v. Geraghty*, 15 Fed. Rep. 35; *In re Guyer*, (Iowa,) 29 N. W. Rep. 826, and note.

LORD, C. J. This is an action in ejectment for dower in two lots of land in Portland. The complaint alleges that W. B. Fain died on the _____ day of _____, seized of an estate of an inheritance in the land in controversy; that the plaintiff, who is respondent herein, is his widow, and as such is entitled to the enjoyment of a life-estate of one-third of said lands, as her dower thereof. The answer denies that Fain was seized of an estate of inheritance in the disputed premises, and claims that the two defendants are the owners thereof. William B. Fain is the admitted source of the title.

From the admission in the pleadings, and the facts stipulated and found, the case presented is briefly this: The plaintiff is the widow of William B. Fain, and the defendants are his children by a former wife, and the land in controversy was owned by him during the life-time of the mother of the defendants, and at the time of her death. When the defendants were children of tender years, their mother being dead, and Fain at that time being the owner of considerable property besides that which is now in dispute, he signed, sealed, and acknowledged, in due form of law, a deed purporting to convey the property in controversy to his two children, the defendants. This deed was never delivered to any person for the children, but remained in the possession of the grantor to the time of his death, a period of _____ years. During that time he managed the property, and received its rents and profits. The court found as a fact—the trial being without a jury—that when Fain made the deed it was not his intention to deliver it, and adjudged that he was at the time of his death seized of an estate of inheritance in the property in controversy, and that the plaintiff was entitled to dower thereof.

Upon this state of facts a single question is presented by this appeal: Was William B. Fain the owner of the land at the time of his death? If he was, it is admitted that the judgment must be sustained; otherwise it is error, and must be reversed. The general rule that a conveyance of land is not completely executed, so as to vest title, without delivery, is not controverted; but it is insisted that the rule is not universal, and that the case under consideration constitutes an exception to which it is not applicable, neither upon reason nor authority. The distinction claimed is this: That, in deeds where both parties are *sui juris*, there are two parties to be consulted,—he who conveys the title and he to whom it is conveyed; and that when, as in the great majority, or nearly all, of such cases, the grantee gives, or obligates himself to give, something in exchange for the land conveyed, or there is a consideration of disadvantage to the grantee, such as the payment of the money, the assumption of some obligation, the carrying of some burden, which moves the grantor to execute the deed, then, the transaction being simply a contract or bargain between the vendor and vendee, it is necessary there be an acceptance of the deed by the latter, which there could not be without delivery, or something tantamount to delivery, by the former. Hence the general rule that delivery of the deed is necessary to pass title. But, it is contended, when the grantee is an infant of tender years, incapable of consenting to the transaction, and the conveyance is wholly voluntary, imposing no burden on the grantee, or his estate, delivery of the deed is not necessary; that such a transaction is wholly unilateral, and the grantee, who is only a passive party, is not required to do or consent to anything in order to give efficacy to the deed; and consequently, if it appear, in such case, that it was the intention of the grantor to vest the title by the deed, it is operative without delivery. It is therefore claimed when the facts disclose, as here, that the deed was made as a voluntary settlement of property on infants of tender years, and of whom the grantor is the father and natural guardian, the fact of signing, sealing, and acknowledging the deed is strong evidence, or at least sufficient *prima facie*, to prove the intention of the grantor to vest the title, in the absence of any facts or circumstances to qualify or rebut it. There are some cases cited, to which we have not had access, in some of the authorities to

which we shall presently refer, that appear to maintain this result; but the principle, as deduced by the text writers, and sustained by the current of decisions, is undeniably to the effect that delivery is essential to the validity of a deed, whether it be a conveyance for a valuable consideration, or a mere voluntary conveyance, in consideration of love and affection.

The delivery is defined to be that part of the operation in executing the deed by which the grantor signifies his intention when and how it is to take effect. Williams, Real Prop. 147 *et seq.* It is required by the law, in order to demonstrate beyond doubt that the party making the deed meant it to be his act. No precise formulary is required. It is not necessary there should be an actual handing over of the instrument to constitute a delivery. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both. Shep. Touch. 57. "But by one or both of these," SPENCER, J., said, "it must be made." *Jackson v. Phipps*, 12 Johns. 421; *Byers v. McClanahan*, 6 Gill & J. 256; *Stewart v. Redditt*, 3 Md. 79. "It is elementary law," said VIRGIN, J., "that the delivery of a deed is as indispensable as the seal or signature of the grantor. Without this act on the part of the grantor, by which he makes known, first, his determination to consummate the conveyance, all the preceding formalities are impotent to impart validity to it as a solemn instrument of title. No formulary of words or acts is prescribed as essential to render an instrument the deed of a person sealing it. It may be done by acts or words, or by both; by the grantor himself, or by another by the grantor's authority precedent, or assent subsequent, with the intent thereby to give it effect as his deed," etc. *Brown v. Brown*, 66 Me. 316. Nor is it essential to the complete execution of the deed that it should be delivered to the party intended to be benefited by it. It may be valid although it remains in the possession of the grantor. In quite a number of cases it has been held that there may be a delivery of a deed effectual to pass the title without an actual surrender of the possession of the deed. But none of these, when examined in the light of the facts, proceed on the ground that delivery is unnecessary. In all there is something tantamount or equivalent, from which it satisfactorily appears that there was an intention to pass the title, or, what is the same, to make the deed a present operative conveyance.

In *Doe v. Knight*, 5 Barn. & C. 671, the grantor at the time of the execution of the deed said, in the presence of the subscribing witness, "I deliver this as my act and deed." The grantee was not present, and he kept possession of the deed. Afterwards he handed the deed to his sister, saying, "Here, Bess, keep this; it belongs to Mr. Garnons," who was the grantee. The jury found that the grantor parted with the possession and all power and control over the deed, and that the sister held it for Mr. Garnons free from the disposition and control of the brother. The court held this a good delivery for the use of the grantee. After reviewing several authorities, BAYLEY, J., said: "Upon these authorities it seems to me that, where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party,—nothing to show that he did not intend it to operate immediately,—that it is a valid and effectual deed, and that delivery to the party who is intended to take it, or to any person for his use, is not essential." Strong as this language may be regarded,—*obiter*, as it is declared by DIXON, J., in *Haker v. Prutsman*, 90 Wis. 644,—yet eliminate the fact of a subsequent actual delivery to the sister for the use of the grantee, upon which the verdict of the jury was founded, and there is still left the decisive manifestation of the intention of the grantor to be presently bound by the express words, "I deliver this as my act and deed." Certainly there is nothing in this oft-quoted case (which is considered as carrying the law as far as any of the cases) that can serve the purpose of the defendants.

In *Xenos v. Wickham*, 106 E. C. L. 381, S. C. 108 E. C. L. 435, and ultimately decided in the house of lords, (108 E. C. L. 861,) BLACKBURN, J., said: "As soon as there are acts or words sufficient to show that it was intended by the party to be executed as his deed, presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying, 'I deliver this as my deed,' but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear, on the authorities as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it." This does not seem to be any more than declaring that, in determining what will constitute a sufficient delivery, the intention is the controlling element, when there are any circumstances which go to make out a delivery. It is the presence of such facts, not the absence of them, that are indicative of the intention of the party to be presently bound to part with the deed, and, of course, to pass the title. All this shows that it is necessary there be something evincing the intent of the party to make his deed presently binding on him; and what is that something but the facts and circumstances which go to make out a delivery, from which such intent is inferred?

In *Souverby v. Arden*, 1 Johns. Ch. 256, Chancellor KENT says that "a voluntary settlement, fairly made, is always binding in equity upon the grantor, unless there be clear and decisive proof that he never parted, nor intended to part, with the possession of the deed; and, even if he retains it, the weight of authority is decidedly in favor of its validity, unless there be other circumstances, besides the mere fact of his retaining it, to show it was not intended to be absolute." This is the case mainly relied upon to support the plaintiff's case. But, in respect to the facts and circumstances of that case, it was equally as pointed as the case of *Doe v. Knight, supra*, and the opinion of the chancellor must be interpreted in the light of the facts before him. Do that, and it cannot be maintained that the chancellor intended to be understood as saying that delivery was unnecessary, or more than that the facts in evidence proved and satisfied him there was a valid delivery in law. Indeed, so far as my examination has extended, the ground in equity upon which many of the deeds in the nature of a family settlement have been upheld is that there was a constructive delivery, and not that delivery was unnecessary, or could be dispensed with.

In *Farrar v. Bridges*, 5 Humph. 411, a bill was filed in chancery to compel Bridges to deliver up a deed of conveyance, signed, sealed, and *delivered*, which he had retained in his custody. REESE, J., in delivering the opinion of the court, said: "If no condition is annexed, if nothing remains to be performed in order to give effect to the instrument, its signing, sealing, and *attestation*, as a valid instrument between the parties, will make it complete and effectual, although the instrument may be left in the possession of the grantor." This excerpt, without reference to the facts, or taken in connection with other portions of the opinion, is liable to give the impression that a delivery may be dispensed with. But the facts of the case show that a contract for the sale of the land had been consummated by the payment of the purchase money, and that the deed was executed in pursuance thereof, all parties being present, and the subscribing witnesses testifying that, when they left, the deed was lying on the table, and that they understood that the contract of sale had previously taken place, and that the deed which they had witnessed was the final consummation of the matter. At this point REESE, J., said: "The testimony of these witnesses does not establish, indeed, any formal, ceremonious delivery; *such delivery is not necessary, and does not very often take place;*" and then follows the quotation above recited. Now, this does not exclude the necessity or essentiality of a delivery, or that a de-

livery had not been made. The evidence proved a consummated transaction and intent to pass title, which in law included a delivery; not, "indeed, any formal or ceremonious delivery," for that kind of delivery the court thought was unnecessary, and seldom took place. See, also, *Payne v. Powell*, 5 Bush, 248; *Scrugham v. Wood*, 15 Wend. 544; *Ward v. Ward*, 2 Hayw. (N. C.) 226.

It is true that the law may imply that a party will accept that which is for his benefit, and especially of infants of tender years, incapable of giving legal assent, or of acceptance. But the fact of acceptance, when presumed, assumes there was a delivery. It is not perceived how the application of this doctrine of the law can aid the hypothesis of the defendants. So, too, there are cases in which it has been held that the recording of a deed was sufficient evidence of a delivery, notwithstanding the fact that the grantor retained the custody of the deed, on the ground that it was a manifestation of the intention of the party to be presently bound, or to make the deed presently operative. But it is unnecessary to refer to these cases, for the absence of the fact renders them inapplicable.

In *Ireland v. Geraghty*, 15 Fed. Rep. 39, it was held that when a deed in fee-simple was made by parents to their child, who was but little more than four months old, conveying to such child certain town lots, which were never delivered to the grantee, and, considering the immature age of the grantee, it was perhaps impossible to have made such a delivery, and unnecessary that it should have been made, yet that the grantor in such deed should do some act manifesting an intention to deliver the deed, and that where such deed was never recorded or published, or in any way, by either of the parents, ever after alluded to, in such way as to show that they, or either of them, considered it a consummated transaction, the deed is an inoperative conveyance. This case presses hard on the contention of the defendants. It shows that though a deed may be duly written and sealed and signed, it is of no effect without delivery; that, unless something more is done, the transaction is incomplete to give it legal existence as a deed; that there must be something else decisive of the intention of the grantor, from which the fact of delivery may be inferred, to make it a consummated transaction, and give it validity as a deed.

In *Wood v. Ingraham*, 3 Strob. Eq. 105, Chancellor CALDWELL said: "The current of decisions has already gone sufficiently far to enable the courts to carry out the intention of the donor to protect the rights of the donee, but they have never presumed delivery without some evidence that it was the intention of the donor, and no case can be found that would warrant the conclusion that a delivery had been made merely because the grantor had signed and sealed the instrument without any further act or declaration."

In *Fisher v. Hall*, 41 N. Y. 421, DANIELS, J., in delivering the opinion of the court, said: "It is not necessary that the grantee, or his agent or servant, should be present at the execution, in order to have such delivery of the instrument made as will give it operative vitality and effect. But it is necessary that it should be placed within the power of some other person, for the grantee's use, or that the grantor shall unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property, in order to have it produce that result. The mere subscribing and sealing, accompanied with the ordinary attestation of these acts by the witnesses, which is all there is any reason for supposing was done in the present instance, followed by the grantor keeping the deed in his custody, and his continued possession of the premises, are not sufficient to constitute a legal delivery of a sealed instrument. Several old authorities in equity were cited upon the argument for the purpose of showing the rule to be different from this statement of it; and it must be confessed that they appeared to maintain that result, but they are evidently so directly opposite to the entire current of

modern authority, both in the courts of this and the other states, as well as the United States, as to require them to be repudiated by this court. A rule of law by which a voluntary deed, executed by the grantor, afterwards retained by him, during his life, in his own exclusive possession and control, and never delivered to any one by him, or declared by the grantor to be intended as a present operative conveyance, could be permitted to take effect as a transmission of the title, is so inconsistent with every substantial right of property as to deserve no toleration whatever from any intelligent court, either of law or equity."

The result of the authorities is that, after a writing has been signed and sealed and acknowledged, any acts or words or circumstances decisive of the intention of the grantor to consummate and to part with it are sufficient to constitute a delivery, and give it validity as a deed. *Fulton v. Fulton*, 48 Barb. 591; *McLean v. Button*, 19 Barb. 450; *Brinckerhoff v. Lawrence*, 2 Sandf. Ch. 406; *Zimmerman v. Streeper*, 75 Pa. St. 147; *Shurtleff v. Francis*, 118 Mass. 154; *Bryan v. Wash*, 2 Gilman, 557; *Gunnell v. Cockerill*, 79 Ill. 79; S. C. 84 Ill. 319; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Cook v. Brown*, 34 N. H. 460; *Younge v. Guibecau*, 3 Wall. 636; *Huey v. Huey*, 65 Mo. 689; *Johnson v. Farley*, 45 N. H. 505; *Brittain v. Work*, 18 Neb. 347; S. C. 14 N. W. Rep. 421; *Duer v. James*, 42 Md. 492; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; Monk, Notes, 18 Eng. R. 786.

We discover no error, and the result is that the judgment must be affirmed; and it is so ordered.

STRAHAN, J., did not sit in this case.

(14 Or. 255)

COOPER v. BLAIR and others.

(*Supreme Court of Oregon. December 6, 1886.*)

TROVER AND CONVERSION—SEVERAL DEFENDANTS—INDEPENDENT ACTS—NONSUIT.

In an action to recover damages for the conversion of wheat stored in a warehouse, where the plaintiff sues several defendants jointly, and they file separate answers, each alleging that the wheat which they took was their own property also stored in the warehouse, and the evidence offered by the plaintiff fails to show that the defendants did not act independently of each other, the plaintiff cannot, upon his complaint, recover severally against each of the defendants, and a nonsuit is properly granted.

Appeal from circuit court, Benton county.

Action to recover damages for conversion. Nonsuit. Plaintiff appeals. *John Kelsy and J. W. Rayburn*, for appellant. *John Burnett, J. R. Bryson, and Tilmon Ford*, for respondents.

THAYER, J. The appellant commenced an action in the court below against the respondents to recover damages for an alleged conversion of a quantity of wheat which the appellant had stored with the respondent Blair at Corvallis, Benton county, Oregon. Blair had two warehouses, in which he received wheat for storage, and dealt in buying and selling wheat. He received from appellant 833 bushels, October 25, 1882, at his warehouse, on First street, Corvallis; 416 7-60 bushels, September 19, 1885, at the same warehouse; and at or about that time received from him 716 46-60 bushels at same warehouse. A part of the wheat so stored the appellant subsequently sold to Blair. He alleges that he had 1,365 bushels and some pounds of wheat after the sale to Blair, which he charged the respondent with having converted. The respondents, the Salem Capitol Flouring-mills Company, Limited, J. E. Henkle, Jacob Henkle, and John Kitson, and W. B. Hamilton, Zephin Job, and B. R. Job, answered separately; that is, the flouring-mills company filed its answer; the Henkles and Kitson, who were partners, filed their answer jointly;

and Hamilton and Zephin and B. R. Job, who were also partners, filed their answer jointly. The said respondents in their said several answers denied the main allegations of the complaint, and set up certain new matter. The flouring-mills company alleged that they purchased and paid full cash value for all of the wheat they received, or that came into their possession, at or about the time of the alleged conversion. Henkle & Co. alleged that they were the owners of a quantity of wheat which had been stored in said warehouse; that it was mixed in bins with other wheat of like grade and quality, with the assent of the owners thereof; and that they took only 2,800 bushels of wheat, which was a less amount than that stored therein belonging to them, and which was delivered to them by said Blair. And Hamilton & Co. alleged that they were the owners of about 13,182 bushels of wheat, which had theretofore been stored in said warehouse, mixed as Henkle & Co.'s wheat was, and that Blair delivered the same to them; which wheat, so received by the respondents, was alleged in the several answers to be the wheat they were charged with having converted. The said Blair filed no answer to the complaint.

Upon the trial of the action the respondents' counsel contended that there could be no recovery against the respondents unless the alleged conversion of the wheat was their joint act, and the circuit judge who presided at the trial seemed to be of that opinion, as he finally nonsuited the appellant apparently upon the ground that the respondents' acts in the premises were several; that is, the flouring-mills company acted for themselves, Henkle & Co. for themselves, and Hamilton & Co. for themselves. The theory of the appellant's counsel seems to have been that they had a right, after proving the amount of wheat appellant had in the warehouse at the time of the alleged conversion, to show how much the flouring-mills company took out of it, how much Henkle & Co. took out of it, and how much Hamilton & Co. took out of it; and, after ascertaining what portion of the wheat so taken belonged to him, recover from said several companies the amount taken by them, respectively, of his wheat.

It must be conceded, I think, that these several companies acted independently of each other in what they did in regard to the taking of the wheat. There is not the slightest trace of testimony in the case, as I can discover, that they combined or co-operated in taking away any wheat from the warehouse in question. The taking was at different times, and was clearly several acts, and resulted from their several motives. Each company took the wheat they supposed they were severally entitled to, and at their own instance and upon their own responsibility; and, unless the appellant's counsel can maintain the theory before indicated, the nonsuit granted by the circuit judge must stand. There were a number of exceptions taken to the rulings of the court at the trial in excluding testimony offered upon the part of the appellant; but they are unimportant, unless the appellant had the right to recover severally against the respondents, as before indicated.

The view the appellant's counsel suggested in reference to this question seems hardly tenable; yet it has been presented with much force and ability, and is sustained by many of the earlier decisions. *Jackson v. Woods*, 5 Johns. 278, and cases there cited. That was a case of ejectment against five defendants, who entered into the consent rule jointly, and pleaded jointly. Two of the lessors of the plaintiff proved title to the premises in themselves, and that the defendants were in possession in separate and distinct parts, but not jointly. The jury found each defendant separately guilty as to that part of the premises in his separate possession, and not guilty as to the other parts possessed by the other defendants; and the court held that the plaintiff was entitled to judgment against all the defendants severally according to the verdict. KENT, who was then chief justice of the court, laid it down as a rule in actions for torts against several who joined in the plea that the jury might find some

guilty of part, or at one time, and the other guilty of another part, or at another time, and that in either of those cases they might assess several damages; and referred to several early English cases that sanctioned such course.

The case is very similar in principle to that of *Jackson v. Hazen*, 2 Johns. 437. There the action was against five defendants, who entered into the consent rule jointly, and pleaded jointly; but it appeared upon the trial that two of them occupied distinct parcels of the premises in severalty, and that the other three possessed the residue of the premises jointly. Ford, for the plaintiff, contended that all the facts necessary to be proved in an action for trespass were admitted by the consent rule, and that the defendants could have prevented the difficulty and hardship that might arise out of a claim to the mesne profits by appearing separately for their distinct parcels; but the court held that the plaintiff was bound to prove a joint possession of all the defendants, and that the two defendants who held separately were entitled to judgment against the plaintiff. SPENCER, J., who delivered the opinion of the court, said that the only case which seemed to warrant a general judgment against all the defendants was that of *Claxmore v. Searle*, 1 Ld. Raym. 729, which stated the practice to be, where some of the defendants appeared at the trial and confessed lease, entry, and ouster, and the others did not, that with regard to such as did not appear, a verdict was to be entered for their not appearing to confess, etc.; but the court held that this rule did not proceed upon the principle arising in the case; nor did it necessarily follow that the rule contemplated distinct possession as to those who did not confess; that in many respects there was an analogy between actions of ejectment and trespass, and perhaps in all respects, except as to the quantity of interest necessary to maintain the one or the other; that, in an action of trespass against several, it would not be competent for the plaintiff to give in evidence the distinct acts of the individuals, without showing also that such acts were in performance of a concert and agreement among all the defendants. Then, and in that case only, would all be responsible for the act of each. In this view Chief Justice KENT and VAN NESS, J., concurred.

These two cases have been referred to in subsequent decisions of the New York courts, but have never been cited except in ejectment proceedings as they were conducted at common law; and all that is said by the court in either of them is only authority in ejectment suits as formerly prosecuted. The doctrine those cases attempted to establish was evidently intended to soften the rigor of the rules in ejectment cases. A strict enforcement of them left the defendant no grounds to stand upon except to defeat the lessor's claim of title to the premises, as he was compelled to confess the leasing, entry, and ouster as a condition upon which he was permitted to defend. This, however, operated as no hardship, except where the action was against several, each occupying distinct parcels of the demanded premises. In that case, if the fiction of law applicable to that class of actions were carried out literally, the defendants would each have to confess, or be deemed to have confessed, the ouster as to the whole, and be liable to the whole amount of mesne profits; and to avoid so palpable an injustice it was necessary either to compel the plaintiff to enter into a separate consent rule with each defendant, or not allow a recovery without proving a joint possession of all the defendants, as in *Jackson v. Hazen*, or by allowing a finding of guilty against each defendant separately as to the part of the premises in his separate possession, and not guilty as to the balance, as in *Jackson v. Woods*. It was only an expedient adopted to prevent injustice; and, in order to preserve consistency, I imagine, Chancellor KENT, in the latter case, cited the authorities, in Cro. Car., and the case in the exchequer chamber, and in 11 Coke, and from Tidd, Pr.; for I very much doubt that that distinguished jurist would ever have decided, as an abstract question, that parties severally committing distinct trespasses could be united in an action, and several judgments be recovered against

them. Whatever may have been the rule upon the subject in the English courts, no such practice ever obtained in the United States, unless under special statutory provision. Nor do I believe that the later English authorities recognize any such doctrine.

Chitty says: "And, if a joint action of trespass be brought against several persons, the plaintiff cannot declare for an assault and battery by one, and for the taking away of goods by the others, because these trespasses are of several natures. And in trover against several defendants all cannot be found guilty in the same court without proof of a joint conversion by all." 1 Chit. Pl. 86. And it is declared in note i to the case of *Wilbraham v. Snow*, 2 Saund. pt. 1, p. 47, in these words: "It is plain that several defendants cannot be found guilty in trover without evidence of a joint conversion. Therefore, where bankrupts and their assignees were joined as defendants in an action of trover, and a verdict passed against all the defendants upon evidence that the bankrupts, before their bankruptcy, had converted the goods of the plaintiff by pledging them without authority, and that the assignees, after the bankruptcy, had refused to deliver them up on demand, the court held that the conversions were separate, and granted a new trial for want of evidence of a joint conversion;" citing *Nicoll v. Glennie*, 1 Maule & S. 588. In Add. Torts, § 1321, the same rule is declared, and same reference made to 1 Maule & S 588. The author further remarks in that section that, "where an action has been brought against several joint trespassers, the evidence must be confined to the joint offenses in which all are implicated." Mr. Pomeroy, in his work on Remedial Rights and Remedies, in section 308, after stating, in the previous section, that those who have united in the commission of a tort to the person or the property, whether the injury be done by force, or be the result of negligence or want of skill or of fraud and deceit, are generally liable to the injured party without any restriction or limit upon his choice of defendants against whom he may proceed, says: "In order, however, that the general rule thus stated should apply, and a union of wrong-doers in one action should be possible, there must be some community in the wrong-doing among the parties who are to be united as co-defendants. The injury must in some sense be their joint work. It is not enough that the injured party has, on certain grounds, a cause of action against one for the physical torts done to himself or his property, and has, on entirely different grounds, a cause of action against another for the same physical tort. There must be something more than the existence of two separate causes of action for the same act or default to enable him to join the two parties liable in the single action." This principle, he there says, is of universal application. In *Forbes v. Marsh*, 15 Conn. 384, the court held that, where the plaintiff in an action of trover against B. and C., introduced evidence proving a conversion by B. only, without the participation or knowledge of C.. that it was not then competent to prove a distinct conversion by C.

This was the predicament the appellant found himself in at the trial of this case. He had joined the three parties, the flouring-mills company, Henkle & Co., and Hamilton & Co., in a single action, and then attempted to introduce evidence proving a conversion by one of them only. He could only be permitted to prove an act of conversion upon the part of one of the parties under an offer to show that the others participated in the act in some way; and, unless he could make such showing, he would be confined to his claim against the one party. Or he might have been permitted to show that all the parties took and carried away the wheat at different times, under an offer to show that there had been a combination entered into between them for that purpose; and, if he failed to show the common purpose, he would have had to submit to a nonsuit unless the court permitted him to amend his complaint, and proceed against one of the parties. Section 99 of the Civil Code is broad enough, I think, to have allowed such an amendment; but to attempt to proceed against

the respondents jointly on account of a several liability is not warranted by law in such a case as this was. We virtually held that in *Dahms v. Sears*, 11 Pac. Rep. 891, (recently decided by this court.) The difficulty in this class of cases has been in attempting to apply the general rule that torts are joint and several, and that in a joint action against several defendants one or more may be found guilty, and the others acquitted; but in the class of cases to which that rule applies, as was said by Judge DILLON in *Turner v. Hitchcock*, 20 Iowa, 316, the injury sued for is an entirety. "The injury is single, though the wrong-doers may be numerous." It has no application to a case where distinct injuries have been committed by the several defendants. If B. were to go to A.'s barn, and unlawfully carry away 10 bushels of his wheat, and C., in like manner, were to go at another time, and carry away 30 bushels more, and there had been no concert of action between them in the matter, but each had acted for himself, it would be absurd to sue them together in one action for the conversion of the amount of wheat so taken. Yet this is the position the appellant occupied in the case at circuit, and he either had to confine his proof to one of the acts, and to the party committing it, or obtain leave of the court to amend his complaint after the proofs disclosed the dilemma he was in, or submit to a nonsuit. There could have been only one recovery in the case, and that had to be against the party or parties who did the act for which it was obtained.

In *Currier v. Swan*, 63 Me. 323, in an action of trespass for an assault against four parties, the jury rendered a verdict in regular form against them all, but appended to it an apportionment of the damages among them severally. The court held that the appended part must be rejected; that but one verdict could be rendered, and that, therefore, the damages must be joint, and not several; that the question was, what damages had the plaintiff sustained? and that for these, whatever they were, all the participants in the assault were liable; that there were no degrees of guilt; and referred to several Massachusetts cases as sustaining that view. And in Sutherland on Damages it is said that "the extent of individual participation in, or of expected benefit from, a joint tort is immaterial; each and all the tort feasors are liable for the entire damage." 1 Suth. Dam. 211.

We think the judgment of the circuit court should be affirmed.

(14 Or. 231)

LANCASTER v. McDONALD.

(Supreme Court of Oregon. December 6, 1886.)

1. APPEAL—FROM JUSTICE'S COURT—NOTICE—SUFFICIENCY—GEN. LAWS OR. 571, § 69; CIVIL CODE, § 523.

Under section 69, Gen. Laws Or. 571, providing that an appeal may be taken from justice's court "by serving a notice thereof on the adverse party, and filing the original, with the proof of service indorsed thereon, with the justice, * * *" a notice is sufficient which is in writing, and gives the title of the action, and states that the appeal is taken from the judgment of a court named "in the above-entitled action," upon a day stated, "in favor of the above-named plaintiff, and against the above-named defendant." See, also, Civil Code, § 523.

2. SAME—PROOF OF SERVICE—OBJECTION NOT MADE IN COURT BELOW.

An objection to the sufficiency of the proof of service of a notice of appeal from justice's court to the circuit court cannot be reviewed, on an appeal to the supreme court, when no such objection was raised in the circuit court.

Appeal from circuit court, Douglas county.

Appellant in person. *C. A. Schlbrede*, for respondent, Lancaster.

STRAHAN, J. The plaintiff commenced his action against the defendant before a justice of the peace of Yoncalla precinct, in Douglas county, to recover against the defendant \$76, where he had judgment for the full amount

claimed, from which the defendant appealed to the circuit court. The defendant's notice of appeal is as follows:

"IN THE JUSTICE'S COURT FOR YONCALLA PRECINCT, DOUGLAS COUNTY,
STATE OF OREGON.

"*J. H. Lancaster, Plaintiff, v. James McDonald, Defendant.*

"CIVIL ACTION TO RECOVER MONEY.

"To *J. H. Lancaster, and C. A. Sehlbrede, his Attorney*: You are hereby notified that James McDonald, the defendant, appeals to the circuit court of the state of Oregon for the county of Douglas, from the judgment of the justice's court for Yoncalla precinct, Douglas county, Oregon, given and entered therein *in the above-entitled action* on the fourth day of August, 1885, in favor of above-named plaintiff, and against the above-named defendant.

"*JAMES McDONALD, Defendant, in Person.*"

The following indorsement was on said notice when it was filed with the justice, on the twenty-seventh day of August, 1885:

"I hereby accept service of the within notice of appeal this twentieth day of August, 1885.

"*C. A. SEHLBREDE, Atty. for J. H. Lancaster, Plff.*"

Also the following:

"I hereby certify that I served the within notice of appeal on the twenty-fourth day of August, 1885, and delivered a copy of the same on the twenty-fifth day of August, 1885, on the plaintiff in person or *J. H. Lancaster*.

"*JOHN G. SAMLER, Constable.*"

The respondent appeared in the circuit court by his attorney, and filed a motion to dismiss the appeal on two grounds: (1) That no sufficient notice of appeal has been given; and (2) that the certificate of the justice of the peace who certified the transcript to this court is insufficient. The court sustained this motion, and dismissed the appeal, from which judgment this appeal is taken.

The respondent seeks to sustain the ruling of the court below on two grounds: (1) That the notice of appeal is fatally defective; and (2) that proof of service of the notice of appeal is not sufficient to give the circuit court jurisdiction.

There is no statute in this state defining what a notice of appeal shall contain, but the act regulating appeals from justices' courts (Gen. Laws, 471, § 69) provides. "An appeal is taken by serving a notice thereof on the adverse party, and filing the original, with the proof of service indorsed thereon, with the justice, and by giving the undertaking for the costs of the appeal, as hereinafter provided." "Notice," in the sense here used, simply means the making known to the adverse party the fact that an appeal is taken in the particular case. If the notice accomplishes this, and is in writing, the statute is complied with. No rigid technicality is, or ought to be, required or permitted.

In addition to the section noticed above, the Civil Code, § 523, prescribes a rule applicable to notices generally, and which I think may properly be applied to notices of appeal from justices' courts. The section is as follows: "A notice or other paper is valid and effectual, although defective either in respect to the title of the action or suit in which it is made, or in the name of the court or the parties, if it intelligibly refer to such action or suit." It is true this section, by its terms, only refers to defects in respect to the title of the action or suit, or the name of the court or the parties; still I think it furnishes the correct rule for determining the sufficiency of the notice in other respects. The test is, does the notice intelligibly refer to such action or suit? If it does, there is no reason for holding it to be defective or insufficient. In such case it cannot deceive or mislead the party for whom it is intended, and

accomplishes every purpose designed by law; and such seems to have been the view taken by this court in *Moorehouse v. Cox*, 11 Pac. Rep. 71. In that case the defect was this: The notice of appeal described the judgment as having been rendered on the twenty-second day of December, whereas it appeared from the transcript to have been rendered on the twenty-second of November. LORD, J., said: "It is manifest from the notice itself, the undertaking filed, and the transcript, that it was a mere clerical oversight or mistake, *and in no way could have misled or injured the respondent.*" The words of the extract which I have italicised furnish the true test, and are, in substance, of the same import as section 523, *supra*.

Counsel for the respondent refers to *Lewis v. Lewis*, 4 Or. 209; *Christian v. Evans*, 5 Or. 253; and *Luse v. Luse*, 9 Or. 149,—as authority to sustain the ruling of the court below. In the case of *Lewis v. Lewis, supra*, the appeal was from a decree, and the notice was held sufficient. Besides, if the test laid down in that case by Mr. Justice McARTHUR be applied to this notice, it will be found to be sufficient. In *Christian v. Evans, supra*, Mr. Justice McARTHUR, again speaking for the court, said: "As the notice in this case is defective *in not describing the judgment and naming the parties thereto*, it falls within the rule of the cases cited, and the motion to dismiss must prevail."

I think these cases, properly understood, hold no more than that the notice of appeal must contain such matter of description as that, by fair construction and reasonable intendment, the court can say the appeal is taken in the particular case, and, to determine this, the court must take the entire record together. The notice in this case recites that the appeal "is from the judgment of the justice's court in Yoncalla precinct, Douglas county, Oregon, given and entered therein in the above-entitled action on the fourth day of August, 1885, in favor of the above-named plaintiff, and against the above-named defendant." This clearly identifies the judgment appealed from. Anything beyond this, by way of description, would be useless and unnecessary verbiage. In *Luse v. Luse, supra*, the notice of appeal was probably insufficient, but the facts were wholly unlike those now before the court. We therefore hold that the notice of appeal in this case is clearly sufficient.

In reaching this conclusion I have not overlooked *Neppach v. Jordan*, 13 Or. 246; S. C. 10 Pac. Rep. 341. This court there said: "The court must be able to identify the judgment from the notice. Can it be done in this case? Evidently so." It is said further: "A notice is also sufficient in which the essential facts required in a notice may be made out by reasonable intendment." It is true there are expressions in that opinion that may appear to require greater particularity than this, but they were not necessary to the determination of the cause.

The other objection, raised here for the first time, as to the insufficiency of the proof of the service of the notice of appeal, is highly technical, and we very much question whether the respondent can be heard to insist upon it, in view of the facts. The admission indorsed on the notice by respondent's attorney was doubtless made in good faith at the time, and was intended to be a valid and sufficient admission of service. No objection was made to the sufficiency of the proof of service in the court below. The parties there acted upon it,—assumed it to be sufficient,—and we think they cannot now be permitted to question it in this court for the first time. The general rule in such cases is that the parties are confined upon the argument to the particular grounds of objection specified in the motion.

The other point presented by the motion to dismiss the appeal in the court below does not seem to be insisted upon here, and will not be noticed.

The judgment appealed from will be reversed, and the cause remanded to the court below for further proceedings.

(14 Or. 243)

SELBY v. CITY OF PORTLAND.*(Supreme Court of Oregon. December 6, 1886.)***OFFICER AND OFFICER—SALARY—ACTION FOR—OFFICER DE FACTO.**

An action against a city by a police officer who has been displaced, to recover the salary of the office, cannot be maintained, while the office is occupied by an officer *de facto*, until the right to the office has been judicially determined in a proper proceeding.

Appeal from circuit court, Multnomah county.

Yocum & Beebe, R. Williams, and W. S. Newbury, for appellant, Selby. *A. H. Tanner and Zera Snow*, for respondent, City of Portland.

THAYER, J. The appellant commenced an action in said circuit court against the respondent, to recover an amount of salary alleged to be due him as police officer of said city, and for the salaries of some five other policemen which had been assigned to him. The appellant and the assignors referred to had been regularly appointed chief of police of the said city, captain, and ordinary policemen thereof, and each served in that capacity during a period of time. While they were so serving, the mayor of the city attempted to displace them, and appoint other policemen in their places, and, as they claim, unlawfully prevented them from performing their duties as such policemen; and the action was brought to recover their respective salaries after being so displaced, and until the time of the commencement of the action. It appears that the appellant was displaced March 18, 1885. His assignor J. H. Lappeus, chief of police at the time, was displaced July 22, 1883; his assignor T. P. Luther, captain of police at the time, was displaced August 2, 1883; and his assignors D. W. Dobbins, J. E. Cramer, and A. Johnson, regular policemen at the time, were each and all displaced March 18, 1885. The amount of all their salaries during the time claimed for aggregated \$15,625.

The respondent interposed the following matters of defense to the complaint: That the salaries sued for were paid to parties other than the appellant and his assignors, without any knowledge on its part that they claimed the offices or the salaries; that appellant and his assignors were removed from their offices, and acquiesced in the removal; that appellant and his assignors abandoned the said offices, and neglected to perform the duties pertaining thereto; and that the appellant and his assignors were duly dismissed and discharged from their offices. The city charter in force at the time of these attempted removals provided that the mayor, with the consent of a majority of the common council, might appoint a chief of police, one or more captains of police, and a suitable force of regular policemen; and remove or suspend any member of the police, including the chief and captains, for any cause which they might deem sufficient, to be stated in the order of removal or suspension. Chapter 8, § 72, Charter 1884, and the prior charters of the city.

It was not claimed in the case that the mayor, with or without the consent of the majority of the common council, had removed or suspended the appellant and his assignors beyond this: The mayor had, in certain messages to the common council, announced in each case that he had appointed a person to the same position they held, and generally stated that it was in the place of the one he intended to supersede, and requested the common council to confirm the appointment, which was done by a majority vote thereof in each of the cases. There was no cause stated for the removal, nor any order made in regard to it, unless the mayor's communication can be deemed such order. Upon the trial of the action in the circuit court, the judge thereof presiding ruled out all the defenses of the respondent except that of abandonment of the offices by the appellant and his assignors. That question the judge permitted to go to the jury, and instructed them that, if they found from the evidence that these parties did in fact abandon their offices, they would find for the re-

spondent; whereupon the jury returned a general verdict in favor of the respondent, and against the appellant, and upon which the judgment appealed from was entered.

To the instruction referred to the appellant's counsel took an exception, and which is the main point relied upon in the case. Whether the instruction was correct or not, depends upon the evidence bearing upon the question of such abandonment. The appellant's counsel claimed that there was no evidence tending to prove an abandonment upon the part of the appellant and his assignors of the said offices; and I confess that I was very skeptical as to the probability of there being any such evidence. I presume instances have occurred in which such officers have abandoned their offices, but they have been so rare that it requires cogent proof to establish them as matters of fact. An officer, doubtless, might legally abandon his office when wrongfully ousted therefrom. His permanent removal from the territorial jurisdiction of the office would necessarily have that effect; but his failure to keep up a clamor for reinstatement could not certainly be urged as evidence of an abandonment.

The mayor, with the consent of a majority of the common council, had the appointment of these officers, and could remove or suspend them. He, with the consent of that body, did appoint other persons to supersede them, and they were formally installed and remained in those positions. What, therefore, could the appellant and his assignors do in the premises but submit to the action of those officials, or institute legal proceedings to annul their acts. I have read the testimony contained in the bill of exceptions, and do not think it tends to show an acquiescence in the removal or abandonment of the officers by the appellant and his assignors,—do not find that they ever proposed to relinquish them. It appears that the most that can be said in regard to their conduct is that they did not attempt to contend about going out of their places, or about being let in again. There is certainly nothing to show that they relinquished any right, or did anything to estop them from claiming the offices. If the mayor and common council had offered to restore them to their positions, and they had refused such restoration, there would be grounds upon which to claim an estoppel, but, as the case stood, I am unable to discover that there was any such ground.

But the respondent's counsel contends that the mayor and council had the right to remove appellant and his assignors from the offices held by them without cause, or having to state cause, in the order of removal; that such office belongs to the class provided for in section 2, art. 15, of the constitution of the state, and is to "be held during the pleasure of the authority making the appointment." It is questionable who "the authority making the appointment" is in this case. The authority itself is derived from the legislative department of the state, and the mayor and common council are restricted in the manner of its exercise; and the question is, whose pleasure is to be consulted,—the legislative, or the mayor and common council? The latter are intrusted with the appointment, but the authority emanates from the former, and it has expressed its pleasure by requiring the mode in question to be pursued when the authority is exercised. The mayor and common council are mere agents in the matter, and I think, beyond question, are subject to any restrictions their principal may deem proper to impose. I cannot see that the authority to remove or suspend policemen could have been exercised without a special cause, which was required to be stated in the order of removal or suspension. The provision is a salutary measure, and should be observed with strictness.

It looks very much to me as though the public confidence was abused in the transaction, and that the appellant and his assignors were shamefully trifled with; but it occurs to my mind that they neglected to take proper steps in the matter, and have lost the remedy they could have invoked successfully. They might have commenced an action in the nature of a *quo warranto* against the

persons designated to succeed them, and been reinstated in their positions; or, probably, they might have sued out a writ of review, obtained a reversal of the action of the mayor and common council in the affair, and been restored to their positions in that way. And it was held by the court of appeals of New York in *Fitzsimmons v. City of Brooklyn*, 102 N. Y. 536, S. C. 7 N. E. Rep. 787, where a policeman of that city had been duly appointed to that office, and entered upon the performance of his duties, was attempted to be removed by the police commissioners, and upon *certiorari* the order of removal was reversed, and he was restored to his office, that he could recover against the city his salary which accrued between the time of the order of removal and the restoration, and without any abatement on account of earnings realized from his former trade, resumed during the interim. Under that decision these parties could possibly have recovered their salaries after a successful prosecution of a writ of review. I cannot, however, believe that they can maintain an action therefor while other parties occupy their places, have qualified as policemen, and are recognized by the city government as such. It seems very evident to me that their right to the office would have to be judicially determined in a proper proceeding, before such an action could be sustained.

The appellant's counsel have cited a number of authorities to show that an action of the character of the one in question can be maintained; but not one of them, as I can discover, was in a case where the plaintiff had been put out of the office, and another person been formally installed, and in the discharge of the duties thereof, unless there had been an adjudication in a direct proceeding declaring him lawfully entitled to it, and the incumbent a usurper.

The appellant's counsel claim that the salary is attached to the office, which is true. It is an incident to the office, and does not depend upon contract. It is fixed by law. But it does not follow that the title to the office can be tried in a collateral action. Dillon, in his work on Municipal Corporations, (3d Ed.,) says, in section 831: "Thus the salary or fees of an officer of a municipal or public corporation may, like other debts, be recovered by an action at law against the corporation. This, ordinarily, is the remedy, and not *mandamus*; but, if the officer cannot sue the corporation, he may, where entitled, compel payment by means of this writ, unless another is in possession under color of right; in which case the title to the office cannot, ordinarily, be determined on *mandamus*, or in any collateral proceeding."

It may be said that the action of the mayor and common council in the premises was a flagrant violation of the law, and of the rights of these officials; but, nevertheless, other persons were nominated in their places, confirmed by the common council, took the oath, were regularly inducted into their places, and became officers *de facto* in their stead. The title to the office necessarily had to be tried as preliminary to the right of action which could have been brought in the lowest court of the state having civil jurisdiction. The parties ousted could, as their salaries accrued, monthly, have sued therefor in justice's court, whose jurisdiction to try the title to the office would have to be conceded, the same as that of the circuit court, under the same form of action, not only in cases where the question as to the title to the office is a simple one, but where it is complicated and doubtful. Courts will not entertain a case in favor of a party to recover for the use and occupation of real property against one who is in possession thereof adversely, but remit such party to his remedy by ejectment; and, I think, there would be less reason for entertaining a case of the character of the one in question than in that referred to. To allow an officer in such a case to remain wholly passive for a term of years, and then bring an action, and recover the amount of his salary, which had been all the time accumulating, without attempting to dispossess the incumbent, would result in a pernicious practice, and tend to overturn a well-established rule of law, regarding the trial of the right to an office. No pre-

edent for such a course has been furnished. It has long been a mooted question whether the payment of a salary, or fees and emoluments, of an office, to a *de facto* incumbent, would exonerate the government, or political body, from the payment thereof to the *de jure* officer. Numerous authorities have been cited upon both sides of that question, though it is not before the court, as the case stands. Those cited by the respondent's counsel go, in the main, to show that it will not. They maintain that the compensation is attached to the office, and carry it out to its logical sequence by holding that the salary must be paid to the *de jure* officer, while the ones which maintain the contrary doctrine generally concede that the salary is attached to the office,—yet hold that the disbursing officer is not compelled to look beyond the certificate of election or appointment of the person who is in the discharge of the duties, and that payment to such person discharges the obligation of the political body in regard to the matter; but neither class of cases sanctions the right of the *de jure* officer to recover the salary, while out of possession of the office, until he obtain a determination of a competent tribunal in favor of his title, in a direct proceeding instituted for that purpose.

Dorsey v. Smyth, 28 Cal. 21, one of the cases cited by the respondent's counsel, was an application for a mandate to compel the county auditor of Tuolumne county, California, to audit and allow the salary of the relator as district attorney of said county. He had been kept out of the office by an intruder, who held it under color of office. The court granted the writ, but, before the application was made, the relator had instituted a contest for the office against the incumbent, and had obtained a decision of the supreme court of that state that he was entitled to it of right.

Douglass v. State, 81 Ind. 429, another of the cases, was a direct proceeding under the statute of the state of Indiana, upon the relation of Wight, against Douglass, in which the latter was charged with having usurped the office of auditor of Harrison county, in that state. It was to try the title to the office, and recover the fees and emoluments thereof, as incidental to the proceeding.

City of Philadelphia v. Rink, 2 Atl. Rep. 505, another of the cases, was an action brought by Rink against the city to recover his salary as magistrate thereof. One Barr had intruded into the office, and held it for some time under color of office. Rink was allowed to recover for the full time, but, before the action was commenced, his right to the office had been determined by the supreme court of Pennsylvania in a direct proceeding instituted for that purpose.

Carroll v. Liebenthaler, 87 Cal. 193, another of the cases, was a *mandamus* upon the relation of Carroll to compel the board of supervisors of Amador county, to allow his salary as supervisor of a district of that county to which one Ingalls had been declared elected, and for some time had held the office. The writ was allowed, but Carroll had commenced the suit to try the right to the office, and had obtained a decision in his favor, before the *mandamus* proceedings were begun.

People v. Potter, 63 Cal. 127; *Meagher v. County of Storey*, 5 Nev. 196; *Matthews v. Supervisors of Copiah Co.*, 24 Amer. Rep. 715; and *City of Philadelphia v. Given*, 60 Pa. St. 186,—four other of said cases,—merely hold that a *de facto* officer cannot recover compensation for services while occupying the office, a point upon which none of the authorities disagree, as I am aware of.

Mayor, etc., of Memphis v. Woodward, 12 Heisk. 499, another of the cases, was a suit by the latter party against the former to recover a salary as physician to the city hospital, an office created by law for said city. Woodward had been chosen to the office, and the mayor went in company with him to Lynch, the former physician, to turn over the office to Woodward. Lynch asked for time in which to arrange his affairs, and, it having been granted

him, he employed it in suing out an injunction to restrain the mayor and Woodward from interfering with him in the enjoyment of the office. The chancellor perpetuated the injunction, but the supreme court of the state dissolved it, and held that Woodward was entitled to the office, and the suit for the salary was not commenced until after that decision was rendered. Under the circumstances, a recovery was had in favor of Woodward for the salary during the time he was deprived of the office.

Mayor, etc., of Macon v. Hays, 25 Ga. 590, another of the cases, was an action to recover compensation as city marshal. That case was tried several times, and will be found reported in 19 Ga. 468, and 21 Ga. 280; and whether it has ever yet been determined or not I am not advised. The right to institute such an action was conceded, although the marshal had been removed from the office by the mayor and common council of the city; but he had, before its commencement, obtained a judgment of the supreme court of the state quashing their proceedings in the matter.

Dolan v. Mayor, 68 N. Y. 274, another of the cases referred to, was an action to recover a salary as assistant clerk of the district court for the Sixth judicial district, in the city of New York, and the plaintiff was allowed to recover for a portion of time during which he had been excluded from the office by another party who was holding under color of office, but not for any portion of the time covered by payment to the *de facto* officer; nor was the action to recover the salary commenced until after judgment of ouster was obtained against the incumbent in *quo warranto* proceedings.

Bryan v. Cattell, 15 Iowa, 538, is also cited by the respondent's counsel. That was a proceeding by *mandamus* to compel the auditor of the state of Iowa to issue to the plaintiff in the proceedings warrants on the state treasurer for the salary of the plaintiff as district attorney for the Fifth judicial district of said state, claimed to be due him for the quarter ending the first days of April, July, and October, 1862. The plaintiff had been duly elected to said office for the term of four years from the first day of January, 1859; but in July, 1861, he was commissioned a captain in the volunteer service of the United States for three years, or during the war; was mustered into the service, and so continued until after the *mandamus* proceeding was instituted. The auditor refused to issue the warrants upon the ground that the plaintiff was absent from the state during the whole period for which he claimed the emoluments of the office; and it was contended that he forfeited his office by engaging in a service incompatible with its duties. The court held that the plaintiff did not, by his enlistment in the service, forfeit his office, and that the salary was attached to it, and allowed the writ. It does not appear that any attempt was made to appoint another person to the office during the plaintiff's absence, or that there was any contest regarding it. The only question the court had to decide in the case was whether the plaintiff's engagement in the military service, under the circumstances, operated *ipso facto* as a forfeiture of it; and, when it was determined that it did not, the court had no alternative but to decide that he was entitled to the salary.

None of the cases referred to indicate that an action to recover the salary of an office could be maintained while occupied by a *de facto* officer, until the right to the office has been determined by a proper adjudication. Such a determination could not properly be had in this case, as it would determine the rights of parties not before the court. It would be a determination that the incumbents who succeeded the appellant and his assignors were intruders and usurpers when they are not before the court. Upon this ground the appellant was not entitled to recover, and the circuit court should have dismissed the complaint, instead of trying the case upon the merits. To that extent the judgment appealed from will be modified. Costs will not be allowed to either party upon this appeal.

(14 Or. 285)

RUTHERFORD v. THOMPSON.

(Supreme Court of Oregon. December 6, 1886.)

TROVER AND CONVERSION—FOR WHAT AND WHEN IT LIES—ACTION BY PERSONAL REPRESENTATIVE.

When, in an action of trover brought by the executrix of a decedent to recover damages for the conversion of personal property belonging to the estate, the evidence shows that the property came to the hands of defendant, by direction of plaintiff, to be sold by him, and that he sold the same, and applied the proceeds to the payment of debts of the deceased, it cannot be said that he has converted the property to his own use, but to the use and benefit of the estate.

Action to recover damages for the conversion of certain personal property. Judgment for plaintiff. Defendant appeals.

W. H. Adams, for appellant. *C. P. Heald*, for respondent.

LORD, C. J. This action was brought by the plaintiff, as administratrix of the estate of John Rutherford, deceased, to recover damages for the conversion of personal property belonging to the estate. The complaint, in substance, alleges that the defendant took possession of a stock of unfinished buggies and materials, the property of John Rutherford, after his death, and disposed of a part of them. The defendant, Thompson, after denying the conversion, alleges, in effect, that, after the death of Rutherford, the plaintiff, who is the widow of the decedent, delivered the property to one J. W. Swartz, as her agent, to manufacture into buggies, and to sell the same for her, and that said Swartz delivered a part of said property to the defendant to be sold, and that he did sell the same, and applied the money to the payment of the debts of the deceased; setting forth the amounts and names of the parties to whom paid, etc. Issue being joined as to this, a trial was had, which resulted in a verdict for the plaintiff.

The error alleged, as disclosed by the bill of exceptions, is the refusal of the court to allow the defendant to show what he did with the money received by him as proceeds of the sale of the property of Rutherford, deceased, and in the giving this instruction: "It makes no difference what the agreement was between defendants, or any of them, and Mrs. Rutherford, widow of John Rutherford, deceased, about the property in question. Defendant, R. H. Thompson, is liable for the value of the property which you believe from the evidence he took possession of and sold, if any; and your verdict must be for the value of the property so converted, if any has been converted by him;" and in the refusal to give certain instructions asked, which it is not necessary to consider, unless the exceptions noted are error.

It is thus seen by the pleadings and the error assigned that the defendant, Thompson, sought to justify his intermeddling with the property on the ground that what he did was done by the direction of the widow or the plaintiff, and was, in fact, her act; and that he had a right to discharge himself by proving debts paid to the amount of the goods or property received which had belonged to the deceased. The court, evidently, thought that it was immaterial whether he had done these things or not. They constitute no defense, and could not be shown in mitigation of damages. It was formerly considered that, if an individual interfered with the property of the deceased, he thereby made himself an executor in his own wrong, or, as it is generally termed, an executor *de son tort*. 2 Bl. Comm. 507; Bac. Abr. tit. "Executors," B; 3 Schouler, Ex'rs, § 184. But this rule has been much modified, if not abolished, by the statute. It is now enacted that "no person is liable, as an executor of his own wrong, for having taken, received, or interfered with property of the deceased, but is responsible to his executors or administrators of such deceased persons for the value of such property so taken and received, and for all injury caused by his interference with the estate." Code, § 371. This provision is almost

identical with the New York statute on the same subject. The only difference, if, in effect, it may be called a difference, is that the provision in the New York statute reads, "But shall be responsible *as a wrong-doer* to an action," etc. As a consequence, it has been held in that state that the office of executor *de son tort* has been abolished, and that an action cannot be maintained against any person in the character of an executor *de son tort*. *Babcock v. Booth*, 2 Hill, 185; *Vermilya v. Beatty*, 6 Barb. 431; *Metcalf v. Clark*, 41 Barb. 49; *Field v. Gibson*, 20 Hun, 276.

Our provision is equally as explicit in the first part of the section—that "no person shall be liable as an executor of his own wrong"—as the New York provision; and it is not of much consequence, as between such person and the rightful executor or administrator, that he be regarded as an executor *de son tort* or as a wrong-doer. It is enough that whoever intermeddles with an estate, without rightful authority so to do, is responsible to account with only the rightful executor or administrator. But the effect of the enactment of this provision produced some important consequences. It took away the remedy the creditor before had to charge the intermeddler as an executor *de son tort*. He can no longer proceed against him in that character, but must procure the appointment of an administrator, and have suit instituted in his name to recover the property from such person who has converted it to his own use. In a word, he is now sent to the rightful representative of the estate, and cannot pursue his action against an executor *de son tort*. The rightful executor or administrator is constituted the trustee of the assets of the deceased, whose duty it is to recover and hold them in his hands as a fund to be disposed of in the best manner for the benefit of creditors. The person who intermeddles with the goods of the deceased is now only responsible to answer in an action to the rightful executor or administrator; and, whether we consider the intermeddler as an executor *de son tort* or as a wrong-doer, the liability to respond to the rightful executor or administrator is the same, and unaffected, and the law unchanged. The fiction of office may be gone, but the unauthorized act of intermeddling remains, to be dealt with judicially, according to the principles of right and justice as applied by the law in such cases.

Now, from the fact that the intermeddler with the goods of a deceased is only liable to respond to the rightful executor or administrator for the value of the goods, etc., it by no means follows, if what he did was of benefit, and not injury, to the estate, as the payment of funeral expenses, or debts of the deceased, or charges such as the rightful representative might have been compelled to pay, he would not be allowed to show the same in mitigation of damages in an action of trover instituted by such executor or administrator. In thus compelling him to account with only the rightful representative, the statute does not purport or undertake to deprive him of any proper or legitimate defense. The title of executor *de son tort* may be repudiated, but the justice of the law will remain, to distinguish between acts which are beneficial and those which are injurious to an estate. As Mr. Schouler has aptly said: "Aside from all fictions of an executorship *de son tort*, the rational consequence of acting without authority in an estate must be that the acts shall be judicially treated with reference to their beneficial or injurious character to the estate, as also to the situation and motives of the person whose conduct towards it is considered." Schouler, Ex'rs, § 188.

Between the acts of conversion alleged, which occurred shortly after the death of John Rutherford, and the granting of letters of administration to the plaintiff, some three or four years elapsed. The stock of unfinished buggy material constituted about all the property of the decedent, and the letters were undoubtedly taken out to hold the defendant, Thompson, responsible for the value, to the extent in which he was concerned. But if it be true that a part of the property as manufactured came into his hands by direction

of the plaintiff, to be sold by him, and he did sell the same, and apply the proceeds to the payment of debts of the deceased, it cannot be said that he has converted the property to his own use, but to the use and benefit of the estate of the decedent, or of the plaintiff in the fiduciary character in which she now sues. Upon the hypothesis that what the defendant did in the matter was done at the instigation and by the direction of the widow, as claimed and argued, it is doubtful whether such facts would be sufficient to constitute the defendant an executor *de son tort*, as understood and applied at common law. To fix that character, the act of intermeddling must be such as to manifest a right to control and make disposition of the effects of the deceased. Merely acting as the agent or servant of another, and doing what was done by the procurement and direction of the plaintiff, would not be enough to render a person liable as an executor *de son tort*. The law considers them as her acts, and they as her agent. *Giles v. Churchill*, 5 N. H. 341; *Magner v. Ryan*, 19 Mo. 197; *Givens v. Higgins*, 4 McCord, 286. "In this case," said PERKINS, J., "if the defendant had not converted the goods to his own use, but to the use of the plaintiff, she had not been damaged in the amount of the value of such conversion." *Reagan v. Long*, 21 Ind. 264. Nor do we think, upon this assumption, that it would make a person liable. To sustain the action of trover there must be a conversion. But if this be considered doubtful, the acts complained of must be treated with reference to their beneficial or injurious character. To deprive the defendant, under the facts, of the right to give such payment in evidence, in mitigation of damages, would certainly be rank injustice. If they are debts which the rightful representative would be bound to pay in due course of administration, they create an equity against the estate; they are not injurious, but must be considered as beneficial, making it competent for the defendant to give such payments in evidence which operated by way of recoupment. At common law, where the rightful executor or administrator sues the executor *de son tort*, if the action "be trover for the goods of the deceased, the defendant," said HOLT, C. J., "cannot plead payment of debts to the value, or that he has given the goods in satisfaction of the debts; but, on the general issue pleaded, he may give in evidence such payments, and they will be *recouped* in damages," if they be such as the plaintiff would have been bound to make, or, in the language of some of the books, made in due course of administration. *Whitball v. Squire*, Carth. 104; Bul. N. P. 48; 2 Bl. Comm. 507; *Mountford v. Gibson*, 4 East, 441; *Parker v. Kett*, 12 Mod. 471.

These principles of the law we believe still to be applicable in determining the liability of the defendant to the plaintiff as administratrix; that in such action it is not material whether the defendant be treated as an executor *de son tort* or a wrong-doer,—the liability, in either case, to account to the executor or administrator, is the consequence of the same act, and is the same, and must be governed by the same principles of legal justice; and, finally, that the justice of the law remains unaffected, to be applied and administered accordingly as the defendant has injuriously or beneficially acted with reference to the estate.

As to the last objection, the court will reserve its judgment until better advised.

The judgment is reversed, and a new trial ordered.

(14 Or. 254)

WOOD v. RIDDLE.

(Supreme Court of Oregon. December 6, 1886.)

INTOXICATING LIQUORS, SALE OF—LICENSE—REMONSTRANCE—REVIEW—PARTIES—CORPORATION GRANTING.

Where remonstrants against the granting of a license to sell spirituous liquors bring a writ of review, the county or other public corporation granting the license must be made a party.

Appeal from circuit court, Douglas county.

Writ of review.

W. R. Willis, for appellant. *J. C. Fullerton*, for respondent.

STRAHAN, J. The respondent applied to the county court of Douglas county for a license to sell spirituous liquors by retail. The appellant, with others, remonstrated. License was granted, and appellant procured a writ of review. Upon a hearing in the circuit court the writ was dismissed, from which judgment this appeal is taken. Douglas county is not a party to this proceeding, and for that reason it is fatally defective. The county court, representing the county, granted the license, and the county received the money. In all analogous cases in this state, from *Thompson v. Multnomah Co.*, 2 Or. 34, to *Pruden v. Grant Co.*, 12 Or. 308, S. C. 7 Pac. Rep. 308, the county or other public corporation whose acts are to be reviewed must be a defendant, and must have the privilege of being heard before its acts can be annulled on writ of review. *Simon v. Portland Common Council*, 9 Or. 437; *Worcester & N. R. Co. v. Railroad Com'rs*, 118 Mass. 561; *Crawford v. Township Board*, 22 Mich. 405.

For this reason the court below did not err in dismissing said writ, and its judgment is affirmed.

(70 Cal. 482)

HEILBRON and others v. HEINLEN. (No. 11,433.)

(Supreme Court of California. August 27, 1886.)

1. ANIMALS—TRESPASS BY—LIMITATION OF ACTION—CALIFORNIA ACT FEBRUARY 4, 1874, § 8.

The eighth section of the California act of February 4, 1874, entitled "An act to protect agriculture, and to prevent the trespassing of animals upon private property in Fresno and other counties in California," does not limit the right of a plaintiff suing for damages for the trespass of animals upon his land to the 60 days limited in that statute; but, where the complaint is not expressly brought under that statute, plaintiff may commence action for such trespass at any time within three years from the date of the trespass.

2. NEW TRIAL—MOTION FOR—NOTICE OF INTENTION TO MOVE—DISMISSAL.

Where, in an action for trespass, plaintiffs except to the ruling of the court refusing to admit certain evidence, and judgment is given for defendant, and plaintiffs file their bill of exceptions, of which defendant accepts service, and file their notice of intention to move to set aside the judgment, and for a new trial, of which defendant accepts service, and plaintiffs do not call up their motion till 20 months have elapsed, the court is not justified in dismissing plaintiffs' notice of intention to move for a new trial.

Department 1. Appeal from superior court, Fresno county.

Action to recover damages for the trespass of the defendant's cattle on plaintiffs' lands. At the trial, in January, plaintiffs' attorneys offered testimony to prove the trespass within two years prior to the commencement of the action. Defendant objected to any testimony showing any trespass for a period more than 60 days prior to the commencement of the action, on the ground that by the California act passed February 4, 1874, § 8, relative to trespass of animals in Fresno and other counties in California, plaintiffs' recovery was limited to trespass committed within 60 days next before the filing of the complaint. The court sustained the objection, and refused to al-

low plaintiffs to show any trespass taking place prior to the period so limited by the statute; to which ruling plaintiffs duly excepted. After the conclusion of plaintiffs' evidence the defendant declined to introduce any evidence, and the jury, after being instructed by the court, returned a verdict for defendant, and the court gave judgment in his favor. Plaintiffs filed notice of intention to move for an order setting aside the judgment, and for a new trial, service of which was accepted by defendant's attorneys, February 4, 1884. Plaintiffs made up their bill of exceptions, specifying as errors the exclusion of evidence as to any trespass prior to the 60 days before the commencement of the action, service of which was accepted by defendant's attorneys, February 12, 1884. On October 7, 1885, defendant, on notice, moved to dismiss plaintiffs' notice of intention to move for a new trial, whereupon plaintiffs called up their motion for a new trial. The court granted defendant's motion to strike out plaintiffs' notice of intention to move for a new trial, and denied plaintiffs' motion for a new trial. The plaintiffs appeal.

Ferry & Ferry, for appellants. *G. A. Heinlen and Sayle & Harris*, for respondent.

MYRICK, J. Judgment was entered in favor of defendant, January 30, 1884. Plaintiffs gave notice of intention to move for a new trial, the motion to be made on bill of exceptions. The bill was served February 12, and settled April 24, 1884. Nothing further was done in the case until October 7, 1885, when the defendant, on notice, moved the court to dismiss plaintiffs' notice of intention, on the grounds, among others, of negligence and delay on the part of plaintiffs in not prosecuting the intention to move for a new trial, and that the same had been abandoned by lapse of time. On the same day plaintiffs submitted their motion for a new trial. On the twenty-second of October, 1885, the court granted defendant's motion to strike out plaintiffs' notice of intention, and denied the motion for new trial. From this order an appeal was taken.

Whatever would have been within the discretion of the court in ruling on a motion (if made) to dismiss the plaintiffs' motion for a new trial, on the ground of laches or failure to prosecute, the court was not justified in striking out their notice of intention. The motion for a new trial should have been granted, on the authority of *Trescony v. Brandenstein*, 6 Pac. Rep. 384. The court erred in confining the proof by plaintiffs of trespasses committed by defendant's cattle to the period of 60 days next preceding the commencement of the action.

The appeal from the judgment has been heretofore dismissed, because not taken in time. The order appealed from—viz., the order granting defendant's motion to strike out plaintiffs' notice of intention, and denying plaintiffs' motion for new trial—is reversed, and the cause is remanded.

We concur: MORRISON, C. J.; MCKINSTRY, J.

(2 Cal. Unrep. 692)

ARNOT and others v. BAIRD. (No. 11,200.)

(*Supreme Court of California*. August 27, 1886.)

MORTGAGE—FORECLOSURE—PLEADING—EXECUTION AND DELIVERY OF NOTES—ABSOLUTE DEED.

In an action to declare a deed absolute in form a mortgage, and sell the property conveyed thereby to satisfy certain notes described in the complaint, where the complaint states that the notes were made payable to parties named, and that a subsequent deed of trust reciting the former deed was made to secure the payment of the amount thereof, and the deed, which is set out in the complaint, states that it was given to secure the payment thereof, the allegations as to the making and delivery of the notes are sufficient to sustain a decree of foreclosure and sale.¹

¹See note at end of case.

Department 1. Appeal from superior court, Sierre county.

Action to have an absolute deed declared a mortgage, and have the property sold to satisfy certain notes described in the complaint.

Van Cleef & Wehe, for respondents, Arnol and others. *Cross & Simonds*, for appellant, Baird.

BY THE COURT. Appeal from judgment. If the recital of facts contained in the decree is not to be treated as a finding of facts, it will be deemed that findings were waived. If the recital is to be treated as a finding of facts, the facts were therein sufficiently found to sustain the decree. There is no bill of exceptions; and it does not in any manner appear that findings of fact were not waived. It may be that findings were waived, and therefore the statement of facts in the decree may be treated as a useless statement. If findings were waived, the stateinent of facts in the decree would not necessarily show error.

The complaint states that the notes were made by the defendant, and were made to the parties respectively; and that the deed of trust was made to secure the payment of the amounts thereof; also the deed of trust (set out in the complaint) states that it was given to secure the payment of the amounts of the various notes. We think there are sufficient allegations as to the making and delivery of the notes. *Hook v. White*. 36 Cal. 300.

Judgment affirmed.

NOTE.

MORTGAGE—ABSOLUTE DEED. As to the facts necessary to render an absolute conveyance a mortgage, see *Buse v. Page*, (Minn.) 19 N. W. Rep. 736; S. C. 20 N. W. Rep. 95.

As to evidence sufficient to establish such facts, see *Jackson v. Lawrence*, 6 Sup. Ct. Rep. 915; *McMillan v. Bissell*, (Mich.) 29 N. W. Rep. 737; *Allen v. Fogg*, (Iowa,) 23 N. W. Rep. 643; *Manufacturers' Bank of Milwaukee v. Ruege*, (Wis.) 18 N. W. Rep. 251; *Madigan v. Mead*, (Minn.) 16 N. W. Rep. 539; *Hurst v. Beaver*, (Mich.) 16 N. W. Rep. 165; *Rockwell v. Humphrey*, (Wis.) 15 N. W. Rep. 394; *Ingalls v. Atwood*, (Iowa,) 5 N. W. Rep. 160; *Bailey v. Bailey*, (Ill.) 4 N. E. Rep. 394; *Workman v. Greening*, (Ill.) 4 N. E. Rep. 385; facts insufficient, *Cadman v. Peter*, 6 Sup. Ct. Rep. 957; S. C. 12 Fed. Rep. 363; *Coyle v. Davis*, 6 Sup. Ct. Rep. 314; *Parish v. Reeve*, (Wis.) 23 N. W. Rep. 568; *Tilden v. Streeter*, (Mich.) 8 N. W. Rep. 502; *Smith v. Crosby*, (Wis.) 2 N. W. Rep. 104; *Butler v. Butler*, (Wis.) 1 N. W. Rep. 70; *Pioneer Min. Co. v. Baker*, 23 Fed. Rep. 258; S. C. 20 Fed. Rep. 4; *Null v. Fries*, (Pa.) 1 Atl. Rep. 551; *Greig v. Russell*, (Ill.) 4 N. E. Rep. 780; *Freer v. Lake*, (Ill.) 4 N. E. Rep. 512.

(2 Cal. Unrep. 695)

WEIDEKIND v. TUOLUMNE CO. WATER Co. (No. 11,446.)

(Supreme Court of California. August 31, 1886.)

WATERS AND WATER-COURSES—NEGLIGENCE OF WATER COMPANY IN REPAIRING DAM.

The evidence in this case failed to show that defendant, a water company, had not used proper care in repairing its dam, the breaking of which injured plaintiff's mining claim, and washed away his tools; and the judgment in plaintiff's favor for damages was reversed, and a new trial ordered.

Department 2. Appeal from superior court, Tuolumne county.

Action against a water company to recover damages for the filling up plaintiff's mining claim, and the washing away of his tools, etc., by the breaking of the company's dam, owing to its negligence in not keeping it in proper repair. Verdict and judgment for plaintiff. Defendant appeals.

Frank W. Street, for appellant. *E. A. Rodgers*, for respondent.

BY THE COURT. The verdict is not sustained by the evidence. The instructions given show no error.

Judgment and order reversed, and cause remanded for a new trial.

(2 Cal. Unrep. 704)

STATE v. FOLSOM WATER CO. (No. 11,174.)

(Supreme Court of California. September 15, 1886.)

DEED—CONSTRUCTION—CONDITION—CANAL—WATER COMPANY.

Deed construed, and held not to impose on defendant water company the obligation to complete a certain canal named therein.

Department 1. Appeal from superior court, Sacramento county.

Action by the state of California to compel the Folsom Water Company, as assignee of the Natoma Water & Mining Company, to construct a certain canal according to the terms and conditions of a deed executed by the latter company to the state, in words as follows:

"This indenture, made this thirtieth day of June, Anno Domini eighteen hundred and sixty-eight, between the Natoma Water & Mining Company, a corporation, duly incorporated under and by virtue of the laws of the state of California, and having its principal place of business in the village of Folsom, in said state, party of the first part, and the state of California, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States, to it in hand paid by the second party, receipt whereof is hereby acknowledged, and in further consideration of fifteen thousand dollars (\$15,000) in convict labor, rated at fifty cents *per diem*, to be furnished to said first party in aid of its water-power canal enterprise, by said party of the second part, but only at the convenience of the state, and whenever it may be deemed advisable and judicious by the board of state prison directors of said state, has granted, bargained, sold, conveyed, and confirmed, and by these presents does grant, bargain, sell, convey, and confirm, unto the said state of California, forever, all that certain piece or parcel of land situate, lying, and being in Granite township, Sacramento county, state of California, and being a portion of the larger tract patented by the United States government under the name of 'Rancho Rio de los Americanos;' the portion thereof herein conveyed being particularly and specifically described as follows, to-wit: Beginning at a point on the east boundary line of said *rancho*, fifteen feet from where said line, projected northwardly, intersects the American river at high-water mark; thence, along said east boundary of said *rancho*, south seventy-five (75) chains and fifty (50) links, to a point; thence, at a right angle west, to a point within ten feet of the eastern line of the water canal of the Natoma Water & Mining Company, which said canal is near the eastern bank of the American river; thence northerly, along said canal and ten feet from the eastern line thereof, to a point ten feet above the dam across said American river constructed by and belonging to said Natoma Water & Mining Company; thence, at a right angle westerly, to a point fifteen (15) feet above the American river at high-water mark; thence, along said river, north-easterly, following its meanderings on a line fifteen feet above high-water mark, to the place of beginning,—containing three hundred and fifty (350) acres of land; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, with the timber standing thereon, and the granite quarries contained therein, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the above-described premises, and every part and parcel thereof, with the appurtenances; also the exclusive right forever to the use of the first fall five feet perpendicular of the whole water of the canal at the upper end of that place on the canal known as 'Prison Yard,' with all rights, privileges, and easements necessary for the taking and enjoyment of power from said fall; it being understood that the said party of the first part reserves

to itself the subsequent power resulting from the flow of water in said canal after the first fall as aforesaid, and that this instrument is not to be construed as granting unto said state the right to divert said water, or any material quantity thereof, permanently from said canal. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said state of California, forever. And the said party of the first part warrants the said premises to be free from all and every incumbrance of any kind, character, or description, and against any and all incumbrances now existing upon said premises, created or suffered by said party, or by any other party, will forever warrant and defend. But, in accordance with the resolutions upon the branch state prison location passed by the board of state prison directors on the eighteenth day of June, A. D. 1868, the above grant of water-power is upon condition always that said board of state prison directors do furnish and supply, at such times and in such manner as it may deem advisable and judicious, fifteen thousand dollars in convict labor, rated at fifty cents *per diem* for each convict employed, unto said first party, in aid and construction of its water-power canal and adjuncts now partially completed along the western line of the lands heretofore described, or so much of the same as may suffice for the completion of dam and canal down to the point of delivering the said water-power, at the upper part of prison yard, as already mentioned.

"In witness whereof, the president and secretary of the said Natoma Water & Mining Company, acting for said company under and by virtue of a resolution passed by the board of trustees of said company, at a regular meeting thereof holden at Folsom on the thirtieth day of April, A. D. eighteen hundred and sixty-eight, which said resolution is in the following words, to-wit: 'Resolved, that the committee on prison site be also authorized to make all arrangements with the board of state prison directors for the location of a branch prison upon the company's property; and the president and secretary are hereby empowered and directed to execute, on behalf of this company, any and all deeds and agreements to and with said board of state prison directors on behalf of the state of California, as shall be agreed to between the said board and this company's committee on prison site,'—which resolution still stands as an order of said board of trustees upon the books of said company, unrevoked and unrepealed,—have hereunto set their hands and seals, the said Natoma Water & Mining Company having no corporation seal, on the day and year first above written.

"The word 'Rio' is interlined between the fourth and fifth lines of the second page, before signing.

[Seal.]

"HORATIO G. LIVERMORE,

"President of the Natoma Water & Mining Co.

[Seal.]

"ROGER S. DAY,

"Secretary of the Natoma Water & Mining Co."

Defendant demurred to the complaint; and, the demurrer being sustained, the state appealed.

E. C. Marshall, Atty. Gen., and *W. B. Treadwell*, for appellant. *A. P. Catlin*, for respondent.

BY THE COURT. We are of opinion that the deed from the Natoma Water & Mining Company to the state did not impose an obligation upon the company to proceed to the completion of the canal. Therefore the ruling of the court below on the demurrer was correct. Judgment affirmed.

(71 Cal. 113)

In re LUKES. (No. 9,468.)

(Supreme Court of California. September 27, 1886.)

INSOLVENCY—DISCHARGE—BOOKS OF ACCOUNT—CALIFORNIA ACT OF APRIL 16, 1880.

In section 49 of the California act of April 16, 1880, prohibiting the discharge of an insolvent merchant or tradesman who has not kept proper books of account, the words "subsequently to the passage of this act" are a limitation upon the general prohibition of the discharge of a merchant or tradesman who has not kept proper books of account, and authorize the discharge of a merchant or tradesman who was engaged in business as such, but who did not keep proper books, prior to the date referred to.

Department 1. Appeal from superior court, Santa Cruz county

Ferdinand J. McCann, (Tyler & Tyler and Underwood McCann, of counsel,) for appellant. Lesser & Hall and J. M. Lesser, for respondent.

MCKINSTRY, J. The motion to dismiss the appeal has been heretofore denied. Oppositions were filed to the discharge of Luke Lukes from his debts under the insolvent law. The issues made by the oppositions, and the answers thereto, were submitted to a jury, who found against the opponents upon all the issues submitted save one.

Among the objections to the discharge was this: "That said Luke Lukes, being a merchant and tradesman, did not, since the sixteenth June, 1880, keep proper books of account." The petitioner denied in his answer that "since the sixteenth day of June, 1888, he did not keep proper books of account," and averred that "he kept proper books of account during all the time he was engaged in business." The jury found that Luke Lukes had not kept proper books of account "since the sixteenth of June, 1880." The petition for discharge alleges that "your petitioner is, and for more than six months next preceding the filing of this petition has been, a resident of the county," etc., "and has since the twentieth day of July, 1881, been engaged in the business of milling and manufacturing flour at the county of Santa Cruz," etc. The petition was filed January, 1883.

Section 49 of the act of April 16, 1880, provides: "No discharge shall be granted * * * if the debtor, * * * being a merchant or tradesman, has not subsequently to the passage of this act, kept proper books of account." It is manifest that the clause relates to merchants or tradesmen. The words "subsequently to the passage of this act" are a limitation upon the general prohibition of the discharge of a merchant or tradesman who has not kept proper books, and authorize the discharge of a merchant or tradesman who was engaged in business as such, but who did not keep proper books, prior to the date referred to.

There is nothing in the case tending to show that the petitioner was a merchant or tradesman, or that he was engaged in any business prior to July 20, 1881, and the uncontradicted testimony proved that he had been engaged in "milling grain, and selling the products thereof," since that date. There was no express finding that he had ever been a "merchant or tradesman." When the issues to be submitted to the jury were being settled, the petitioner asked the court to submit the issue, "Did Luke Lukes keep proper books of account since the twentieth day of July, 1881?" But the court adopted—and the same was subsequently submitted to the jury—the issue, "Did Luke Lukes keep proper books of account since the sixteenth day of June, 1880?" the same being the date when the insolvent law took effect. The petitioner objected to the settlement and submission of the issue last recited, upon the grounds—*First*, that the time specified is not within any of the issues made by the pleadings herein; *second*, that the same is immaterial. The court overruled the objections, and petitioner duly excepted.

If it be conceded that the petitioner was a "merchant or tradesman" from and after the date when he commenced the business of milling and selling

flour and other products of the mill, the court below erred in submitting the issue to the jury; and, as the judgment refusing the discharge was based on the special verdict of the jury, the judgment is erroneous. As the case was presented, it was immaterial whether the petitioner kept any books prior to July 20, 1881. For aught that appears from the findings of the jury, he kept proper books after that date.

Judgment reversed, and cause remanded for further proceedings.

We concur: MYRICK, J.; Ross, J.

(71 Cal. 149)

TAIT v. HALL. (No. 11,259.)

(*Supreme Court of California. September 28, 1886.*)

1. APPEAL—EVIDENCE CONFLICTING—FINDINGS.

Where there is a substantial conflict in the testimony, the supreme court will not disturb the findings of the trial court.

2. EVIDENCE—RES GESTÆ—DECLARATIONS AS TO INTENT IN PERFORMING ACT.

The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence.

Commissioners' decision.

Department 2. Appeal from superior court, Tehama county.

Chipman & Garter, for respondent, Tait. *John F. Ellison*, for appellee, Hall.

SEARLS, C. This is an action to restrain the defendant, as road overseer of Tehama road-district, in the county of Tehama, from opening a road for public use across the land of plaintiff. The cause was tried by the court without a jury. Written findings were filed, upon which a decree was entered in favor of the plaintiff, perpetually enjoining the defendant from entering upon, laying out, constructing, opening, or keeping open a road for public use through the land of the plaintiff, which is properly described.

From this decree, and from an order denying a motion for a new trial, defendant appeals. Under the pleadings and evidence the case turned upon the question whether a strip of land 60 feet in width on the east side of the premises described in the complaint, and running across the same from north to south, was in fact a public road.

The findings on this branch of the case are as follows:

"(6) That the said strip of land, above described, has never been laid out or erected as a road or public highway by order of the board of supervisors, and has never become a public road by use or dedication by any owner of said land, or otherwise; nor has any part or portion of plaintiff's land described in his complaint in this action, and in the findings, become a public road by order of the board of supervisors, or by use or by dedication, or otherwise.

"(7) That the said defendant will carry out and perform the acts so threatened by him, unless restrained by the process of this court, and plaintiff will be irreparably injured thereby.

"(8) That A. G. Toomes, mentioned in defendant's answer, never, as owner or otherwise, on or about the year 1873, or at any other time, dedicated said strip of land, or any part thereof, to the public and for a public highway, either by spoken words of said A. G. Toomes, or by his conduct.

"(9) That the said strip of land was never accepted by the public as a highway, and the public, since 1873, or since any other date, have not traveled upon or over said strip of land, or any part thereof, or used the same continuously or at all as a public highway."

Appellant attacks these findings numbered 6, 7, 8, and 9, upon the ground that they are not supported by the evidence, and are contrary thereto.

There is a substantial conflict in the testimony, and, upon well-settled prin-

ciples, we are not at liberty to disturb the findings under such circumstances. The findings cover all the issues in the cause necessary to a determination of the case. The allegation of the answer that A. G. Toomes was the owner of the land in 1870 was wholly immaterial, except as a predicate for showing that, as such owner, he dedicated the land to the purposes of a highway; and the eighth finding negatives the fact of such dedication.

The court having found that no highway ever existed over the land, and that plaintiff was the owner thereof, the further allegation of the answer, that plaintiff built a fence thereon, and across the highway, became immaterial. Manifestly, if he owned the land, and the public had no easement in it or right to it, he could build as many fences as he chose upon it, without incurring any liability thereby. So, too, if it was never a highway, there was no right in the public to be abandoned. The question of highway or no highway was one of fact, to be passed upon as such by the court, and was properly determined as such. *Harding v. Jasper*, 14 Cal. 642.

There was no error in permitting the witness A. J. Clark to testify as to the declarations of Toomes, deceased, made while he was having the land surveyed, to the effect that he was not going to have a road on the west line of the land he was surveying. The declarations of a party while engaged in the performance of an act, and illustrating the object and intent of its performance, are admissible in evidence. The evidence was admissible in rebuttal of the declarations introduced by defendant tending to show that Toomes had said, about the same time, that he would open a road at the point indicated.

The action of the court in ruling out the testimony of the witness Healy, so far as he proposed to give *his impressions*, was proper. The witness had stated that, in surveying off the west line of the land sold to Simpson by Toomes, he had run the western boundary on a line with the east side of Second street. The witness was then asked if he knew what the object of Toomes was in making the lines thus correspond, to which he replied that he did not recollect what Toomes said about it, and then was about to give his impression as to the object. The inference to be drawn from the acts of Toomes was for the court to draw from his acts, and the impressions or opinions of the witness were not admissible as aids to the deductions to be made by the court.

We find no error in the record calling for a reversal, and are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(70 Cal. 424)

SMITH v. FURNISH. (No. 11,800.)

(Supreme Court of California. August 23, 1886.)

1. EXECUTORS AND ADMINISTRATORS—CLAIM BY MARRIED WOMAN FOR NURSING DECEASED—HOW PRESENTED.

A claim by a married woman for services rendered a decedent as nurse constitutes community property, and should be presented to the executors of the estate in the name of the husband; but when a claim, verified by the wife, is presented in her name by the husband, and rejected, a judgment in an action by husband and wife to recover for such services will not be reversed simply because the claim was not properly presented.

2. ELECTION—BEQUEST IN PAYMENT FOR SERVICES—ACTION.

Where a certain sum of money is bequeathed to a nurse by the testator in payment for her care and attention to him, an action against the estate to recover the value of such services will be considered an election not to claim the bequest, and it will not be a bar to the suit.

Department 1. Appeal from superior court, Sacramento county.

W. H. Beatty and S. C. Denson, for appellants. *Grove L. Johnson*, for respondents.

Ross, J. The plaintiff Emma L. Smith, and her co-plaintiff, A. J. Smith, are husband and wife, and as such resided together in the house of the deceased, William Hicks, during which time Mrs. Smith rendered Hicks services as nurse, for the value of which this suit was brought. It is contended, on behalf of the appellants, that the claim for the services was not properly presented to the executors of the estate of Hicks. It was verified by Mrs. Smith, and presented in her name by her husband to the executors, and by them rejected. They claim that it should have been verified by the husband, and presented in his name; that the debt due by Hicks was due to A. J. Smith; and that it is indispensable to an action upon it that a claim for the amount should have been duly presented to the executors in *his* name.

It does not admit of doubt, we think, that the amounts due for the services rendered constituted community property. It is provided by section 162 of the Civil Code that "all property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property;" and, by the next section, that "all property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." By section 164 it is declared that "all other property acquired after marriage, by either husband or wife, or both, is community property." An exception to this last general provision is made in favor of the earnings and accumulations of the wife while she is living separate from her husband, by virtue of section 169 of the Civil Code, which reads: "The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

It would be clearly contrary to these provisions of the Code to hold that *all* earnings and accumulations of the wife are her separate property. The exception cannot be extended by the courts beyond its fair scope. The provision that the earnings and accumulations of the wife *while she is living separate from her husband* are her separate property, plainly assumes that such earnings and accumulations as are not so acquired do not constitute the separate property of the wife, but are embraced by the general provisions of section 164, and constitute community property. It is true that, by section 168 of the same Code, it is provided that "the earnings of the wife are not liable for the debts of the husband;" but what should be considered earnings of the wife, and what debts of the husband, within the true meaning of that section, are questions that do not arise in this case.

The debt due from the deceased, Hicks, for the services rendered him by Mrs. Smith, being the community property of Mr. and Mrs. Smith, was there such a presentation of the claim for the amount to the executors of the estate of Hicks as would authorize a suit upon its rejection?

As has been seen, it was verified by the wife, and presented in her name by the husband. That the claim was sworn to by the person best acquainted with the facts surely cannot be good ground of objection to its verification. Undoubtedly it ought to have been presented in the name of the husband, since the amount due constituted community property, but it was presented by the husband in the name of his wife. Had the claim been allowed by the executors, he would have been estopped from presenting another claim in his own name for the same services; and having, with his wife, brought this suit upon the rejected claim, a recovery thereon would equally estop him. A claim for the services, properly verified, was presented to the executors, who rejected it, but without objection to the manner of its presentation. Suit hav-

ing been brought thereon, plaintiffs proved the rendition of the services and their value, and recovered judgment. Ought the judgment to be reversed only because the claim was presented to the executors by the husband in his wife's name instead of his own? Under the circumstances of the case, we think not. The substantial rights of the estate have not been affected by the manner of its presentation, and we do not think a just judgment against it ought to be reversed on that ground.

The only other points relied on by the appellants for a reversal grows out of the fact that the deceased in his will made a bequest to Mrs. Smith, of \$3,000, "in consideration and in payment for her kind care and attention during my last sickness." It is said that the bequest was intended as full compensation for the services rendered by Mrs. Smith, and that it has not been renounced. The answer to this is that her action in respect to the claim was an election on her part not to rely upon the bequest; and upon the distribution of the estate the rights of the executors, and of all interested therein, can be properly and appropriately protected.

Judgment and order affirmed.

We concur: MYRICK, J.; MCKINSTRY, J.

(14 Or. 293)

CARLON v. DIXON and another.

(*Supreme Court of Oregon. December 13, 1886.*)

1. REPLEVIN—ACTION ON BOND—LIABILITY OF SURETIES—COSTS.

Where an action of replevin was brought to recover an article of property, and a judgment obtained which was afterwards reversed on appeal, the sureties on the bond are liable for the payment of the costs incurred in the original action.

2. SAME—ACTION—EXTENT OF LIABILITY.

In an action on a replevin bond the sureties are only liable to the amount of the penalty of the bond, and costs.

3. SAME—BOND—BREACH—PENALTY—INTEREST.

Where there is a breach of the condition of a bond in replevin, the penalty becomes in law a debt due, and the obligors may discharge themselves from liability on the bond, when the damages resulting from it exceed the penalty, by the payment of the penalty alone; but, if the damages in such case be not paid on the happening of the breach, it will bear interest until it is paid.

Action on replevin bond. Judgment for plaintiff. Defendants appealed. C. Ball, for plaintiff. W. R. Willis, for defendants.

LORD, C. J. This is an appeal from a judgment rendered in the circuit court upon a trial by the court without a jury. Briefly, the facts are these: William Britt brought an action in replevin against Carlon, the present plaintiff, claiming the delivery to him of a horse which was in the possession of Carlon. To entitle and secure to Britt the immediate delivery of the property, the defendants, Dixon & Dixon, executed an undertaking as sureties for double the value of the property, "For the prosecution of said action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff," as prescribed by the Code. The horse was then taken by the sheriff, and thereupon the plaintiff gave the undertaking as prescribed in such Code, and the sheriff redelivered the horse to him. The action proceeded to trial, and Britt obtained judgment, whereupon Carlon, the present plaintiff, appealed to the circuit court, and the judgment was reversed, and a judgment rendered in favor of him, for his costs and disbursements, taxed at \$512.20. This action was brought on the undertaking of the defendants, Dixon & Dixon, given in the action brought by Britt, above mentioned, to recover the amount of costs adjudged to him in that action. The penalty in the bond or undertaking of the defendants, for double the value of the prop-

erty, was fixed at \$250. There are but two questions which we are required to consider on this record: (1) Are the defendants liable on their undertaking for costs? and (2) what is the extent of the liability after default?

The liabilities of sureties on replevin bonds for the payment of costs incurred in the original action has been so often adjudged that the question ought to be deemed settled. In New York, where the provisions of the Code in respect to the matter are identical with our own, it has been adjudged that the sureties are liable, on their undertaking given in accordance with section 209, for costs. In *Tibbles v. O'Connor*, 28 Barb. 539, a case upon all fours as to the facts in hand, the court say: "This is a clear case for the plaintiffs. The undertaking provided, among other things, for the payment to the plaintiffs in this action of such sum as might *for any cause* be recovered against the plaintiff in that action. The 209th section of the Code required that the undertaking should contain that provision. These plaintiffs have secured these two sums in that action. They are clearly within the undertaking of the statute." And this decision has been approved by later authorities in that state. In *Hinckley v. Kreitz*, 58 N. Y. 538, CHURCH, C. J., in referring to it, said: "*Tibbles v. O'Connor*, 28 Barb. 538, was upon an undertaking in behalf of the plaintiff in an action upon a claim and delivery of personal property, conditioned, among other things, for the payment of such sum as might 'for any cause' be recovered in the action. The court held that the costs recovered upon appeal were covered by the undertaking, *as they clearly were.*" *Letson v. Dodge*, 61 Barb. 128.

At common law, where the bond was conditioned to prosecute the suit with effect, and for a return of the goods in case a return shall be awarded, the sureties were liable for costs. *Gainsford v. Griffith*, 1 Wms. Saund. 58, note 1; *Branscombe v. Scarbrough*, 6 Adol. & E. (N. S.) 13; *Balsley v. Hoffman*, 13 Pa. St. 606. At one time it was thought that the condition of such bond was alternative, and that the effect of rendering either impossible was to discharge the surety, (*Kimmel v. Kint*, 2 Watts, 431;) in a word, that the condition of the replevin bond is simply for the return of the goods in event of a judgment *de retorno habendo* being rendered against the plaintiff in the action of replevin, and for which alone the surety was responsible; and some such notion seems to have prevailed in the case here. But in *Gibbs v. Bartlett*, 2 Watts & S. 33, the doctrine of *Kimmel v. Kint, supra*, was overthrown, and numerous cases cited to show that the undertakings stipulated by the bond constitute distinct and independent conditions, and that a breach of any of them worked a forfeiture. In *Tibbal v. Cahoon*, 10 Watts, 232, the defendant had retained the goods under a claim of property, which being found for him, he was also held entitled to recover the costs in an action on the bond, though there was no judgment *de retorno*. "If it were held," said KENNEDY, J., "that the surety is not liable on the clause, to prosecute his suit with effect, for the costs adjudged to the defendant, upon failure of the plaintiff to prosecute the suit with success, the clause, though full of meaning and force, would be thereby rendered wholly useless, and entirely inoperative." Applying this language in *Balsley v. Hoffman, supra*, BELL, J., said: "Now, as, in this instance, the goods replevied have been retained by the defendant, the only damnification suffered by him was in the costs to which he had been put, and, as these could only be reached under the clause for effective prosecution, the decision would seem to be directly in point to show the liabilities of the parties in the bond to answer, at least to the extent of the penalty, the damages recovered by the defendant in the first action." But the authorities do not stop here. See, also, *Thomson v. Joplin*, 12 S. C. 581; Morris, Repl. 265; 2 Suth. Dam. 43.

But the more difficult question here is whether the judgment can be given on a replevin bond against the sureties for more than the penalty and costs; that is to say, whether interest can be recovered, beyond the penalty, from

the time of the breach of the condition. In *Hefford v. Alger*, 1 Taunt. 218, it is held that the sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of suit on the bond. "It is not to be disputed," said TINDAL, C. J., "that the sureties singly would be liable to the amount of the penalty of the bond; and in *Hefford v. Alger*, 1 Taunt. 218, which is subsequent to *Evans v. Brander*, 2 H. Bl. 547, it was held that the two together are liable to no more. After that decision in this court, we ought not to throw the matter open again, by laying down a different rule for the sheriff, who is responsible on the failure of the sureties." *Paul v. Goodluck*, 2 Bing. N. C. 220. The general principle, as stated, is that on a penal bond a judgment cannot be recovered beyond the penalty. *Wilde v. Clarkson*, 6 Term R. 303; *Branscombe v. Scarbrough*, 6 Q. B. 13; *Clark v. Bush*, 3 Cow. 151; *Farrar v. U. S.*, 5 Pet. 872. Mr. Morris says: "The liability of the surety in replevin is limited by the penalty of the bond. The preceding observations show that his liability may be less than that amount; it cannot exceed it." Morris, Repl. 268, cites *Hunt v. Round*, 2 Dowl. 558; *Ward v. Henley*, 1 Younge & J. 285; *Gould v. Warner*, 3 Wend. 54.

In the case in hand the judgment was rendered in the replevin suit for costs, May 21, 1883, and the liability of the defendants then became fixed. The judgment was for an amount which exceeded the penalty of the bond; but, as we have seen, the defendants could have discharged themselves by the payment of the amount of the penalty. They neglected to do this, and necessitated the action on the bond. The court below found that the defendants were liable on their undertaking in the sum of \$250, the amount of the penalty, with legal interest from May 21, 1883; and that the plaintiff was entitled to a judgment against the defendants for that sum, with such interest, and rendered judgment accordingly.

At the argument it was claimed by counsel for the plaintiff that the condition of the undertaking was such as to cover the entire amount of the judgment in the replevin action, and that, therefore, judgment on the undertaking might be for an amount in excess of the penalty fixed by that instrument. But this is untenable. The sureties are only liable to the amount of the penalty of the bond and costs. The penalty is that sum which the sureties bind themselves and agree to pay when a breach of the condition occurs which is a part of their obligation.

The more difficult and disputed question is whether, after breach of the condition, the sureties are liable for interest for the delay in payment, by way of damages for the breach. In *Fraser v. Little*, 18 Mich 198, the authorities, both English and American, are reviewed by CAMPBELL, J.; and the result he reaches is that interest cannot be recovered on the penalty. Referring to *Brainard v. Jones*, 18 N. Y. 85, in which it was held that interest was recoverable for withholding payment after default, he says: "It is in direct conflict with the mass of decisions, and in conflict with the principle which underlies them all, that a *penalty* is not to be enlarged under any circumstances, and will not be enforced beyond its letter." But the force of this decision is greatly broken by the dissenting opinion of CHRISTIANCY, J., which is in general accord with the doctrine of the law as held in New York, Massachusetts, Kentucky, and perhaps some other states. In *Brainard v. Jones, supra*, it was held that the recovery against a surety in a bond for the payment of money is not limited to the penalty, but may exceed it, so far as necessary to include interest from the time of the breach; and that, so far as interest is payable by the terms of the contract, and until default made, it is limited to the penalty, but after breach it is recoverable, not on the ground of contract, but as damages, which the law gives for its violation. COMSTOCK, J., said: "But when the sum claimed becomes a debt actually due from them, and they continue in default, the question, properly considered, is one of damages for

the delay. As the law imposing these damages finds its warrant, not in the terms of the contract, but in the rules of reason and justice, so it must follow that the same rules furnish the only restraint upon its power in such cases. The question, in short, is not, what is the measure of a surety's liability under a penal bond? but what does the law exact of him for an unjust delay in payment after his liability is ascertained, and the debt is actually due from him?"

Formerly it was the rule, upon a breach of the condition, that the surety was liable for the entire amount of the penalty, although the loss or damage was insignificant. The breach worked a forfeiture, and the penalty fixed the liability. But this rule no longer prevails. If the loss or damage be less than the penalty, the liability is discharged by the payment of the amount of such loss or damage. The penalty merely fixes the maximum of the liability of the sureties or obligors, and they cannot be held liable for interest beyond the penalty of the bond, except for such interest as accrued from their own default in unjustly withholding payment. When the judgment is equal to or in excess of the penalty fixed in the bond, the sureties may discharge themselves from liability by the payment of the amount of such penalty; but, if they refuse so to do after breach of the condition, and persist in defending the suit brought to compel their performance, they will be liable for the penalty and interest by way of damages for unjustly withholding payment. In such case the penalty is an ascertained sum which is due; and, when withheld, like any other debt, ought to carry interest. It has been so held by this court in a case not reported, as I am informed by one of my associates. It is difficult to see upon what principle interest can be refused upon the penalty of a bond which is due, more than interest upon any other money which has not been paid when the creditor has become entitled to it. In *Carter v. Thorn*, 18 B. Mon. 488, it was held, upon the breach of the condition of a penal bond, the penalty becomes in law a debt due, and the obligors can discharge themselves from liability on the bond, when the damages resulting from the breach of the condition exceed the penalty, by the payment of the penalty alone; but, if the damages in such case be not paid on the happening of the breach, it will bear interest until it is paid. See, also, *Hughes v. Wickliffe*, 11 B. Mon. 202; *Walcott v. Harris*, 1 R. I. 404; *Leighton v. Brown*, 98 Mass. 516; *Judge of Probate v. Heydock*, 8 N. H. 493; Murfree, Official Bonds, § 609, and cases cited.

We think the court committed no error in allowing the interest. The plaintiff is entitled to his costs and disbursements of the court below, and, as both appealed to this court, each will pay his costs of his own appeal.

(9 Colo. 280)

SMITH v. BAUER.

(*Supreme Court of Colorado*. December 3, 1886.)

1. COURTS — FEDERAL COURTS — STATE COURT — ATTACHMENT — CONSENT TO PROCEEDING AGAINST MARSHAL.
Notwithstanding the rule that, when property is in the hands of a United States marshal under a writ of attachment issued from a federal court, his custody thereof cannot be interfered with by a sheriff acting under authority of process issuing from a state court, an action of replevin may be maintained in a state court against a United States marshal for goods so attached by him, when the pleadings show that consent of the federal court to proceed in the premises against its marshal was first obtained.¹
2. SAME — COMITY BETWEEN COURTS OF CONCURRENT JURISDICTION — ALLEGATION OF CONSENT IN COMPLAINT — OBJECTION TO SUFFICIENCY AFTER VERDICT.
An objection taken to an allegation, in a complaint, of consent obtained from a federal court to proceed against its marshal in a state court for the recovery of goods attached by him under process issuing from the federal court, because it does not show that the consent referred to covered the particular suit in question, and

¹See *Connor v. Hanover Ins. Co.*, 25 Fed. Rep. 549, and note.

the tribunal in which it is brought, does not raise a jurisdictional question, but one of comity between courts of concurrent jurisdiction, and such objection, taken after trial and verdict, comes too late.

Error to district court, Pueblo county.

Bauer brought his action of replevin in the state court, claiming ownership and right to possession of the goods and chattels described in his complaint. Smith, among the defenses set up in his answer, averred that he held the property as United States marshal by virtue of levies under writs of attachment duly issued out of the circuit court of the United States for the district of Colorado in two certain suits brought against one Julius Kessler. At the trial the foregoing matters set up in the answer were admitted to be true; but the court, nevertheless, tried the issue of ownership and right to possession, and the same was determined in favor of Bauer. To reverse the judgment thus entered this writ of error was sued out. The complaint contained, *inter alia*, the following averment: "That, prior to the commencement of this action, the plaintiff obtained leave from the circuit court of the United States to sue the defendant, who is and was United States marshal for the district of Colorado."

Patton & Urmy, for plaintiff in error. *John M. Waldron*, for defendant in error.

HELM, J. 1. The supreme court of the United States, in *Freeman v. Howe*, 24 How. 450, announce the doctrine that, when property is in the hands of the United States marshal under a writ of attachment duly issued from a federal court, his custody thereof, even though it be wrongful, and though not by virtue of a proceeding *in rem*, cannot be interfered with by the sheriff, acting with the authority of process issuing from a state court. The conclusion reached in that opinion has been adhered to in later decisions by the same august tribunal; and, although no construction of the constitution or laws of the United States was involved, it is accepted, we believe, by all of the state courts of last resort which have had the question before them. It was adopted by us in *Parks v. Wilcox*, 6 Colo. 489.

This principle or rule of procedure is, however, not decisive of the case at bar. The precise question here presented is: May the state court, notwithstanding the rule, determine all the rights of plaintiff in the replevin case, where the pleadings show that *consent of the federal court to proceed in the premises against its marshal was first obtained?* It is obvious that the institution of suit for property, in a court other than the one asserting control thereof, may be a matter of great convenience and economy to litigants. Such proceeding may also be a relief to the latter court itself. The last suggestion is particularly true of the class of cases now under consideration, since the effect of the rule mentioned is to draw into the federal courts litigation which is not contemplated by the provisions of the constitution and laws defining their jurisdiction. If, therefore, the course pursued in the case at bar can be sustained without doing violence to the foregoing rule, in our judgment, it should be. The principle of non-interference with each other by courts of concurrent jurisdiction, which, with proper limitations, is so universally acknowledged and so widely commended, is one both of comity and necessity. *Peck v. Jenness*, 7 How. 612. It rests mainly upon the following very excellent reason: Without it, an embarrassing element of discord and uncertainty would be introduced into judicial procedure. Unseemly interference and conflict would often exist in the attempt, by different tribunals, to exercise contemporaneous jurisdiction over the same causes or the same subject-matter, while disastrous consequences might follow to the immediate parties in interest. But when, in cases like this, the court under whose control property is, gives its prior unqualified consent to the replevin action before another tribunal, can it be said that the foregoing reason is

applicable? Such consent may fairly be construed to show the intention of the court giving it to relinquish temporarily the control possessed, and to be governed, so far as needful, by the result attained in the replevin suit. Hence there is no more confusion than would exist had the writ of replevin issued from the latter court, or had the claimant intervened therein in the original attachment proceeding. The danger of conflict is avoided, and the principle of comity is fully satisfied. We are constrained to hold that since, in the case at bar, the reason for the rule fails, the rule itself should not be applied.

2. It is, however, urged by counsel for plaintiff in error that, admitting the correctness of the foregoing conclusion, the averment of the complaint before us, relating to consent by the federal court, is wholly insufficient. They assert that, since the averment in question does not specifically show that the consent referred to covered this particular suit, and the tribunal in which it was brought, the complaint does not bring the case within the exception, and that for this reason it fails to state a cause of action. The principle of "comity and necessity," above mentioned, is, in its various applications, often spoken of as though the question involved were one of jurisdiction. We think the language thus used inaccurate, and that, perhaps, counsel have been misled thereby. Unless a concurrence of the right to jurisdiction over the subject-matter or the cause of action, as the case may be, exists, the necessity for invoking the rule could not arise. The question, properly speaking, is not, has the court jurisdiction to entertain the proceeding? but, ought it to do so? Should not the exercise of its acknowledged jurisdiction in the premises be held in abeyance until the control of the other court has terminated? Would not the issue and levy of its process be a violation of that comity which should be maintained towards another judicial tribunal? And is it not an imperative duty, under the circumstances, to withhold, for the time being, its action, because of the serious mischief that would follow from a general recognition in practice of the opposite course?

When courts, in the trial of such causes, discover that the officer acted under a valid process, and hence that this principle of comity has been disregarded, they do not always immediately dismiss the same. They sometimes retain the cases, and take such steps as will repair the injury committed. In actions of replevin, final judgment is entered, if necessary, awarding a return of the property, or payment of the value, should the return be impossible. *Booth v. Ableman*, 16 Wis. 485; *Booth v. Ableman*, 18 Wis. 519; *Feusier v. Lammon*, 6 Nev. 209; *Parks v. Wilcox*, *supra*.

The averment under consideration is defective in the particulars mentioned, and plaintiff might have been compelled to amend his pleading had it been assailed at the proper time. But the subject to which the averment relates is not jurisdictional. An answer was filed, and the cause was fully adjudicated; no objection being made on this ground till the trial was concluded and the verdict returned. The evidence of plaintiff is not before us, and we must presume that his proofs supplied such material matters as the averment may have omitted. The defect in question is of such a nature that, upon this record, it could not, for the first time, be complained of after verdict.

This opinion, it will be observed, makes no reference to cases of replevin brought by the owner in one *state* court for property wrongfully taken by the sheriff under writs of attachment or execution issuing from another *state* court of concurrent jurisdiction.

The judgment will not be disturbed. *Affirmed.*

(9 Colo. 277)

ANFENGER and others v. ANZEIGER PUB. CO.

(Supreme Court of Colorado. December 3, 1886.)

CORPORATIONS—DIRECTORS—LIABILITIES FOR DEBTS—REPORTS—ACTION—GEN. ST. COLO. 184, § 16—COMPLAINT.

In an action against the directors of a corporation brought under Gen. St. Colo. 184, § 16, making directors jointly and severally liable for the corporation debts for the preceding year, on their failure to file the report of debts and capital required by the statute, the complaint is bad if it fails to aver that the corporation was doing business in the county in the recorder's office of which it claims the report should have been filed, to set out the contract of indebtedness on which the action is brought, the default of the corporation, and the directorship of the defendants, as of such dates as to show the liability of the defendants under the statute.

Appeal from county court, Arapahoe county.

Action for debt. Judgment for defendant on demurrer. Plaintiffs appeal.

This action was brought against the appellants, as directors of the German Printing Company, under the following statute:

"Sec. 16. Every such corporation shall annually, within sixty days from the first day of January, make a report, which shall state the amount of its capital, and the proportion actually paid in, and the amount of existing debts, which report shall be signed by the president or secretary of said company, under its corporate seal, and filed in the office of the recorder of deeds of the county where the business of the company shall be carried on. And if any such corporation shall fail so to do, unless the capital stock of said corporation has been fully paid in, and a certificate made and filed as provided in section twelve (12) of this act, all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should, by this section, have been made and filed, and until such report shall be made." Gen. St. 184.

Bartel & Blood, for appellants, Anfenger and others.

ELBERT, J. The complaint is bad. The averment that the defendant company failed to file the financial report required by the statute in the office of the recorder of deeds of the county of Arapahoe has no force, without the further averment that the defendant company carried on its business in that county. Unless this last was the fact, the statute cast upon it no duty to file the report in the county of Arapahoe. The default of the company, upon which the liability of the defendants depends, does not appear. Neither does the complaint allege, except inferentially, when the debt was contracted. The language of the statute is: "The directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should, by this section, have been made and filed, and until such report shall be made." The contract of indebtedness, the default of the corporation, and the directorship of the defendants, should all be averred, and as of such dates as to show the liability of the defendants under the statute. The court erred in overruling the demurrer to the complaint.

The judgment is reversed, and the cause remanded, with leave to the plaintiff to amend.

(14 Or. 280)

SPRINGER v. YOUNG and others.

(Supreme Court of Oregon. December 10, 1886.)

1. TRUST—SALE OF DONATION LAND CLAIM—PROMISE TO CONVEY TO WIFE.

Where a husband and wife sold a donation land claim acquired by them under the act of congress of September 27, 1850, and invested the proceeds in other lands,

with the understanding and agreement that the husband would convey to the wife an undivided half of the latter premises at some convenient time thereafter, the deed having been made to the husband alone, an implied trust results to the wife in the land so purchased, which she has the right to enforce in equity.¹

2. STATUTE OF LIMITATIONS—ACTION TO ENFORCE TRUST—HUSBAND AND WIFE.

Where land was purchased by a husband with the proceeds of other land, in which he and his wife owned an interest of one-half each, and the deed was taken in his name, but they occupied the same together up to the time of the husband's death, held, in an action brought by the wife to enforce her equity to a trust in the land, that, as neither husband nor wife can hold, adversely to each other, premises of which they are in the joint occupancy as a family, the statute of limitations (Civil Code of Oregon) did not apply to bar her claim, nor was she prevented by lapse of time from attempting to enforce the same.²

3. HUSBAND AND WIFE—PROCEEDS OF LAND SOLD BY HUSBAND—INVESTED IN OTHER LAND.

Where a husband sold land in which his wife had an equal interest with himself, and invested the proceeds in other land, her equity to the fund, or her portion of the same, attached to the land so acquired by him, of which she cannot be deprived by virtue of any of his marital rights.

Appeal from Yamhill county.

Action to enforce a trust in land. Decree for plaintiff. Defendants appealed.

C. Loughary and W. D. Fenton, for appellants, Young and others. *H. Hurley*, for respondent, Springer.

STRAHAN, J. This suit is prosecuted by the plaintiffs against the defendants to establish an implied trust in her favor in certain lands situated in Yamhill county. The defendant Nancy S. Young is the plaintiff's daughter, and C. W. Young is her husband. May Wilson is also a daughter of the plaintiff, and J. C. Wilson is her husband, and Grace Springer is a minor, a daughter of the plaintiff, and is represented by her guardian *ad litem*.

It appears from the facts in this case that George W. Springer, in his lifetime, was the husband of the plaintiff, and that they resided together as husband and wife in Polk county, Oregon, on and prior to June 23, 1851, and that on that day said George W. Springer made settlement on 640 acres of unoccupied public lands in Polk county, and now included within the limits of the Grand Ronde Indian reservation, and that said George W. Springer and the plaintiff, his wife, thereafter continuously resided on and cultivated said land for more than four years next after said settlement; that on the fourth day of October, 1853, the said George W. Springer gave notice to the surveyor general of Oregon of his said settlement upon and cultivation of said lands in all respects pursuant to the act of September 27, 1850, commonly called the "Donation Law," and thereby became entitled to 640 acres of land under said act,—one-half to himself, and the other half to his wife; that on the fourth day of March, 1856, Gen. Joel Palmer was superintendent of Indian affairs for Oregon, and that on that day, acting for and in behalf of the United States, he purchased of the said George W. Springer and the plaintiff their said donation land claim, and paid them therefor the sum of \$3,750, and that they executed to him a deed for said claim. It also appears that on the seventeenth day of March, 1856, the said George W. Springer and the plaintiff purchased one of the tracts of land in controversy in this suit of C. Comegys, and paid therefor \$2,250, being a part of the same money they had received for their said donation claim; and that on the twenty-fifth day of April, 1856, they purchased the other parcel in controversy of John Sherwood, and paid therefor the sum of \$1,500, being the residue of the sum received from Gen. Palmer by Springer and the plaintiff for their said donation claim. It further appears that, at the time of said purchases, respectively, by said Springer and wife,

¹See note at end of case, part 1.

²See note at end of case, part 2.

last referred to, said Springer managed said business for himself and wife, and took the deeds for said land in his own name, and not in the name of himself and the plaintiff; but that thereafter, and up to the time of his death, he recognized the rights of the plaintiff in said land, and it was the understanding between the plaintiff and her said husband that he would convey to the plaintiff an undivided half of said premises at some convenient time thereafter. During the life-time of George W. Springer, and after his death, the matter was often talked over in the family, and was understood by all the children, six in number; and they have all since conveyed to the plaintiff what would have been their mother's part if the arrangement between their father and mother had been completed, except the defendants Nancy S. Young and May Wilson. About the year 1880, George W. Springer was taken suddenly ill, and died in a few days thereafter, since which time the plaintiff has had the possession of all of said premises, except after the appointment of an administrator, using the proceeds for the support of herself and family, and in making some improvements on the farm. During his life-time George W. Springer always recognized the right of the plaintiff in said land, and they appear never to have been controverted or drawn in question until since his death.

A proper solution of the questions discussed by counsel requires that we should first consider the rights of Mrs. Springer in the land in controversy, without regard to and independently of the marital relation which existed between her and her deceased husband. When a conclusion shall have been reached on that point, we can the more readily determine in what manner, and to what extent, her rights were affected, if at all, by the marriage relation.

We think it clear that, under the facts in this case, a trust must be implied in favor of the plaintiff. It rests upon principles of equity that have often been recognized in this state, and that are elementary. "Whenever the circumstances are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties who, in equity, are entitled to the beneficial enjoyment." Will. Eq. Jur. 599. The same author, on the same page, classes constructive trusts as follows: "First, when the acquisition of the legal estate is tainted with fraud, either actual or constructive; and, second, when the trust depends on some general equitable rule, independently of the existence of fraud." And Mr. Story says: "If a joint purchase is made in the name of one of the purchasers, and the other pays or secures his share of the purchase money, he will be entitled to his share as a resulting trust." 2 Eq. Jur. § 1206. And so it is laid down by the same author as the established doctrine, without a single exception, and as the result of all the cases, "that the trust of the legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others, without the purchaser's name; whether in one name or several; whether jointly or successively, [successive,]—results to the man who had advanced the purchase money." 2 Story, Eq. Jur. § 1201. Another author, very eminent in this department of the law, speaking of constructive and resulting trusts, says: "They are of two species,—'resulting' and 'constructive,' which latter are sometimes called trusts *ex maleficio*; and both of these species are properly described by the generic term 'implied trusts.' Resulting trusts arise when the legal estate is disposed of or acquired, not fraudulently, or in the violation of any fiduciary duty, but the intent, in the theory of equity, appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title. Constructive trusts are raised by equity for the purpose of working out right and justice, where there was no intention of

the party to create such a relation, and often contrary to the one holding the legal title. * * * If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." 1 Pom. Eq. Jur. § 155.

It must be apparent that George W. Springer could not have retained the title to this land against the claim of this plaintiff, so far as yet appears; and, if he could not, neither can the defendants, who have or claim no other interest therein than such as descended to them as heirs at law of their father, George W. Springer. They stand in the shoes of their ancestor. They take the title which the law casts upon them, affected with the same trusts and equities as it was when their ancestor held it.

Does the fact that the plaintiff was the wife of George W. Springer during these transactions affect, impair, or destroy the rights which she would have otherwise had in the land in question? It was argued by counsel for the appellants that George W. Springer received the plaintiff's portion of the purchase price of the donation claim when it was sold, and thereby reduced the same to possession, and this made the same his own, and cut off all rights of the plaintiff. This assumption relates to a question of fact, and does not appear to be justified by the evidence. The plaintiff testified that she had possession of her half of this money, the same as he had his, and I cannot find any controverting evidence in this record. Besides, if the plaintiff only gave this money to her husband to pay over for her for the land in question, then his possession of it was not such as would extinguish her rights.

However this may be, there is another and a more serious difficulty in the way of the appellants. On the twentieth day of January, 1852, the legislature of Oregon passed an act providing that "all right and interest of the wife in land donated by said act of twenty-seventh of September, 1850, should be secured to the sole and separate use and control of the wife, and that she should have to her own use the rents and profits thereof, and that such land should in no manner be made liable to the debts of her husband." It is true this act was repealed in 1853, but the effect of the act and of the repeal have both received a construction by this court which is adverse to appellant's claim, and is decisive of this point. *Linnville v. Smith*, 6 Or. 202.

The appellants next insist that the plaintiff's claim or interest in said land is barred by the statute of limitations. Section 378 of the Civil Code, as amended by Sess. Acts 1878, p. 25, provides: "A suit shall only be commenced within the time limited to commence an action as provided in title 2 of chapter 1 of this Code, and a suit for the determination of any right or *claim to or interest in* real property shall be deemed within the limitations provided for actions for the recovery of the possession of real property." This suit falls within this provision of the Code, and the same statute that would bar an action for the recovery of the possession of real property will bar this suit. That period is 10 years, and is fixed by section 4 of the Civil Code as amended. Sess. Acts 1878, pp. 21, 22. But possession, to constitute a bar either at law or in equity, must be adverse. The statute nowhere defines what shall be an adverse possession sufficient to bar an entry. An adverse possession cannot begin until there has been a disseizin; and, to constitute a disseizin, there must be an actual expulsion of the true owner for the full period prescribed by the statute. An adverse possession is aptly defined by INGERSOLL, J., in *Bryan v. Atwater*, 5 Day, 181, to be "a possession, not under the legal proprietor, but entered into without his consent either directly or indirectly given. It is a possession by which he is disseized and ousted of the lands so possessed." To make a possession adverse it must be "an actual, continued, visible, nota-

rious, distinct, and *hostile* possession." If its inception was permissive, or with the consent of the true owner, then such possession could never become adverse until some clear decisive act of the occupant is shown which would constitute a disseizin of the true owner. *Hall v. Stevens*, 9 Metc. 418; *Dikeman v. Parrish*, 6 Pa. St. 210; *McMasters v. Bell*, 2 Pen. & W. 180. So, also, if, at the time one enters, or afterwards, he does not claim title in himself, but acknowledges the title of another, his possession must be taken as an entry or holding in subordination to the title of the person whose right he acknowledges. *Rung v. Shoneberger*, 2 Waits, 28.

But we do not think the statute of limitations applies in this case, for another reason. Neither husband nor wife can hold, adversely to each other, premises of which they are in the joint occupancy as a family. *Hendricks v. Rasson*, 53 Mich. 575; S. C. 19 N. W. Rep. 192. In such case the possession of neither can be regarded as adverse to the other while they jointly reside upon and occupy such premises. There is no more reason to claim that Mr. Springer's possession was adverse to the plaintiff than there would be to maintain that her possession was adverse. The possession of neither was adverse to the other. In such case the law will not subject either husband or wife to a loss of property because such person has not resorted to legal proceedings, but will rather hold that the possession of each was in subordination to such rights in the property as were possessed by the other party.

Nor is this a stale claim. The same reason that would prevent the statute of limitations from running in this case will save the claim from being stale. The plaintiff was not bound to sue her husband. He never denied her right, but always acknowledged it, and no sufficient reason has been suggested why the plaintiff should be denied the assistance of a court of equity, on the ground that her claim is alleged to be stale. The plaintiff's claim is entirely meritorious. It rests on its own merits. It is unaffected by a single act of bad faith. It had its origin in the act of congress making donations of public lands to the early settlers of Oregon. She endured the hardships of pioneer life to assist her husband in its acquisition. She has done no act to forfeit the right thus acquired, and we have no doubt she is entitled to the relief prayed for.

Let the decree be affirmed.

THAYER, J., (*concurring.*) This appeal is from a decree in equity. The suit in the court below originated out of family difficulty. The respondent, who is quite an old lady, claimed to own a trust-estate in a 520-acre farm in Yamhill county, and two of her daughters, who are married women, denied the ownership. Thereupon the respondent commenced the suit to have a trust in her favor declared in an undivided half of the farm. She claims that her husband, George W. Springer, late of said county, deceased, and herself, owned a donation land claim under the donation law of Oregon, situated in Polk county; that they sold it, in the year 1856, for the sum of \$3,750, and invested the proceeds in said farm, under an agreement between themselves that each should own one-half thereof; that the deed was taken in the husband's name as a matter of convenience, but that he agreed, at the time, to convey an undivided one-half of it to her, and had, during all his life thereafter, recognized her right to such half; that they lived upon and cultivated the farm, reared a large family, and that in 1880 the husband was taken suddenly ill, and only lived a few days thereafter. All the children, except the two daughters, recognize the respondent's right in the premises, and joined in a conveyance to her of a one-half of the farm, but the deed was to the north half of it in severalty.

There is no dispute as to the ownership of the respondent and her husband of the donation claim, nor of the sale and investment of the proceeds thereof in the farm, though some question is made in regard to the *status* of their

title to the claim at the time of the sale, and it is denied that there was any agreement between them that respondent was to have a half interest in the farm. The appellants' counsel claim that, upon the sale of the donation right, the money realized therefrom came into the hands of the husband, was personal property, and he became the absolute owner thereof by virtue of his marital rights as then existing; and that, therefore, no funds of the respondent went into the farm, and consequently no resulting trust could have arisen in her favor; and that, if there had been such an agreement between the respondent and her husband as claimed by her, the statute of limitations had cut off her right to claim any interest in the farm; and that, in any view, she was barred by lapse of time from asserting her pretended claim.

It seems to me that an unprejudiced person would look upon this defense, under the circumstances of the case, as very ungracious, and one that a court of equity would not regard with favor. I am unable to discover why, if the respondent and her husband owned the donation claim, and invested the proceeds arising from a sale of it in the farm, the respondent should not be entitled to a half interest in the latter as a matter of right and justice. Her title to a half interest in the donation claim was as undoubted as that of her husband. It was given to her by the act of congress of September 27, 1850, "to be held by her in her own right;" and to hold that a sale of it, and the purchase of the farm with the proceeds, operated, against her will, to forfeit to the husband her interest in the matter, would, as I view it, be an attempt to legalize robbery. The act of congress referred to granted to every white settler residing in the territory of Oregon, 320 acres of land if a single man, and, if a married man, 640 acres,—one-half to himself, and the other half to his wife, to be held by her in her own right. This act always seemed to me to vest in the wife, upon compliance with its terms, a separate estate; that the grant had a double operation. It not only conveyed to the wife an estate, but it capacitated her to hold it in her own right, without the intervention of trustees to prevent the marital rights of the husband from attaching. It was a law, as well as a grant; and it precluded, by its terms, the husband from interfering with the land granted, or with the proceeds, in event she sold it. It stood upon a different footing from that of real property conveyed to a married woman at common law. There, in order to prevent the marital rights of the husband from attaching, it had to be conveyed to trustees for her use. It was not in the power of a private party to impress upon the property conveyed directly to a married woman such a character of trust as would relieve it from the operation of the rules of the common law; but the congress of the United States has power, under the constitution, to make all needful rules and regulations respecting the territory and other property belonging to the United States. It had power, at the time of the passage of the donation act, to legislate in the then territory of Oregon in regard to persons and property therein; and, when it enacted the law giving to a married woman land to be held by her in her own right, it certainly did not intend that the husband could appropriate its use, or convert the proceeds arising from a sale of it without her consent; nor that unfilial children should be able to deprive her of its benefits through the instrumentality of an obsolete rule found among the dusty cobwebs of the common law.

In granting the public lands, congress has a right to annex to the grant such conditions and qualifications as it may deem proper, and exempt the land granted from the operation of existing general laws. Thus the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, exempted such homesteads from liability for debts contracted prior to the issuing of the patent; and the provision has been enforced by this court. *Clark v. Bayley*, 5 Or. 343. The effect of the latter act was to restrict the laws of Oregon in regard to the liability of property to execution; and the former act, in the same way, curtailed the marital rights

of a husband to his wife's half of a donation land claim. He might probably succeed, upon her death, to an estate as tenant by the courtesy in it under the statutes of the state, but did not have what was termed at common law an estate *jure uxori* in her half of the claim.

Under this view it would only require slight evidence, if any, beyond the fact that the proceeds from the sale of the donation claim were invested in the farm, to establish that the respondent was owner of the trust-estate therein, as claimed in her complaint. That there was an understanding that she was to have an undivided half interest in the farm is very certain, if any credit whatever is to be given to the testimony taken in the case, and read at the hearing. It is so natural and just that such should have been the understanding between the respondent and her husband that I am not inclined to question the sufficiency of the proof upon that point, although it merely depends upon the respondent's evidence alone.

Nor do I believe that the trust is affected by the statute of limitations, any more than the legal title would have been under the circumstances, if it had been conveyed to the respondent immediately after the purchase of the farm. The appellants, in the latter case, could as effectually have interposed that plea as they can now. The respondent's right was not denied by her husband. He always, up to the time of his last sickness, she says, recognized it. Both parties were living upon the farm as husband and wife, enjoying its benefits; and the latter, as long as she had entire confidence in the former, had no occasion to exact from him a conveyance. It seems to me that in such a case it would require some overt act on the part of the husband to set the statute in motion; that it would not begin to run until the respondent was excluded from an enjoyment of the farm, or her claim to an undivided half interest in it were denied by the husband. For the same reason the defense that the respondent's claim is barred on account of lapse of time that intervened between the time it accrued and of the attempt to enforce it, is not sustained.

I am of the opinion, therefore, that the decree appealed from should be affirmed.

NOTE.

1. As to implied trusts arising when land is conveyed to one person, and the consideration, or a part thereof, is paid by another, see *Bedford v. Graves*, (Ky.) 1 S. W. Rep. 634, and note; *Bigley v. Jones*, (Pa.) 7 Atl. Rep. 54.

2. As to the running of the statute of limitations against a trust, see *Henderson v. Maclay*, (Pa.) 8 Atl. Rep. 52, and note; *Gilbert v. Sleeper*, (Or.) 12 Pac. Rep. 172.

As to adverse possession, and the running of statute of limitations against joint tenants, see *Comer v. Comer*, (Ill.) 8 N. E. Rep. 796, and note; *Burgett v. Taliaferro*, (Ill.) 9 N. E. Rep. 334.

(36 Kan. 90)

STATE v. PFEFFERLE.

(*Supreme Court of Kansas*. December 9, 1886.)

1. INTOXICATING LIQUORS—PROSECUTION FOR SALE OF—EVIDENCE.

Under an information charging the unlawful sale of intoxicating liquors, there was proof that the defendant sold a beverage called "Phoenix," which stimulated and intoxicated those who drank it. Held, that the testimony that the defendant had a barrel of whisky on tap in his place of business tended to support the charge, and was admissible.

2. CRIMINAL LAW—DEFENDANT AS WITNESS.

Where a defendant in a criminal case takes the witness stand to testify in his own behalf, he assumes the character of a witness, and is entitled to the same privileges, and subject to the same treatment, and to be contradicted, discredited, or impeached, the same as any other witness.¹

3. WITNESS—CROSS-EXAMINATION—COLLATERAL MATTERS.

The extent to which a witness may be cross-examined on matters irrelevant and collateral to the main issue, with a view of impairing his credibility, depends upon

¹See note at end of case.

the appearance and conduct of the witness, and all the circumstances of the case, and necessarily rests in the sound discretion of the trial court; and only where there has been a clear abuse of that discretion will error lie.

4. SAME—CONVICTION OF CRIME—CO-DEFENDANT.

A co-defendant who voluntarily became a witness, and has not appealed, was asked by the state, on cross-examination, if he had not recently been tried and convicted several times for the unlawful sale of intoxicating liquors, and, over objection, gave an affirmative answer. *Held* to be no error.

5. INTOXICATING LIQUORS—PROSECUTION—INSTRUCTIONS.

Where the only sales of liquor charged in the information were those made within the present year, and there was no proof of sales except of those made during the same year, it was unnecessary for the court to instruct the jury that they could only consider such sales as were made within two years preceding the filing of the information.

6. CRIMINAL LAW—REQUESTING INSTRUCTION.

A party who desires an instruction upon some particular question not included in the general charge, should request the presiding judge to give the same; but where no such request is made, and the case is fairly presented to the jury, he cannot afterwards complain that the instruction was not given.

(*Syllabus by the Court.*)

Appeal from Lyon county.

Information against two defendants for unlawful sale of intoxicating liquors. Both found guilty. One appeals.

J. W. Feighan and S. B. Bradford, Atty. Gen., for the State. Wood & Mackey, for appellant.

JOHNSTON, J. The information in this case contained five counts, in each of which it was charged that O. Pfefferle and August Gutekunst sold intoxicating liquors at stated times during the year 1886, without having a permit to do so. They were jointly tried, and were both found guilty on each count, but Pfefferle only has appealed. Testimony was received over the objection of the defendants that a portion of a barrel of whisky was found in the cellar of the house in which they were doing business. It is claimed that the testimony was irrelevant, and did not tend to support the issue in the case, which were sales of a drink called "Phoenix," and not of whisky. We entertain no doubt that the testimony was admissible. The defendants were openly engaged in the sales of beverages, one of which was termed "Phoenix." There was no analysis of this beverage, and whether whisky was one of the ingredients is not clearly shown. Witnesses did testify that "Phoenix" was stimulating; some that it tasted, smelled and looked like beer; others that they became drunk by the use of it; and the defendant admitted that it contained some alcohol. The charge was the sale of intoxicating liquors, and, if the beverage sold was intoxicating, the mere fact that it was called "Phoenix" will not change the rules of evidence, nor relieve the defendant from the consequences of its unlawful sale. The state elected to stand upon the sale of intoxicating liquors, and not upon the sale of "Phoenix," as defendant argued.

The evidence is amply sufficient to show that the beverage sold was an intoxicating one, and the fact that the defendant had, in his place of business, a barrel of whisky on tap tended, in some degree, to sustain the charge, and, in connection with the other evidence, was sufficient to sustain a verdict.

The defendant Gutekunst voluntarily became a witness in behalf of Pfefferle and himself, and, upon cross-examination, he was asked if he was not an old saloon keeper, and if he had not been tried and convicted in that court several times for the sale of liquor. Other questions of like import were asked, and the witness, over the objection of the defendant, admitted that he had been engaged in the sale of liquor, and had recently been tried and convicted for its unlawful sale. The admission of this evidence is the principal error complained of. By taking the witness stand, Gutekunst

changed his *status*, for the time being, from defendant to witness, and was entitled to the same privileges, and subject to the same treatment, and to be contradicted, discredited, and impeached, the same as any other witness. But if a different rule applies to the defendant who becomes a witness, as some authorities seem to hold, it would not avail the appellant; as the defendant Gutekunst has not appealed, and is not complaining, and therefore stands in the same relation to the appellant as any other witness. Although there is some diversity of judicial opinion concerning how far a witness may be cross-examined upon matters not relevant to the issue, with a view of discrediting him, yet we think the limits of cross-examination for such purpose rests largely in the discretion of the court; and there is abundant authority for allowing the questions asked in this case.

Mr. Wharton, in discussing this question, says that "in this country there has been some hesitation in permitting a question, the answer to which not merely imputes disgrace, but touches on matters of record; but the tendency now is, if the question be given for the purpose of honestly discrediting a witness, to require an answer." Whart. Crim. Ev. § 474.

Stephens, in article 129 of his Digest of the Law of Evidence, in speaking of what are lawful questions on cross-examination, says: "When a witness is cross-examined, he may be asked any questions which tend—*First*, to test his accuracy, veracity, or credibility; or, *second*, to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided in article 120, viz., when the answer might expose him to a criminal charge or penalty."

In *Wroe v. State*, 20 Ohio St. 460, the witness for the defendant was asked, on cross-examination: "Were you not discharged, or compelled to resign, from the police force of the city of Dayton?" And also: "Are you not now under indictment for murder in the second degree, in this court?" And another witness for the defendant was asked if he had not been indicted for assault and battery in that court, and pleaded guilty. The supreme court held that the questions were allowable, under the latitude of cross-examination; and stated, in its opinion, that "it is difficult to lay down any precise rule fixing the limits to which a witness may be cross-examined on matters not relevant to the issue. This must, in a great measure, rest in the sound discretion of the court trying the cause. Such questions may well be allowed when there is reason to believe it will tend to the ends of justice; but they ought to be excluded when the disparaging course of the examination seems unjust to the witness, and uncalled for by the circumstances of the case."

In a later case in that state, where the defendant was on trial for murder in the first degree, and, having offered himself as a witness, was asked, on cross-examination, if he had not previously been indicted for assault with intent to kill, and pleaded guilty to the same, and if he had not frequently been arrested in that county on charges of assault and battery, objections to these questions were overruled; and the supreme court held that it was within the discretion of the court to allow the questions, for the purpose of judging of the character and credit of the witness from his own admissions, and that it did not appear that the discretion had been abused. *Hanoff v. State*, 37 Ohio St. 178.

In *Brandon v. People*, 42 N. Y. 265, the defendant became a witness in his own behalf, and, on cross-examination, he was asked: "Have you ever been arrested before for theft?" The counsel for the defendant objected to the question on the ground that the prosecuting attorney had no right to attack the character of the prisoner, she not having put her character in issue. The objection was overruled, and the court of appeals held the question proper for the purpose of impairing the credibility of the witness; saying that "it had been the practice of the courts of this state, from a very early

period, to permit questions of this character to be put to a witness, and for the purpose indicated. Its abuse is guarded against in two modes: *First*, by the privilege of the witness to decline to answer any question which may disgrace him, or may tend to charge him as a criminal; *second*, by the power of the court, of its own motion, to prohibit an unreasonable or oppressive cross-examination."

The supreme court of Michigan considered the propriety of such testimony in a case where the defendant was sworn as a witness in his own behalf, and controverted the plaintiff's case. On cross-examination he was allowed, against objection, to be asked whether he was ever confined in a state prison. The court held the objection was not tenable; saying that "it has always been held that, within reasonable limits, a witness may, on cross-examination, be very thoroughly sifted upon his character and antecedents. The court has a discretion as to how far propriety will allow this to be done in a given case, and will or should prevent any needless or wanton abuse of the power. But, within this discretion, we think a witness may be asked concerning all antecedents which are really significant, and which will explain his credibility, and it is certain that proof of punishment in a state prison may be an important fact for this purpose. And it is not very easy to conceive why this knowledge may not be as properly derived from the witness as from other sources. He must be better acquainted than others with his own history, and is under no temptation to make his own case worse than truth will warrant. There can with him be no mistakes of identity. If there are extenuating circumstances, no one else can so readily recall them. We think the case comes within the well-established rules of cross-examination, and that the few authorities which seem to doubt it have been misunderstood, or else have been based upon a fallacious course of reasoning, which would, in nine cases out of ten, prevent an honest witness from obtaining better credit than an abandoned ruffian." *Wilbur v. Flood*, 16 Mich. 40.

In *Clemens v. Conrad*, 19 Mich. 170, a witness was required to answer if he had not been indicted and convicted of a criminal offense. The objection was there made, as it is in this case, that the testimony involved matters of record, and was for that reason objectionable; but Judge COOLEY, speaking for the court, said: "We think the reasons for requiring the record evidence of a conviction have very little application to a case where the party convicted is himself upon the stand, and is questioned concerning it, with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken about it, is so slight that it may almost be looked upon as purely imaginary, while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent. We prefer the early English rule upon the subject. (*Priddle's Case*, 1 Leach, 442; *King v. Edwards*, 4 Term R. 440;) and for the reasons which were stated in *Wilbur v. Flood*."

Running in the same line are the following additional authorities: *La Beau v. People*, 34 N. Y. 223; *State v. Bacon*, 9 Pac. Rep. 393; *Com. v. Bonner*, 97 Mass. 587; *Rex v. Clarke*, 2 Stark. 241; *Yewin's Case*, 2 Camp. 638; *Rex v. Pitcher*, 1 Car. & P. 86; *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; *Driscoll v. People*, 47 Mich. 413; S. C. 11 N. W. Rep. 221; *Hamilton v. People*, 29 Mich. 183; *State v. Garrett*, Busb. 357; *Storm v. U. S.*, 94 U. S. 76; *Gutterson v. Morse*, 58 N. H. 165; *State v. Ward*, 49 Conn. 429; *Com. v. Lyden*, 113 Mass. 452.

These authorities show that, for the purpose of impairing his credibility, a witness may be cross-examined as to specific facts tending to disgrace or degrade him, although such facts are irrelevant and collateral to the main issue. The range of cross-examination, and extent to which such questions should be allowed, depend upon the appearance and conduct of the witness, and all

the circumstances of the case, and necessarily must be regulated by a sound judicial discretion. It is only where there has been an abuse of the exercise of this discretion by the court, resulting to the prejudice of the party complaining, that error will lie. We cannot say that the cross-examination went beyond the proper limits in this case, or that the court abused its discretion in allowing the questions objected to.

Complaint is made that, while Gutekunst was upon the witness stand, records of the convictions of the witness in that court were read to the jury. If the records read were the convictions which had been admitted by the witness, no harm was done; and, in no event, can we say that what was read was prejudicial, as the records are not included in the bill of exceptions, and we are not apprised of what they contain.

The instructions are criticised because the court failed to instruct the jury that they could only consider sales made within two years preceding the filing of the information; and it is claimed that the instructions were not as full in some other respects as the evidence and nature of the case demanded. On the first question, it may be stated that the information was filed in 1886, the sales were alleged to have been made during the same year, and the proof given upon the charge was confined to the sales made during the present year, and hence there was no necessity to instruct the jury upon the statute of limitations. In regard to the alleged omission of the court to instruct upon certain phases of the case, we remark that the charge fairly represented the case to the jury, and, as the appellant failed to request other or different instructions, as he might have done, he cannot now complain. *Douglass v. Geiler*, 32 Kan. 499; S. C. 4 Pac. Rep. 1039.

The judgment of the district court will be affirmed.

(All the justices concurring.)

NOTE.

CRIMINAL LAW—ACCUSED AS WITNESS. A defendant who takes the stand, and testifies, waives his constitutional privilege. *Thomas v. State*, (Ind.) 2 N. E. Rep. 808; *State v. Tatman*, (Iowa,) 13 N. W. Rep. 632. He is to be treated as any other witness, *Boyle v. State*, (Ind.) 5 N. E. Rep. 203; *Heldt v. State*, (Neb.) 30 N. W. Rep. 626; is subject to the same rules as to examination and cross-examination, *Thomas v. State*, (Ind.) 2 N. E. Rep. 808; as to the competency of testimony, *State v. Kelly*, (Iowa,) 11 N. W. Rep. 635; *State v. Red*, (Iowa,) 4 N. W. Rep. 831; and as to impeachment, *State v. Red*, (Iowa,) 4 N. W. Rep. 831. He may be cross-examined on all facts relevant and material to the issue, *Thomas v. State*, (Ind.) 2 N. E. Rep. 808; and his failure to explain or contradict evidence tending to criminate him is proper subject of comment, *Heldt v. State*, (Neb.) 30 N. W. Rep. 626; *State v. Spaulding*, (Minn.) 25 N. W. Rep. 793; *Comstock v. State*, (Neb.) 15 N. W. Rep. 355; *State v. Tatman*, (Iowa,) 13 N. W. Rep. 632. It is not improper to charge the jury that, in weighing his testimony, they should take into consideration the interest he necessarily has in the result of the trial. *People v. Calvin*, (Mich.) 26 N. W. Rep. 851.

As to limits of examination and cross-examination, see *People v. Clark*, (N. Y.) 8 N. E. Rep. 38; *People v. Quick*, (Mich.) 18 N. W. Rep. 375; *People v. Cummins*, (Mich.) 11 N. W. Rep. 184.

(71 Cal. 407)

HUSCHEON *v.* HUSCHEON. (No. 9,832.)

(*Supreme Court of California*. December 18, 1886.)

1. MORTGAGE—ABSOLUTE DEED—CIVIL CODE CAL. §§ 2924, 2925.

Under the law of California (Civil Code, §§ 2924, 2925) every transfer of an interest in land, other than in trust, made only as a security for the performance of another act, is a mortgage; and the fact that the transfer was made subject to a defeasance may be proved, though it does not appear by the terms of the instrument.¹

2. SAME—WHEN DECLARED A MORTGAGE—INADEQUATE CONSIDERATION—PREPONDERANCE OF EVIDENCE.

A deed, absolute on its face, of land worth \$4,000, by an ignorant man, made, under the pressure of debt and impending litigation, to a brother, in whom he

¹See note at end of case.

placed great confidence, will be declared a mortgage, where it appears that the deed was given in consideration of the brother's settling the mortgagor's debts, present and prospective, and that the debts so paid amounted to only \$1,500, and where the preponderance of evidence shows that, at the time the deed was made, a contemporaneous contract was executed which was subsequently lost, and by the terms of which the grantor was to be allowed to redeem the land so conveyed at the end of six years.¹

3. SAME—STATEMENT OF ACCOUNT.

An absolute deed having been declared a mortgage, the account should be stated between the parties as to credit the mortgagor with all sums of money paid out by him for the mortgage, and for taxes and improvements upon the property, and also with his expenses and a reasonable compensation for his time in attending to the mortgagor's business, and with interest on the several sums at 10 per cent. The mortgagor should be charged with the value of the rents and profits of the land while he held possession of it, with the amount of a mortgage which he had placed upon the land and had not paid, and with the value of certain labor which the mortgagor had performed for the mortgagee.

Commissioners' decision.

Department 1. Appeal from superior court, Humboldt county.

S. M. Buck, for respondent. *J. D. H. Chamberlain* and *P. F. Hart*, for appellant.

BELCHER, C. C. By this action the plaintiff seeks to have a deed, executed by him to defendant, adjudged to be a mortgage; and the facts of the case, as found by the court below, are substantially as follows:

On the fifteenth day of July, 1876, plaintiff was the owner of 760 acres of land in Humboldt county, of the value of \$4,000. He was indebted to one Margaret Fitzgerald in the sum of about \$500, for which an action had been commenced against him, and his property attached. He had been a partner with one Comise in the dairying business, and Comise was claiming that a considerable amount was due him on partnership account, and was threatening to commence an action to settle up the partnership affairs. Plaintiff had no money, but it was necessary for him to be prepared to meet and settle these demands.

Under these circumstances he applied to the defendant, who was his brother, and in whom he placed great confidence, for assistance. Defendant agreed to pay the Fitzgerald note, and also to defend any action that might be commenced by Comise, and to pay all the cost and expense of such action, and any judgment that might be recovered therein, provided plaintiff would execute to him a conveyance of all his lands. Thereupon plaintiff executed and delivered to defendant a deed of his lands, which was absolute in form. On the same day another paper was executed by the parties, which is now lost, but is called by some of the witnesses a lease, and by others a "back paper." By this paper it was, in effect, agreed that defendant should take and hold possession of the lands for six years, and that, at the expiration of that time, they should be reconveyed to the plaintiff, upon his paying to the defendant such sum or sums of money as might then be found due him. Under the agreement defendant took possession, and has ever since held it. A few days after receiving the deed he paid the Fitzgerald claim, amounting to the sum of \$540, and thereafter, at divers times, paid out sums aggregating about \$800, for costs and expenses incurred in the litigation between Comise and plaintiff, and to satisfy the judgment obtained by Comise in that litigation. After the expiration of the six years provided for in the agreement, plaintiff demanded from defendant an account of the rents, issues, and profits of the land, and of all sums of money due defendant, if any, and offered to pay him whatever sum might be found due; but defendant refused to account to or with plaintiff in any manner, and claimed to own all of said property absolutely. At that time the land had largely increased in value.

¹See note at end of case.

The action was commenced in January, 1883, plaintiff alleging in his complaint that the deed executed by him to defendant was intended to be, and was given and accepted as, security for the money to be paid for him by defendant, and praying that it be adjudged a mortgage; that an account of the dealings between them be taken; and that he be permitted to redeem the property so conveyed upon paying to defendant all sums of money found due him, if any, and for a reconveyance of the lands to him by defendant. Upon these facts, the court, by its judgment, granted to the plaintiff the relief demanded. The defendant then moved for a new trial, and, his motion being denied, appealed from the judgment and order.

In support of the appeal, it is now earnestly contended that the deed in question was an absolute conveyance in fact as well as in form, and that the finding of the court that it was only a mortgage is not justified by the evidence. In this state every transfer of an interest in real property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage; and the fact that the transfer was made subject to a defeasance may be proved, though it does not appear by the terms of the instruments. Sections 2924, 2925, Civil Code. Whether a deed absolute in form be a mortgage or not is a mixed question of law and fact, to be determined from all the evidence, written and parol; and, in determining it, all the facts and circumstances attending the transaction should be considered. If it were given as a security for a loan of money, a court of equity will treat it as a mortgage; and whether it was so given or not is the test by which its character must be judged. *Farmer v. Grose*, 42 Cal. 169; *Montgomery v. Spect*, 55 Cal. 352; *Peugh v. Davis*, 96 U. S. 332.

In the last-named case, FIELD, J., delivering the opinion, it is said: "It is an established doctrine that a court of equity will treat a deed absolute in form as a mortgage, when it is executed as a security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible."

The debt to secure which the deed is given, may be an antecedent debt, or one created at the time, or it may be advances to be thereafter made by the mortgagor to or for the mortgagor, and no accompanying written promise on the part of the mortgagor to pay the debt is necessary. *Pioneer G. M. Co. v. Baker*, 10 Sawy. 539; S. C. 23 Fed. Rep. 258; *Campbell v. Dearborn*, 109 Mass. 130; *Russell v. Southard*, 12 How. 189; 4 Wait, Act. & Def. 541, 542; *Horn v. Keteltas*, 46 N. Y. 605. One of the circumstances tending strongly to show that a deed absolute in form was only a mortgage, is the fact when it appears that there was great inequality between the value of the property conveyed and the price alleged to have been paid for it. As said in *Russell v. Southard, supra*: "In examining this question, it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practiced, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and therefore, in the cases on this subject, great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold;" citing *Conway v. Alexander*, 7 Cranch, 241; *Morris v. Nixon*, 1 How. 126; *Vernon v. Bethell*, 2 Eden, 110; *Oldham v. Halley*, 2 J. J. Marsh. 114; *Edrington v. Harper*, 3 J. J. Marsh. 354.

Tested by the foregoing rules of law, was the deed in question an absolute conveyance or a mortgage?

It is not pretended that the value of the property, when the deed was made, was less than \$4,000, nor that there was any consideration for its execution

except an agreement on the part of defendant to pay all of plaintiff's debts, including all claims then in litigation, or that might be brought against him. The amount to be paid on the Fitzgerald note was known to be only a little more than \$500. The only other debt was the Comise claim, which was uncertain in amount; it might be nothing, or might be several hundred dollars. Taking both of the claims together, we are unable to see how it could have been anticipated that the defendant would be called upon to pay more than a thousand or twelve hundred dollars. The consideration for the deed was, then, altogether inadequate, and it seems quite incredible that plaintiff would be willing to sell out all his property, even to his brother, for about one-fourth of its value.

Upon the question whether a paper in the nature of a defeasance was executed by the parties or not, the testimony was conflicting, and upon that subject we quote and adopt what was said by the court below, in deciding the case: "Aside from the consideration of inadequacy of price, I am entirely satisfied from the evidence that, at the time of the execution of the conveyance, it was not only agreed and understood between the parties that plaintiff should have the right to redeem upon the payment to defendant of all sums which he had paid for plaintiff, but I am also satisfied that there was at the same time executed by the parties an agreement to that effect. This writing has not been produced in court, and diligent search and inquiry have failed to discover it. It is lost or destroyed. The defendant denies most emphatically that such an instrument was ever executed. He admits that there was some talk about it; that plaintiff wanted such a writing, but that he, the defendant, positively refused to execute it. In my opinion, the evidence as to the execution of this paper is so overwhelming as to place it beyond all doubt. The plaintiff swears positively to it, gave his reasons why he wanted it, testifies circumstantially to the reading of it by Watson in the presence of Walsh, himself, and defendant, of his signing it, and defendant attaching his mark, being unable to write; also as to the controversy between them as to the duration of the lease, as it was called, or the time within which he should be allowed to redeem; and finally, at the suggestion of Walsh, fixing the term at six years. Incidentally, it appears that he spoke of it to a number of parties at various times; sometimes calling it a bond for a deed, sometimes a lease, and sometimes using the homely but expressive term, a 'back paper.' The testimony of Walsh as to the execution of the paper is clearer and more satisfactory than that of the plaintiff. He was the mutual friend of the parties, and they consulted and advised with him, and discussed the matter in his presence, and adopted his suggestion in fixing the duration of the lease at six years. He heard it read by Watson to the parties, heard them express their satisfaction at its contents, saw plaintiff sign his name, and defendant make his mark; before this having sent them to Watson to get him to write it. He subsequently read it over himself, and kept it for about a year in his safe. He is quite certain that some one obtained it from him pending the Comise and Huscheon litigation. Watson remembers distinctly of writing two papers in which the parties were interested, and that Walsh had something to do with the negotiations, but fails to remember the contents or purpose. Walsh cannot testify minutely to all the terms of this lease, as he terms it, but does remember clearly that the purpose and object was to allow the defendant to use the land and stock for six years, the rents and profits to be applied in payment of plaintiff's indebtedness to him, and at the expiration of that time he was to deed back to plaintiff, upon the payment by him of the money expended in his behalf, if any should be due."

This is a fair review of the evidence, and, in our opinion, it correctly states its scope and meaning. It is true, it appeared that plaintiff had often spoken of the business relation existing between himself and defendant as that of a partnership, and that in a suit against the defendant, which involved the

right to the personal property transferred, and was tried before a justice of the peace in 1877, he was a witness, and testified that he had no interest in the personal property, and incidentally that he had none in the land. But we do not consider these facts of any particular importance. Plaintiff was an ignorant man, and may well have supposed that the transaction established some kind of a partnership relation. So as to the testimony before the justice. If plaintiff testified just as it is claimed he did, it may have been done honestly. He knew that he had deeded the land to defendant, and that defendant was in possession of it, and had a right to retain that possession for several years. Under the circumstances he may have supposed that he had no interest in the land then, and would have none until he had settled with defendant, and paid back to him all sums of money which had been or should be advanced for his benefit.

Looking, then, at all the testimony, we agree with the court below that it clearly and satisfactorily appears that the deed in question was given as a security for the repayment of moneys to be thereafter advanced by defendant, and that it should be held and treated as a mortgage.

It is also argued for the appellant that the deed was made to hinder and delay the creditors of plaintiff, and therefore he is entitled to and can obtain no relief from the courts against it. On looking through the record we are unable to find anything to support this claim. In his very able and exhaustive brief, counsel for appellant says that, as the consideration for the deed, "defendant agreed to pay all plaintiff's debts, including all claims then in litigation, or that might be brought against him." If this be so, how can there be any plausible pretense that in making the deed plaintiff intended to hinder, delay, or defraud his creditors? We, at least, are unable to see how a needy debtor can be said to have violated any rule of law or good morals, because, to raise money to pay his just debts, he has turned over all his property, as security, to some one, who has the ability, and has undertaken honestly and in good faith, to pay them.

Among other defenses interposed, defendant pleaded nearly all of the sections of the Code providing for the limitation of actions, and it is claimed that, under some one or more of these sections, plaintiff's cause of action is barred. If it be true, as found by the court, that defendant took and held possession of the land under a written agreement, which was executed by the parties, and provided, in effect, that plaintiff should have the right to redeem at the expiration of six years upon paying to defendant whatever should then be found due him, it is quite clear that there could have been no adverse holding of the land, and that defendant cannot now avail himself of any of the sections of the Code which provide bars against the recovery of real property. So, too, it is equally clear that the paper constituted a written recognition of the debt from plaintiff to defendant, and a promise to pay it when the right to redeem should accrue, and consequently that, if defendant had instituted an action to foreclose, plaintiff could not have availed himself of any of the sections of the Code which provide bars against the recovery of money. It must follow, therefore, that the rights of the parties were reciprocal and commensurable, and that the court properly held that the action was not barred.

In stating the account between the parties the court credited defendant with all sums of money paid out by him for the plaintiff, and for taxes and improvements upon the property, and also with his expenses and a reasonable compensation for his time while attending to plaintiff's business, with interest on the said several sums at the rate of 10 per cent. per annum, but it refused to credit him with the money paid out for expenses in the lawsuit before the justice of the peace hereinbefore referred to; and it charged him with the value of the rents and profits of the land while he held possession of it, with the amount of a mortgage he had placed upon the land and not paid,

and with the value of certain work and labor performed by plaintiff on another farm owned by defendant. As the accounts were thus stated it was found that the defendant had been fully paid, and that a balance of \$217.30 was due the plaintiff, for which judgment was also entered in his favor.

It is now objected that the court erred in refusing to credit defendant with his expenses in the justice's court case, and in charging him with the rents and profits of the land, and for the work and labor of plaintiff. But in the rulings of the court upon these matters we see no material error. The action before the justice of the peace was brought by a third party against the defendant to recover the personal property, and it had no connection with the transaction in hand. The defendant was a mortgagee in possession, and chargeable with the rents and profits of the mortgaged premises, (*Ruckman v. Astor*, 9 Paige, Ch. 517; *Strang v. Allen*, 44 Ill. 428; 4 Wait, *Act. & Def.* 566, 577;) and there was testimony tending to show that the value of the rents and profits was even greater than the amount allowed. The court, in effect, found that the services of plaintiff were rendered in part payment of the sums advanced by defendant under the original agreement; and the testimony of plaintiff that he never made any separate contract about the work, and never expected defendant to pay him \$25 per month in money for his work, but supposed he was working in the interest of the general partnership between them, is in support, we think, of the court's view of the matter.

The plaintiff seems to have thought that the transaction between himself and defendant created a partnership between them, and that he was working to discharge the duty cast upon him by that relation. He was mistaken about the partnership, but his work was nevertheless performed to release him from the burden of debt which the transaction had imposed upon him.

It follows that the judgment and order should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

NOTE.

MORTGAGE—DEED GIVEN AS SECURITY. A deed given merely as security, with an understanding that the land is redeemable by the payment of the money or the performance of the obligation, is, between the parties, a mortgage, *Scheiber v. Le Claire*, (Wis.) 29 N. W. Rep. 570; *Jeffrey v. Hursh*, (Mich.) 25 N. W. Rep. 176; *Niggeler v. Maurin*, (Minn.) 24 N. W. Rep. 389; *Hulin v. Stevens*, (Mich.) 18 N. W. Rep. 569; *Madigan v. Mead*, (Minn.) 16 N. W. Rep. 539; *Hurst v. Beaver*, (Mich.) 16 N. W. Rep. 165; *Butler v. Butler*, (Wis.) 1 N. W. Rep. 70; *Jackson v. Lawrence*, 6 Sup. Ct. Rep. 915; *Cox v. Ratcliffe*, (Ind.) 5 N. E. Rep. 5; *Workman v. Greening*, (Ill.) 4 N. E. Rep. 385; and a bill of sale will, under like circumstances, be construed as a chattel mortgage, *Winner v. Hoyt*, (Wis.) 28 N. W. Rep. 380; *Manufacturers' Bank of Milwaukee v. Rugee*, (Wis.) 18 N. W. Rep. 251, *Rockwell v. Humphrey*, (Wis.) 15 N. W. Rep. 394; *McAnulty v. Seick*, (Iowa,) 13 N. W. Rep. 743.

The intent of the parties may be shown by parol evidence. *Winner v. Hoyt*, (Wis.) 28 N. W. Rep. 380; *Parish v. Reeve*, (Wis.) 23 N. W. Rep. 568; *Manufacturers' Bank of Milwaukee v. Rugee*, (Wis.) 18 N. W. Rep. 251; *Madigan v. Mead*, (Minn.) 16 N. W. Rep. 539; *Rockwell v. Humphrey*, (Wis.) 15 N. W. Rep. 394; *Barber v. Milner*, (Mich.) 5 N. W. Rep. 92; *Butler v. Butler*, (Wis.) 1 N. W. Rep. 70; *Jackson v. Lawrence*, 6 Sup. Ct. Rep. 915; *Pioneer Gold Min. Co. v. Baker*, 23 Fed. Rep. 258; S. C. 20 Fed. Rep. 4; *Cox v. Ratcliffe*, (Ind.) 5 N. E. Rep. 5; *Workman v. Greening*, (Ill.) 4 N. E. Rep. 385.

As to the facts necessary to convert an absolute deed into a mortgage, see *Arnot v. Baird*, (Cal.) *ante*, 386.

(70 Cal. 423)

PETERSEN v. WEISSBEIN. (No. 11,544.)

(Supreme Court of California. August 23, 1886.)

INJUNCTION—CROSS-COMPLAINT—DEMURRER—MOTION—AFFIDAVITS.

In an action of ejectment, where defendant files a cross-complaint, and seeks to enjoin plaintiff from asserting any title to the property, pending the decision of a demurrer to the cross-complaint, defendant cannot, upon motion, on affidavits, obtain a perpetual injunction, but must await the result of the proceedings.

Department 1. Appeal from superior court, Nevada county.
Cross & Simonds and *E. H. Gaylord*, for appellant. *A. Burrows*, for respondent.

Ross, J. The complaint in this case is in the usual form of complaints in an action of ejectment. To it the defendants filed an answer, putting in issue its averments, and also pleading in bar of the action judgments in certain other actions, which, it is claimed, determined adversely to the plaintiff the title to the property in controversy. The defendants also filed a cross-complaint, by means of which they sought to have the plaintiff perpetually enjoined from asserting any right to the property, on the ground that his action was vexatious, to which cross-complaint the plaintiff filed a demurrer. Subsequently, and during the pendency of the demurrer, defendants moved the court, upon affidavits and the judgment rolls in the suits pleaded in bar, for an order perpetually enjoining the plaintiff from further prosecuting the action. The motion was granted, and the action of the court in that particular constitutes the ground of the present appeal.

It is not necessary in this case to determine whether, under any circumstances, it is competent to try, upon affidavits, the question whether or not the title claimed by plaintiff in an action of ejectment is the same title adjudicated against him in some other action, nor to determine the sufficiency of the cross-complaint in the present case to obtain the relief sought thereby. It is enough to say that defendants could not anticipate the result of the proceedings under the cross-complaint by the motion in question.

Order reversed, and cause remanded for further proceedings.

We concur: MYRICK, J.; MCKINSTRY, J.

(71 Cal. 491)

LANG v. SUPERIOR COURT. (No. 11,367.)

(*Supreme Court of California*. December 30, 1886.)

A petition for rehearing was filed, and, upon the denial thereof, the opinion formerly filed in this case, and reported *ante*, 306, was, by order of the court, modified by striking out the following words on page 307:

"We are not familiar with the practice of rehearsings in the superior court; and what right or power the superior court had, on the twelfth of December, 1884, to order a rehearing in the case, we are at a loss to conceive. The demurrer and the motion for a new trial had been disposed of, and then, on what is called a 'rehearing,' the case was again brought before the court, and a new order made. This is a new practice with which we are not familiar, and we know of no statute authorizing it."

Also, by striking out the words "Judge FINN" on page 306; and also changing the words "Judge FINN, superior judge, who had succeeded," on page 307, by inserting in lieu thereof the words "the successor of."

TRUCKS v. BAGLEY. (No. 11,224.)

(*Supreme Court of California*. August 23, 1886.)

APPEAL—EVIDENCE—FINDINGS.

Where the evidence is conflicting, the findings of the lower court will be sustained, and the judgment affirmed.

Department 1. Appeal from superior court, Nevada county.
 Action to quiet title. Judgment for plaintiff. Defendant appeals.
Chas. W. Kitts, for appellant. *Cross & Simonds*, for respondent.

BY THE COURT. Under the rule prevailing here, we do not think we would be justified in holding the findings unsupported by the evidence. And, unless that can be done, it is clear that the judgment of the court below must be affirmed.

Judgment and order affirmed.

(*Or. 268*)

GEE v. MCMILLAN and others.

(*Supreme Court of Oregon. December 7, 1886.*)

VENDOR AND VENDEE—VENDOR'S LIEN—PURCHASE NOTE.

Where land has been conveyed to purchasers under an agreement by which they are to give the vendor, in payment for the same, a good, negotiable, bankable promissory note, to be signed by persons of sufficient responsibility to enable plaintiff to cash the same, and the purchasers, after receiving the conveyance, give their own note which is not negotiable nor collectible, the court will enforce a lien for the purchase money upon said land in favor of the vendor.

Appeal from circuit court, Multnomah county.

Suit to enforce vendor's lien. Judgment for plaintiff. Defendants appeal.

P. L. Willits, for appellants, McMillan and others. *O. P. Mason*, for respondent, Gee.

STRAHAN, J. The object of this suit is to enforce a grantor's lien upon certain real property situate in Multnomah county. The material parts of the complaint are as follows: That the defendant Sarah McMillan is the wife of the defendant R. H. McMillan, and the defendant Mary Haugg is the wife of the defendant N. Haugg; that on the eighteenth day of December, 1885, the plaintiff was the owner of an undivided interest in and to the real property described in the complaint, and was also the owner of an undivided interest in and to certain personal property in complaint described, and that the legal title to said land and personal property was in B. F. Mays, who held the interest owned by plaintiff for her; that plaintiff is the wife of D. L. Gee, and that said property was her sole, separate, equitable estate; that on or about December 19, 1885, the defendants R. H. McMillan and N. Haugg, and the said D. L. Gee and B. F. Mays, entered into a contract to sell all of said property to R. H. McMillan and N. Haugg, and that defendants last named then and there agreed to and with the said D. L. Gee and B. F. Mays to purchase said property, and to pay therefor as follows: To pay to D. L. Gee and Mays \$1,000, including the payment of a certain chattel mortgage which was a lien upon a part of said personal property in the sum of \$150, and to turn over to said D. L. Gee a butcher-shop and business, estimated at \$250, and to make, execute, and deliver to the plaintiff a good, negotiable, bankable promissory note for the sum of \$1,250, to be signed by persons of sufficient responsibility, so as to enable plaintiff to cash the same, and that they would take said land subject to a certain mortgage thereon for \$2,200; that pursuant to said agreement, and at the request of said defendants R. H. McMillan and N. Haugg, said Mays executed a deed to said real property to the defendants Sarah McMillan and Mary Haugg, who now hold the title to said property; that said defendants last named have paid nothing whatever for said property, and that R. H. McMillan and N. Haugg caused and procured the conveyance of all of said property to their said wives, Sarah McMillan and Mary Haugg, for the purpose, and with the intent, to defraud and cheat the plaintiff out of all her interest in said property; that the defendants R. H. McMillan and N. Haugg failed to execute to plaintiff such bankable note as they had agreed to do, but fraudulently and falsely, and with the intent to cheat and defraud the plaintiff out of the said \$1,250, made and executed a certain promissory note themselves, wherein they promised to pay to the order of Lizzie Gee, this plaintiff, the sum of \$1,250; that said note was sent to the plaintiff through the mail, and was not received by her in payment of anything; that said R. H. McMillan

and N. Haugg are now, and were at the time said note was made, wholly insolvent; and that said note is wholly worthless, and was made, executed, and sent to the plaintiff with the intent to defraud and cheat her out of said property; that at the time the defendants Sarah McMillan and Mary Haugg received said deed they knew all the foregoing facts; that no part of said note has been paid, and that the same is overdue.

The defendants answered together, and denied the material allegations of the complaint, except that it is admitted that said property was conveyed to the defendants Sarah McMillan and Mary Haugg.

The cause was referred for the purpose of taking the evidence, and the same was taken in writing, and accompanies the transcript. The trial in the court below resulted in a decree in favor of the plaintiff, enforcing a grantor's lien against the real property described in the complaint, from which decree the defendants Sarah McMillan and Mary Haugg have appealed to this court. There are therefore but two questions presented for our examination, namely: (1) Does the evidence prove, to the satisfaction of the court, the material allegations made by the plaintiff? and (2) are those allegations, if true, sufficient in law to entitle the plaintiff to the relief which she prays?

I will now examine these questions in their order; and, first, as to the question of fact. Lizzie Gee, D. L. Gee, B. F. Mays, and Robert Gee were examined as witnesses on the part of the plaintiff, and it is sufficient to say that their evidence satisfies me of the truth of all the material allegations in the complaint. The facts disclosed leave no doubt in my mind as to the intent on the part of R. H. McMillan and N. Haugg to overreach and defraud the plaintiff, and to obtain her interest in said real property without paying the \$1,250 represented by said note. No extended discussion of the facts is necessary. They do not seem to be seriously controverted by the defendants, who offered no evidence or explanation whatever touching their conduct in this transaction. Under these circumstances, we are justified in drawing the strongest and most favorable inferences from the evidence given on the part of the plaintiff that the facts will authorize. The defendants had the opportunity of contradicting this evidence, so damaging in its character, and, having failed to do so, we must give it effect according to its fullest scope and meaning. We therefore adopt the findings of fact made by the learned circuit judge as the findings of this court.

The questions of law are more difficult. The complaint appears to have been drawn to meet one of two alternative views of the law; that is, either to enforce a grantor's lien on the real property described, or, if that cannot be done, then to annul said transaction for fraud. At least, both views were insisted upon on the argument. But the complaint does not contain facts sufficient to authorize a rescission of the contract. The fraud is, perhaps, sufficiently alleged and proven; but that is not enough. If the transaction is to be rescinded, all parties must be restored to the same situation they were in, substantially, at the time the deed was executed. This would require that the plaintiff should tender back to the defendants all that they parted with on the faith of the agreement, or, at least, offer in her complaint to make restitution. It is manifest that this transaction cannot be rescinded under the facts alleged. Mr. Mays received a part of the consideration from the defendants, and he is not even a party to this suit, and it does not appear whether he desires a rescission or not.

But the other question is the one mainly relied upon, and, it must be admitted, presents the greatest difficulty. The contention of the plaintiff is that the note for \$1,250 described in the complaint is for the residue of the purchase money for the real property which she conveyed to the two defendants, Sarah McMillan and Mary Haugg, and that, as against them, she has a lien in equity for said purchase money. In this case the property was conveyed to the grantees, and therefore, according to some of the authorities,

the lien, if it exists, is called a grantor's lien, (3 Pom. Eq. Jur. § 1249;) while other authorities, equally as respectable, seem to ignore this distinction, and to treat the lien as a vendor's lien, where the property has been conveyed, or else it is entirely disregarded, (1 Lead. Cas. Eq. pt. 1, 481; 2 Story, Eq. Jur. §§ 1217, 1218.)

Whether the lien be treated as a vendor's lien, or as a grantor's lien, can make no difference in this case, as the result would be the same. The principle contended for by the respondent is that, where one sells real property to another, and conveys the same by deed, a lien arises in equity in favor of the grantor for the purchase money, or for such part thereof as remains unpaid. I think this proposition rests on principles of equity too strong to be shaken or overthrown without legislative sanction. It is not important whether it will be accounted for as a trust, or as an equitable mortgage, or as arising from natural equity, or as having originated from any of the other causes or reasons stated by the writers on that subject,—the result must be the same. In either event, it is a principle eminently promotive of justice between man and man, and, in my opinion, has the sanction of the ablest writers on jurisprudence, as well as the weight of judicial opinion in its favor. 3 Pom. Eq. Jur. §§ 1249, 1250; 1 Lead. Cas. Eq. 481, and notes; 2 Story, Eq. Jur. *supra*; and see 2 Sugd. Vend. 671, and notes.

Mr. Pomeroy's excellent treatise shows that the grantor's lien exists in the following states and territories: Alabama, Arkansas, California, Colorado, Dakota, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oregon, Tennessee, Texas, and Wisconsin. Section 1249, *supra*. The states of Connecticut, Delaware, Georgia, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and West Virginia do not recognize the doctrine. The supreme court of the United States recognizes and enforces the lien. Said that court: "When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration. It is on this principle that the courts of equity proceed, as between vendor and vendee. The purchase money is treated as a lien on the land sold, where the vendor has taken no separate security." *Chilton v. Braiden's Adm'x*, 2 Black, 458; *Peters v. Bowman*, 98 U. S. 56; *Thredgill v. Pintard*, 12 How. 24.

The earliest case in this court where a vendor's lien is recognized is *Pease v. Kelly*, 3 Or. 417. The opinion is brief, and was delivered by BOISE, J. Speaking of the lien for the unpaid purchase money, he said: "A mortgage is a more certain and definite security than a vendor's lien. The lien exists, if there is no higher security." In the brief of counsel for the appellant in that case the very grounds upon which this lien appears to have been doubted in this state, in a case presently to be mentioned, were referred to, and must have been considered by the court. It is clear that the reasons there suggested did not prevail, and that the court would have enforced the lien if it had not been waived by the taking of a mortgage. It is difficult to understand how the vendor's lien could be waived by the taking of a mortgage, if such lien never had any existence.

The case which seems to throw some doubt upon *Pease v. Kelly*, *supra*, is *Kelly v. Kuble*, 11 Or. 75; S. C. 4 Pac. Rep. 593. There it is said: "As the respondent has failed to make out a sale, it becomes unnecessary to consider the case further. We have thus far impliedly admitted the existence of the equitable lien of the vendor of real estate for the unpaid purchase price; but we doubt the actual existence of the lien in this state. *Ahrend v. Odiorne*, 118 Mass. 261; *Kauffelt v. Bower*, 7 Serg. & R. 64-76. It is not believed the existence of such a lien was decided in *Pease v. Kelly*, 3 Or. 417. Having reached the conclusion that no sale had been shown in the case before the

court, no question could arise as to a lien for purchase money. While this intimation by this court is entitled to very great respect and consideration, I do not think, under the facts of the case, it ought to be adopted as controlling authority. In *Coos Bay Wagon-road Co. v. Crocker*, 6 Sawy. 574, S. C. 4 Fed. Rep. 577, the United States circuit court, district of Oregon, recognized and enforced a vendor's lien; and this court, at the present term, has recognized and applied the same principle, (*Burkhart v. Howard*, 12 Pac. Rep. 79.)

It was suggested upon the argument that a grantor's lien did not exist in this case, for the reason that the note mentioned in the complaint was partly for the price of the land, and partly for the price of the personal property. But we do not find that any part of the consideration for personal property entered into said note. The court below found that this note was given as a part of the purchase price for land, not personal property; and I think the finding was justified by the evidence. No stronger case could be presented requiring the application of the equitable doctrine of grantor's lien for purchase money than this. Here a most flagrant fraud appears to have been practiced upon some confiding and unsuspecting people, manifestly requiring relief of some kind; and yet, unless it be administered through the application of the law of equitable lien for purchase money, it seems to me the wrong would have to go unredressed. Of course, the fraud practiced in no manner affects the question of lien,—that exists independently of the fraud; but it does illustrate and make plain the real necessity there is for the application of this principle in the practical administration of justice. Let a decree be entered in accordance with this opinion.

THAYER, J., (concurring.) The question involved in this case depends very much upon the right of a grantor of real property, by deed of absolute conveyance, to claim a lien upon the property for the unpaid purchase price thereof. In *Kelly v. Ruble*, 11 Or. 75, S. C. 4 Pac. Rep. 593, this court expressed a doubt as to whether a vendor's lien, as it existed at common law, was in force in this state. It was not necessary to the decision of that case to determine the question, and hence no opinion upon it was declared further than an intimation of its non-existence. But, in a former case, (*Pease v. Kelly*, 3 Or. 417,) this court there, evidently, considered that a lien of that character was in force, although it did not directly so determine. It will not be contended, I presume, but that the common law of England, so far as applicable to the condition of the people, has been adopted in this state; nor be denied that the part thereof relating to vendors' liens was adopted with it, unless unfitted to the situation of the affairs of the community. A great amount of speculation has been indulged in as to the origin of such a lien. Mr. Pomeroy, in his work on *Equity Jurisprudence*, says "that it has been accounted for as a trust, as an equitable mortgage, as arising from a natural equity, and as a contrivance of the chancellors to evade the unjust rule of the early common law by which land was free from claims of the simple contract debts." Section 1250, Pom. Eq. Jur. Chancellor Kent terms it an equitable mortgage, and says "that it will bind the vendee and his heirs, and volunteers, and all purchasers from the vendee with notice of the vendor's equity; that *prima facie* the lien exists without any special agreement for that purpose, and it remains with the purchaser to show that, from the circumstances of the case, it results that the lien was not intended to be reserved, as by taking other security," etc. 4 Kent, Comm. *151, 152. Judge Story says that "it attaches to the estate as a trust, equally whether it be actually conveyed, or only be contracted to be conveyed." Section 1218, Story, Eq. Jur.

In *Ahrend v. Odiorne*, 118 Mass. 261, Judge GRAY, now of the supreme court of the United States, then chief justice of the supreme court of Massachusetts, concluded, after an elaborate examination of the question, that the foundation of the doctrine was that justice required that the vendor should

be enabled to charge the land in the hands of the vendee as security for the unpaid purchase money, and that the restriction of it to real estate suggested the inference that the court of chancery was induced to interpose for the reason that real estate could not be attached on mesne process, nor, except in certain cases, and to a limited extent, be taken in execution for debt. The learned judge rejected the theory of natural equity, because that would apply to a sale of chattels as well as of land; and the theory of a trust, as that would include too many other cases to which confessedly the doctrine had not been extended. Mr. Pomeroy repudiates the idea of its being a trust, and thinks that the original and true ground of the lien arises out of natural judicial conception; that upon the sale of anything on credit the very identical thing sold should be regarded, in some sort, as a special fund, out of which payment of the price was to be obtained, or, at least, secured; and that the seller should not be considered as parting absolutely with his whole interest and dominion until the price is fully paid. 3 Pom. Eq. Jur. p. 256, § 1250. And in a footnote to said section, on page 256, that author concludes that the theory advanced by the Massachusetts courts, as to the origin of the doctrine, was imperfect and unsatisfactory; that the absence of any power at common law to make the land liable for ordinary debts, instead of being the source of the grantor's lien, was itself only another instance and consequence of the same general superiority given to the ownership of land,—both were incidents of one common mode of treating real estate, as compared with personalty. But he suggests the opinion that the original grounds and reasons for admitting the grantor's lien do not exist in our own country, and that the lien itself is not in harmony with our general real-property law. Judge Story, on the other hand, says that "the principle upon which courts of equity have proceeded in establishing the lien, in the nature of a trust, is that a person who has gotten the estate of another ought not, in conscience, as between them, be allowed to keep it, and not pay the full consideration money." Section 1219, Story, Eq. Jur. And in the previous section the same author says: "It has often been objected that the creation of such a trust by courts of equity is in contravention of the statute of frauds. But, whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by any mere theoretical doubts." Story, Eq. Jur. § 1218.

The objection to the doctrine of vendors' liens is not to its application to estates contracted to be conveyed, but to the extension of it to estates actually conveyed. It seems to me that, if the doctrine has no other foundation than to evade the rule of the common law exempting real property from the payment of simple contract debts, its adoption to the extent suggested is very questionable indeed, as there never was a condition of affairs in this country that required such a remedy on account of any such circumstance as that. But if, on the other hand, it was founded upon the principle stated by Judge Story, and suggested by Mr. Pomeroy, "that a person who has gotten an estate of another ought not, in conscience, as between them, be allowed to keep it, and not pay the full consideration money," then it was as applicable here as in Great Britain. That principle is eternal, and applicable to every country and every age.

I think the principle is a salutary one, and that it should be enforced, in a proper case. Whether it is broad enough, however, to uphold a vendor's lien to the extent of raising a trust in favor of a grantor who has conveyed by deed of absolute conveyance so as to admit of the purchase price being made a charge upon the property conveyed, in an ordinary case of sale of real estate, I do not undertake to decide, as I do not regard the decision of that question as necessarily essential to the decision of the case under consideration. Here the conveyance was procured by the vendees to be made to their wives, appellants herein, upon an assurance that the vendees would execute to the respondent, in consideration of the conveyance of her interest in the

land, good, approved, bankable notes, instead of which they merely gave their own note, which is uncollectible; and, by reason of the conveyance having been so made, the respondent is not able to reach the property, so as to make it applicable to the payment of her debt, by an ordinary proceeding at law. The transaction was fraudulent. Property obtained under such circumstances ought to be made chargeable with the consideration money, whether the law relating to vendors' liens as it existed at common law is in force or not. The appellants, through the false promise of the vendees, obtained the respondent's property, and they certainly ought not, in conscience, be allowed to keep it and not pay for it. That presents a case in which a court of equity would have an undoubted right to charge the property with the payment of the debt, irrespective of the other question referred to. Upon that ground I think the respondent is entitled to a lien upon the property for the payment of her debt. I therefore concur in the result reached in the opinion of Judge STRAHAN herein.

(14 Or. 290)

NEWHOUSE v. NEWHOUSE.

(*Supreme Court of Oregon. December 13, 1886.*)

HUSBAND AND WIFE—DIVORCE—WIFE'S COSTS—FAILURE TO PAY—INABILITY—DISMISSAL.
Where a husband sues for divorce, and, after issue joined, the court, on the wife's application, orders the husband to pay into court a sum for his wife's costs within a prescribed time, the failure of the husband to do so within that time, when such failure arises from inability and poverty, and not from willful or negligent disregard of the order, will not put him in contempt, or warrant the dismissal of his suit.

Suit for divorce. Order of dismissal. Plaintiff appeals.

J. J. Whitney and W. R. Bilyeu, for appellant. *L. H. Montanye and H. E. Courtney*, for respondent.

LORD, C. J. The plaintiff brought suit for a divorce. After issue joined the defendant appealed to the court for an allowance to enable her to defend. The court granted the application, and ordered the plaintiff to pay into court for the defendant, within 30 days, the sum of \$100. The plaintiff failed to comply with the order in the time named, but at the ensuing term of the court the plaintiff deposited with the clerk of the court the sum ordered to be paid, and at the same time filed his affidavit to the effect that his default was due to his inability to raise the sum in the time prescribed, and not a willful or negligent disregard of said order. The defendant, by her counsel, filed a motion to dismiss the suit at the plaintiff's cost, for the reason that he had failed and refused to comply with the order of the court. The court granted the motion to dismiss, and made an order to that effect on the ground that the plaintiff had failed to comply with the order in the time prescribed. The overruling of the plaintiff's motion, and the dismissal of said cause, are assigned as the ground of error.

Under our Code, the court, or judge thereof, may enforce an order or decree in a suit other than for payment of money, by punishing the party refusing or neglecting to comply therewith as for contempt. Code, § 402. The authority of the court to make the order of allowance, and to enforce obedience, is not disputed when there is a willful or negligent failure to comply with such order. Cause was shown, uncontested, so far as disclosed by this record, why the plaintiff had not yielded strict compliance with the order. Any intentional contempt of the court's authority is rebutted by the admitted facts. It was not a refusal to obey, but an inability, owing to poverty, to comply with the order in the time prescribed. He did deposit the money, not, it is true, within the 30 days, but he made oath, as the reason of non-payment, that it was the want of money, and inability to raise or procure it within the period of the

order, and not out of any negligent or willful disregard of the authority of the court, which occasioned the delay. Mistake, misfortune, inability from poverty or other equivalent cause, when shown to exist, have always been held in equity a sufficient excuse for non-payment of money, or failure to comply with an order, and to purge the contempt. To the prayer originating in such cause equity will lend a listening ear, and grant such relief as the merits of the facts authorize. If, then, the plaintiff has brought himself within these recognized grounds, he is not in contempt; and, if not in contempt, there can be no justification for dismissing his suit. We do not mean to say that a party refusing to obey an order to pay such allowance cannot be lawfully punished, or that the court cannot compel or enforce obedience to its orders or decrees. What we do say is that the facts disclosed do not present a case of neglect or refusal to obey the order from contumacy or fraudulent conduct, but from the want of means, which, as soon as procured, although not within the time limited, were deposited, and the reason assigned for the delay constituted a sufficient excuse to purge the contempt. Upon such a state of facts, to dismiss the party's suit is an authority which, if may be exercised, ought certainly to be exercised only in extreme cases, when other punishment cannot be inflicted, or will not compel obedience.

We think there was error, and the order must be reversed.

(9 Colo. 388)

WALKER v. STEELE.

(*Supreme Court of Colorado. December 3, 1880.*)

1. ACCOUNT—ACTION FOR BALANCE—EVIDENCE.

In an action on an account to recover a balance due, where the plaintiff testifies that he sent defendant statements of the account, that defendant never denied or disputed the bill, and frequently promised to pay it, and defendant, in his testimony, does not deny the account, nor his promises to pay it, but states that he is ignorant as to whether the books show a balance due, the evidence is sufficient to justify the court in finding for the plaintiff.

2. PARTNERSHIP — DISSOLUTION — PURCHASE OF PARTNERSHIP PROPERTY — ACTIONS BY PARTNERS—CODE CIVIL PROC. COLO. § 3.

There is no defect of parties plaintiff in a suit brought, after the dissolution of a partnership, by a former member thereof, who purchased the partnership property, to recover the balance of an account due the firm. Civil Code Colo. § 3.

3. DEPOSITIONS—OBJECTIONS TO, AT THE TRIAL—WAIVER—CODE CIVIL PROC. COLO. § 379.

Under section 379, Code Civil Proc. Colo., objections to the manner of certifying depositions in a cause must be taken before the trial, and a party failing to call the court's attention to such irregularities until a deposition is offered at the trial will be held to have waived them.

4. APPEAL—IMMATERIAL QUESTIONS—EVIDENCE—BOOKS OF ACCOUNT—FOUNDATION FOR ADMISSION.

Where it appears from the record in a cause tried by the court that certain books of original entry were not read in evidence, nor examined by the court, it is not necessary to determine whether a proper foundation was laid for the introduction of such books in evidence.

Appeal from the county court, Gunnison county.

W. H. Fishback, for appellant, Walker. *Thomas & Thomas*, for appellee, Steele.

HELM, J. 1. There was, in this case, no defect of parties plaintiff. The partnership had, in fact, been dissolved several months when the suit was brought; and plaintiff, through the settlement between himself and copartner, and his purchase of the partnership property, had become the exclusive owner of the account sued on. He was therefore the only party really interested in collecting the balance due. Hence, under section 3 of the Code of Civil Procedure, the action was properly brought in his name alone. *Bassett v. Inman*, 7 Colo. 270; S. C. 3 Pac. Rep. 383. The common-law princi-

ple that an action for a partnership debt, whether instituted before or after dissolution of the firm, must be prosecuted in the name of all the partners, does not, under the present practice, and the facts disclosed, apply to this case.

2. The deposition of Coslett was properly admitted in evidence. Defendant's principal objections relate to the manner of certifying and returning the same. It was his duty to have had all such questions disposed of before the trial. Code Civil Proc. § 379. Having failed to call the court's attention thereto till the deposition was offered, he must be held to have waived irregularities in these respects, if any existed.

3. It is not necessary for us to determine whether or not a proper foundation was laid for the admission of the books of original entry. The cause was tried to the court without the intervention of a jury. The bill of exceptions shows affirmatively that "said books, nor any of them, were not opened or read in evidence in said cause, nor examined by the court." We are therefore informed by the record itself that the findings of the court were not based upon evidence of the account afforded by the books, and we are of opinion that, without the books, the proofs sufficiently support the judgment.

Plaintiff testifies that he had frequently sent defendant statements of his account, and often had conversations with him regarding his bill; that defendant never denied nor disputed the bill, but frequently said he would pay it as soon as he could raise the money; that he even promised to borrow money on his property, and pay the same. Defendant does not deny the rendering of these statements of account, nor his promises to pay the balance due as shown thereby. He testifies that he handed them to his attorney to be examined, and that his attorney did not report anything wrong with them. He made no effort at the trial to prove that any item was erroneously charged, and did not deny the correctness of the balance claimed. The nearest he came to a denial in this regard was the declaration of his ignorance as to whether or not the books showed any remaining indebtedness upon his part.

Under the foregoing facts we think the court was justified in finding for the plaintiff, and in giving judgment accordingly.

(9 Colo. 402)

SIMONTON and others v. ROHM and others.

(*Supreme Court of Colorado. December 3, 1886.*)

APPEAL—WHEN TAKEN—COLORADO ACT APRIL 23, 1885, §§ 6-11.

Where a judgment appealed to the Colorado supreme court has been rendered more than 30 days prior to the first day of the next term of such court, the appellant is not bound, under sections 10 and 11 of Colorado act of April 23, 1885, to serve notice of appeal 20 days before the next term, and file and docket the cause by the third day of such term, or procure an extension of the time for cause, but he has the two months given by section 6 of the same act within which to take the appeal at his option.

Appeal from county court, Eagle county.

Motion to dismiss appeal.

Brown & Glenn, for appellees, *ex parte*.

PER CURIAM. This is a motion by the appellees to dismiss the appeal, on the ground that the appellants failed to comply with the requirements of sections 10 and 11 of the act of April 23, 1885, in relation to appeals to the supreme court. Laws 1885, p. 352.

These sections are as follows:

"Sec. 10. The notice of appeal must be served at least twenty days before the first day of the next term of the supreme court; provided, the judgment or order appealed from was rendered not less than thirty days prior to the first day of such term. And the cause must be filed and docketed not later

than the third day of such term, unless the court shall, for good cause shown, extend the time. If the appeal is taken less than twenty days before the term, it must be so filed and docketed before the next succeeding term.

"Sec. 11. If the appellant fails to file the transcript required above, and have the cause docketed, as provided in the preceding section, or fails to get the time extended by showing good cause for the delay, the appellee may file a certified copy of the judgment or order appealed from, and of the notice served on the clerk of the court below, and, on motion, have the appeal dismissed, or the judgment or order appealed from affirmed."

In the present instance, the judgment appealed from was rendered more than 30 days prior to the last regular term of this court, which was the April term thereof; and the failures alleged against the appellants are that they did not serve their notice of appeal at least 20 days before the first day of the April term, and that they neither had the cause filed and docketed by the third day of that term, nor procured an extension of the time therefor. Appellees now present a certified copy of the judgment appealed from, and the notice of appeal, as provided by section 11, and move that the appeal be dismissed, and the judgment of the county court be affirmed.

If the sections quoted contained all the provisions of the act bearing upon the right of appeal, and the time allowed within which this right may be exercised, we would be compelled to sustain this motion, and dismiss the appeal. But a previous section (section 6) provides that "Appeals from the district, county, and superior courts may be taken to the supreme court at any time within two months from the rendition of the judgment or order appealed from, and not afterwards." While there is a seeming conflict in the provisions of these several sections, yet they are not irreconcilable, and they are capable of a construction that will enable this court to give effect to the evident purpose and intent of the legislature. The provisions of the act being thus construed, section 6 gives to all litigants entitled to appeal two months from the rendering of the judgment or order appealed from within which to perfect their appeals; but they may perfect the same in a shorter period of time, if they desire to do so, and thereby, in some cases, make the appeal returnable at an earlier term of this court.

The provisions of section 10 determine the term of court to which appeals are returnable. When the judgment is rendered 30 days prior to a regular term of the supreme court, and the notice of appeal is served 20 days before such term, a transcript of the judgment or order appealed from, together with the notice of appeal, must be filed in this court, and the cause docketed, not later than the third day of such term, unless the time therefor be extended by the court. But the fact that a term of this court occurs 30 days after the rendition of a judgment was evidently not intended to curtail the full time, prescribed by section 6, within which an appeal may be perfected. The full time allowed by the statute may be taken, at the option of the appellant.

The motion to dismiss is denied, and the cause ordered to be stricken from the docket.

(2 Cal. Unrep. 687)

PORTER v. MURRAY. (No. 9,384.)

(*Supreme Court of California. August 24, 1886.*)

1. FORCIBLE ENTRY AND DETAINER—COMPLAINT—CAUSE OF ACTION—JOINING WIFE OF PRINCIPAL DEFENDANT—DESCRIBING PREMISES.

A complaint in an action of forcible entry and detainer is not obnoxious to a demurrer as not stating facts sufficient to constitute a cause of action which sets up the plaintiff's ownership of certain described premises, his possession thereof on a day named, the unlawful entry of the defendants thereon on that day, and their forcible detainer thereof up to the time of bringing the action. Nor is it demurrable for joining the wife of the principal defendant as a party defendant, nor because it sets out one cause of action in several distinct counts, and only describes the premises in the first one.

2. SAME—MOTION FOR NONSUIT—STRANGER ENTERING BETWEEN GOING OUT OF TENANT AND ENTRY OF LANDLORD.

In an action of forcible entry and detainer, where the testimony for plaintiff tends to show that on a certain day the plaintiff's agent received notice that plaintiff's tenant would vacate the premises on the following day; that on that day at 8:30 A. M., the agent was on hand to take charge of the premises, and was told by the tenant's wife that the tenant would not go out until 1:30 P. M. of that day; that at 12:30 P. M. the agent returned and found one of the defendants in the house, with the windows and doors barricaded, and threatening to shoot the agent if he attempted to enter,—a motion for a nonsuit was properly denied.

8. SAME—FINDINGS—COMPLAINT—ALLEGED BY PLAINTIFF.

Where, in such an action, the findings show that, on the day mentioned in the complaint, the plaintiff was in the peaceable possession of the premises; that on that day the defendants wrongfully entered thereon, and have ever since forcibly detained possession thereof from the plaintiff; and the facts thus found, together with the admissions contained in defendants' answer, make out a cause of action alleged in favor of the plaintiff,—it is no cause of complaint on the part of defendants that the court did not find the facts in as many ways as they were set out in the complaint.

Department 1. Appeal from superior court of San Francisco.**Forcible entry and detainer.**

This action was brought under the provisions of the California Code of Civil Procedure respecting forcible entries and unlawful detainers. Section 1159 *et seq.* The property is a small lot in San Francisco, California, and is the same property that was involved in the case of *Murray v. Green*, 64 Cal. 363. The complaint set out the one cause of action in four separate counts, to each of which a demurrer was interposed. One ground of demurrer to each count was that it did not state facts sufficient to constitute a cause of action. The second, third, and fourth counts were demurred to for uncertainty in not repeating the description of the land given in the first count. Each count was demurred to for the misjoinder of Mrs. Lawler as a defendant. The demurrer was overruled. Defendants answered, and a trial was had. Defendants' counsel made motions for a nonsuit on behalf of each defendant, which were all denied. Findings were filed, and judgment went for plaintiff. Defendants appealed from the judgment. Objection is made to the findings, because, of the four causes of action stated separately in the complaint, there are no findings as to any one of them, but the findings are a medley of some parts of them all.

A. L. Rhodes, for plaintiff and respondent. *Matt. I. Sullivan and E. A. Lawrence*, for defendants and appellants.

Ross, J. The demurrer was properly overruled. The findings show that, on the day mentioned in the complaint, the plaintiff was in the peaceable possession of the property, and that on that day, during his absence, Murray wrongfully entered thereon, and has ever since forcibly detained possession thereof from the plaintiff. As there was no omission to find upon any material fact set up by the defendants, and as the facts found by the court, together with the admissions contained in the answer, sustain a cause of action alleged in favor of the plaintiff, defendants have no just ground of complaint because the court did not find the facts in as many different forms as the plaintiff, out of abundant caution, thought it best to employ in the statement of his cause of action.

In respect to the defendants Lawler and wife, it appears from the pleadings that they entered under Murray, and, together with him, detain the possession of the property from the plaintiff.

The motion for nonsuit was properly refused. The testimony on the part of the plaintiff tended to show that on the afternoon of the fourteenth of August, plaintiff's agent received notice that the tenant of the plaintiff, who had occupied the premises for many months, would vacate the premises the following day; that plaintiff's agent went to the premises at 8:30 A. M. on

the 15th, and was informed by the wife of the tenant that they would not move out before 1:30 that day; whereupon she was informed by the agent that at 12:30 he would be there to take charge of the premises, and promptly at that hour he was on hand, when he found Murray in the house, with the windows and doors barricaded, and threatening to shoot the agent if he attempted to enter. Manifestly, when the tenant quit, the landlord was restored to the possession. It would be a monstrous doctrine to affirm that the landlord does not get possession of the premises upon the expiration of his tenant's lease if some third party can slip in between the moving out of the tenant and the moving in of the landlord. Judgment affirmed.

We concur: MYRICK, J.; MCKINSTREY, J.

(70 Cal. 604)

In re Estate of CAHALAN, Deceased.

(*Supreme Court of California. September 8, 1886.*)

1. APPEAL—WHAT REVIEWABLE—INTERMEDIATE ORDER—EXECUTOR'S ACCOUNT.

Where a decree settling an executor's final account is afterwards set aside by the court making it, and the executor is required to render a new account, upon appeal from the decree settling the latter account the order setting aside the former settlement will be reviewed; and, if erroneous, the appeal will be sustained.

2. EXECUTORS AND ADMINISTRATORS—ACCOUNT—DECREE—SETTING ASIDE—CODE CIVIL PROC. CAL. § 473.

After the statutory period prescribed by Code Civil Proc. Cal. § 473, for obtaining relief against a decree settling an executor's account has elapsed, such decree cannot be set aside upon the petition of children of a deceased child of testator who were omitted from the will, alleging that they were omitted therefrom unintentionally, and that the order discharging the executor was made inadvertently.

Commissioners' decision.

Department 2. Appeal from superior court, Santa Clara county.

The final account of M. M. Cahalan, as executor of Michael Cahalan, was rendered and allowed in the probate court of said county, of which said superior court was the successor, August 7, 1875. April 30, 1880, the children of a deceased child of testator who had been omitted from the will filed a petition alleging that they had been omitted unintentionally, and that the order discharging the executor was made inadvertently, and praying that said order be set aside. June 11, 1880, an order was made in accordance with the prayer of the petition. From this order the executor appealed to the supreme court, which dismissed the appeal, on the ground that the order was not appealable. *In re Estate of Cahalan*, 60 Cal. 232. Another account was afterwards ordered to be filed in the court below, and was filed and settled, and thereupon the executor brought this appeal.

John Reynolds, for appellant. *W. P. Veuve* and *J. J. Burt*, for respondents.

FOOTE, C. An appeal from an order of the superior court of Santa Clara county, settling a final account of an executor, and distributing the decedent's estate.

Michael Cahalan, the deceased, departed this life on the sixteenth day of December, A. D. 1874, leaving a will dated February 13, 1872, in which the petitioners, (respondents,) the children of a deceased daughter of the testator, were not mentioned, and by which M. M. Cahalan (the appellant) was constituted executor and residuary legatee. The will was duly admitted to probate, and letters testamentary issued to the appellant on the ninth day of January, A. D. 1875. Notice to creditors to exhibit their claims was given February 7, 1875.

A final account was rendered and filed by M. M. Cahalan on the twenty-sixth of June, 1875. Accompanying that account was a petition setting forth

that all debts had been paid, and all other directions of his testator's will had been faithfully carried out, and asking that a day be appointed for the settlement of his account, and for his discharge. It is recited in the decree ordering the allowance of that account, and the discharge of the executor, which order was made on the seventh day of August, 1875, that it had been proven to the satisfaction of the court (then the probate court) that due and legal notice had been given of the settlement of said final account; that the executor had paid all the expenses and just claims against the estate of his testator, and all legacies and bequests in said will mentioned; that he had fully and completely discharged the trust mentioned in the eighth subdivision of the will, paid over all the money, and delivered all the property, as provided in said will; that it fully appeared to the court, by documentary evidence and other good and sufficient proof, that said executor had fully and completely done, performed, and carried out the provisions of said last will of said deceased; that he had fully complied with all the orders of the court in the premises; that he had honestly and faithfully discharged all of his duties as such executor; that no other property remained in his hands belonging to the estate; that no further acts remained to be performed by him as executor of said decedent; that he be wholly and absolutely discharged from all further duties and responsibilities as such executor. His letters testamentary were declared vacated, the estate adjudged fully distributed, and the trust settled and closed.

Upon its face that decree was valid, (*Dean v. Superior Court*, 63 Cal. 473,) and, as the statutory period for obtaining relief against it, as prescribed in section 473, Code Civil Proc., had long since elapsed, it could only be attacked and set aside, on the ground alleged in the petition therefor, by a proceeding in equity, (*In re Estate of Hudson*, 63 Cal. 454; *Dean v. Superior Court*, *supra*.)

But it is said that this court cannot, upon the present appeal, review the order made on the eleventh of June, 1880, setting that decree aside. The order thus made was declared by this court to be one from which an appeal cannot be prosecuted. *In re Estate of Calahan*, 60 Cal. 232. It was clearly intermediate, and necessarily affects the judgment from which this appeal is prosecuted, and is reviewable on such appeal. Section 956, Code Civil Proc. For if the decree which the order set aside was valid on its face, and could not be, as it was, summarily held for naught, then that now appealed from was affected to the extent that it was utterly void, and no basis existed for the action of the court in making it, unless it had first swept away the former decree, and thereby made a starting-point for its jurisdiction and procedure in the premises.

As a result it follows that the order appealed from was erroneous, and should be reversed, and the cause remanded, to be proceeded with in accordance with the views herein expressed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is reversed, and cause remanded, to be proceeded with in accordance with the views expressed in said opinion.

(71 Cal. 208)

MCKENZIE v. BRANDON and others. (No. 11,037.)

(*Supreme Court of California*. October 26, 1886.)

1. PUBLIC LAND—STATE LANDS—AFFIDAVIT OF PURCHASER.

When one seeks to purchase land from the state, he must state in his affidavit, and state truly, all the facts required to be stated therein.

2. SAME—ADVERSE OCCUPATION.

Where, at the time of an application to purchase from the state the west half of a certain thirty-sixth section of land, a previous applicant had 18 acres of the half

section inclosed with adjoining land owned by him, cultivated a part of this eighteen acres, and pastured his stock on the balance of the half section, held, that he was in such adverse occupation as contradicted the applicant's affidavit that there was no occupation adverse to his.

Commissioners' decision.

Department 2. Appeal from superior court, El Dorado county.

Plaintiff and defendant were contestants as to the right to purchase lands. The decision of the court below was in favor of plaintiff, but a new trial was granted upon defendant's application, and from the order granting it plaintiff appealed.

Irwin & Irwin, for appellant. *Blanchard & Swisler*, for respondents.

BELCHER, C. C. In June, 1876, the defendant Brandon made application to purchase from the state the west half of a certain thirty-sixth section of land in El Dorado county. At that time he owned the south-east quarter of the section, and had that quarter and 18 acres of the south-west quarter inclosed by a fence, which he has since kept up. He has never resided on the west half of the section, but has usually, in connection with the cultivation of the south-east quarter, cultivated about seven acres of the south-west quarter, lying within his inclosure, and has used the balance of the half section to pasture his stock.

While the 18 acres were so inclosed, and a portion of it cultivated, by the defendant, the plaintiff, in February, 1884, made application to purchase from the state the same half section. In the affidavit on which his application was based he stated, among other things, "that there is no occupation of said lands adverse to any he has." The contest between the parties as to which had the right to purchase the land was referred by the surveyor general to the court below for determination, and, after a trial of the case, judgment was entered that plaintiff was, and the defendant was not, entitled to purchase it. The defendant moved for a new trial, and his motion was granted upon the ground "that the affidavit filed by the plaintiff, McKenzie, in the surveyor general's office, failed to show the adverse occupation of the defendant Brandon of a portion of the land." From the order granting a new trial this appeal is prosecuted, and the only question to be determined is, what constitutes an adverse occupation, within the meaning of the law, as it stood when the affidavit was filed?

It is argued for the appellant that, to constitute an adverse occupation, within the meaning of section 3495 of the Political Code, the adverse occupant must be an actual settler on the land; or, in other words, must himself be in such a position as would entitle him to purchase from the state. It is well settled that, when one seeks to purchase land from the state, he must state in his affidavit, and state truly, all the facts required to be stated therein. *Woods v. Sawtelle*, 46 Cal. 389; *McCoy v. Byrd*, 65 Cal. 92; S. C. 3 Pac. Rep. 121; *Millidge v. Hyde*, 6 Pac. Rep. 852; *Plummer v. Woodruff*, 11 Pac. Rep. 871, (opinion filed September 28, 1886.) And, when the case is brought into court for determination, each party must set forth his pleadings, and show by his proofs that he has strictly complied with the law. *Gibson v. Robinson*, 10 Pac. Rep. 193.

The land sought to be purchased in *Woods v. Sawtelle*, *supra*, was within Woods' inclosure, and had been so for several years. Sawtelle made the first application to purchase it, and in his affidavit stated "that there is no occupation of said land adverse to that he now holds." Woods, by reason of his delay, had lost all preference right to purchase the land; but it was held that the affidavit made by Sawtelle was not the one required by the statute in such a case, and so he had acquired no rights. The statute then, in reference to the sale of the sixteenth and thirty-sixth sections, was substantially the same

as in 1884, except that, after the amendment of 1880, the applicant was required to further state that he was himself an actual settler upon the land.

"The word 'occupation' may be so used, in connection with other expressions, or under peculiar facts of a case, as to signify a residence; but, ordinarily, the expressions 'occupation,' 'possessio pedis,' 'subjection to the will and control,' are employed as synonymous terms, and as signifying actual possession." *Lawrence v. Fulton*, 19 Cal. 690.

In *Woods v. Sawtelle* the word "occupation" was evidently treated as having its ordinary meaning, and we are unable to see anything in the constitution, or statutes since passed, tending to show that its meaning has been changed.

It follows that when the plaintiff made his affidavit he, in effect, stated that there was no actual possession of the lands adverse to any he had. This was not true in fact, and the affidavit was not the one required by the Code in such a case.

The order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(71 Cal. 318)

MOSELY v. TORRENCE. (No. 9,580.)

(*Supreme Court of California*. November 2, 1886.)

PUBLIC LANDS—CALIFORNIA STATE LANDS—ACTUAL SETTLERS—FALSE AFFIDAVITS—CONST. CAL. 1879, ART. 17, § 3.

In June, 1879, T. made application to purchase from the state of California a piece of land in Sonoma county, and M., in August, 1882, filed an application to purchase the same. Each was duly qualified to make the purchase. T.'s application was in proper form, and at the time of making it, he had all the land inclosed except a small piece on which M. afterwards made his settlement. T. never personally resided on the land, but occupied and managed it by servants and employees, and before August, 1882, had cultivated parts of it, and placed valuable improvements upon it. Before making his application M. settled upon the small piece outside of T.'s inclosure, and has ever since resided there, with his family. In the affidavit on which his application was made he stated, among other things, "that there is no occupation of said lands adverse to any he has." In an action brought by M. to settle the contest between himself and T. in respect to the land, *held*, (1) that T., under Const. Cal. 1879, art. 17, § 3, was not, and never had been, an actual settler on said land; (2) that the application of M. was defective, because he falsely stated that there was no occupation of said lands adverse to him; (3) that neither of said parties were entitled to purchase said land from the state.

Commissioners' decision.

Department 2. Appeal from superior court, Sonoma county.

Action to determine a contest in respect to land purchased from the state of California. Case tried, and judgment entered that neither party was entitled to purchase the land, whereupon both parties appealed. The facts are sufficiently stated in the opinion.

G. A. Johnson, for appellant Mosely. *John Brown*, for appellant Torrence.

BELCHER, C. C. This action was commenced to determine a contest between the parties about the right to purchase from the state a part of a sixteenth section of land in Sonoma county. The case was tried, and judgment entered that neither party was entitled to purchase the land, and thereupon both parties appealed from the judgment.

It appears from the findings that the defendant made application to purchase the land in question in June, 1879, and the plaintiff in August, 1882, and that, at the time of making his application, each party possessed the quali-

fications required by law to entitle him to purchase school land from the state. The defendant's application was in proper form, and, at the time of making it, he had all the land inclosed, except a small piece on which plaintiff afterwards made his settlement. He has ever since kept up his inclosure, and has cultivated portions of the land; and been in the actual occupation of all of it, except the small piece before mentioned. Prior to August, 1882, he had placed improvements on the land of the value of \$3,000, consisting of a good house and barn, and a half mile of picket fence, and had planted a vineyard of eight acres. He has never personally resided on the land, but has occupied and managed it by servants and employes. Before making his application the plaintiff settled upon the small piece outside of the defendant's inclosure, and has ever since been residing there with his family. In the affidavit on which his application was made, he stated, among other things, "that there is no occupation of said lands adverse to any he has." Upon these facts the court below found, as conclusions of law—"First, the said Torrence is not, and never has been, an actual settler on said land; second, the said application of Moseley is defective, because he falsely states that there is no occupation of said lands adverse to him; third, that neither of said parties were entitled to purchase said land from the state of California."

1. Under the provisions of the new constitution, adopted in 1879, lands belonging to the state, which are suitable for cultivation, can only be granted to actual settlers thereon, (article 17, § 3;) and the restriction operates as well on applications made before as after the constitution took effect, (*Johnson v. Squires*, 55 Cal. 103; *Dillon v. Saloude*, 9 Pac. Rep. 162.) Actual settlement means actual residence; and, as the defendant never had any actual residence on the land in question, it is clear that the judgment, so far as it affected him, was the proper one to be entered.

2. It is claimed for the plaintiff that his affidavit was not false or defective in any respect, because, as the defendant was not an actual settler on the land, and therefore not entitled to purchase it himself, his occupation of it was not an adverse occupation within the meaning of section 3495 of the Political Code. The same point was made in *McKenzie v. Brandon*, *ante*, 428, (decided October 26, 1886.) In that case, McKenzie sought to purchase land, a part of which was in the possession of Brandon, and made an affidavit like that made by the plaintiff here. Brandon was not himself entitled to purchase the land, but it was held that McKenzie's affidavit was not such a one as was required to give him a right to purchase, and that he therefore acquired no rights by making it. We are satisfied with the conclusions reached in that case, and the judgment here, as to both parties, should be affirmed.

We concur: SEARLS, C; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(71 Cal. 405)

MILLER and others v. REA and others. (No. 9,847.

(*Supreme Court of California*. December 17, 1886.)

APPEAL—SERVICE OF NOTICE—PARTITION—INTERLOCUTORY DECREE.

The notice of appeal from an interlocutory decree in partition need not be served on all adverse parties to the proceeding where the appeal is from specific parts of the decree only. A service on parties, or their attorneys, interested adversely in so much of the land as is involved in the appeal, is sufficient.

In bank. Appeal from superior court, Santa Clara county.

On motion to dismiss.

Partition by Henry Miller, Thomas Rea, and Johanna Fitzgerald against Massey Thomas and some 1,200 other defendants. The land in question is

the Rancho Las Animas, in Santa Clara county, California. The *rancho* was a Spanish grant to one Mariano Castro, who died in 1828, leaving a wife and eight children surviving him. Maria Lugardo Castro de Doak, one of his daughters, became the owner by inheritance of an undivided one-sixteenth of the *rancho*. The respective interests of the parties to this appeal are confined to this tract.

Page & Ells, for appellant. *John Reynolds*, for respondents.

MYRICK, J. A motion was made to dismiss this appeal on the ground that the appellant had not served the notice of appeal on all the adverse parties, or their attorneys. The appeal is from specific parts of the interlocutory decree only, viz., the parts relating to certain portions of an undivided one-sixteenth of the Rancho Las Animas. The decree as to the remainder of the *rancho* is not involved in the appeal. The notice was served on the parties (or their attorneys) interested adversely to the appellant in so much of the undivided one-sixteenth as is involved in the appeal. The motion is denied.

We concur: MORRISON, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

(71 Cal. 406)

MILLER v. THOMAS and others. (No. 9,938.)

(*Supreme Court of California. December 17, 1886.*)

APPEAL—SERVICE OF NOTICE—PARTITION—INTERLOCUTORY DECREE.

It is no ground for dismissing an appeal from an interlocutory decree in partition that the notice of appeal was not served on all the adverse parties, or their attorneys, where it appears from the transcript that the decree may be modified, if necessary or proper, without affecting the rights of the parties not served.

In bank. Appeal from superior court, Santa Clara county.

On motion to dismiss.

For the facts in this case, see *Miller v. Rea, ante*, 431.

A. W. Crandall, for appellants. *John Reynolds*, for respondents.

MYRICK, J. Partition. Appeal by Pablo Doak and Isaac Doak. The attorneys for some of the respondents moved to dismiss this appeal on the ground that the notice of appeal was not served on all the adverse parties, or their attorneys.

The appeal was taken from so much of the interlocutory decree as directed the allotment of one-sixteenth of the *rancho* to Henry Miller and others, [not named in the notice.] In the decree specific tracts were allotted to said Miller, and other specific tracts were allotted to others. The claim made by appellants (denied by the court below) was to a specific tract of land. The notice was served on various parties.

So far as appears to us from the transcript, the decree might be modified (if necessary or proper) without affecting the rights of any party not served. If, however, it should appear on the final hearing that the necessary parties are not before the court on this appeal, the appeal will then be held ineffectual. Motion denied.

We concur: MORRISON, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

(9 Colo. 385)

RARA AVIS GOLD & SILVER MIN. CO. v. BOUSCHER.

(Supreme Court of Colorado. December 3, 1886.)

1. MINES AND MINING CLAIMS—LIEN OF SUPERINTENDENT, BOOK-KEEPER, AND DISBURSING AGENT.

The services of a superintendent of mines in planning and superintending development work upon the mines, and in planning and superintending the erection of a mill and machinery, are work and labor in or upon the property, within the meaning of Sess. Laws Colo. 1872, p. 147, entitled "An act to secure liens to mechanics and others," but the services of such superintendent in keeping books and disbursing funds are not within the statute.

2. TRIAL—INSTRUCTIONS—ISSUE NOT RAISED.

In an action by a foreman of a mine against a mining company, for the value of services, in which defendant sets up damages, an instruction to the effect that if plaintiff's report on the ore in sight and on dump was made in good faith, and defendant was not misled by it, there being no controversy as to the good faith of plaintiff's report as to the amount or value of ore, nor any claim for damages arising out of the report, is misleading to the jury, and reversible error.

Appeal from district court, Gilpin county.

Plaintiff, Bouscher, brought his suit in the court below to recover upon the *quantum meruit* for services rendered to the defendant company. He also prayed a lien, under the mechanic's lien law, upon the property described. Plaintiff's services consisted of work as foreman, superintendent, and mechanic upon certain mines belonging to defendant; also of labor as defendant's agent in disbursing its money, and in keeping its accounts. Defendant, in its answer, after pleading the proper denials, sets up a contract with plaintiff which provided for a specific monthly salary, and avers that the same was fully paid. Defendant also demands a judgment against plaintiff for his misappropriation of certain of its moneys, and for injuries suffered through his negligent and unskillful development of its mines, and his negligent and wasteful disbursements of its funds.

The trial resulted in a verdict and judgment in plaintiff's favor for the sum of \$2,404.67. A lien for the entire judgment was also decreed. From this decree and judgment the present appeal was taken.

The instruction referred to in the opinion is as follows: "No. 2. The court instructs the jury that if you find from the evidence that the value and amount of ore in sight, or on the dump, did not realize the amount reported by Bouscher as being in sight and on the dump, and you find that Bouscher's report was made to the company in good faith, or that Bouscher was mistaken, or that the report was sent to the company for the purpose of selling stock, and the company were not deceived thereby, or that the report was ratified by the members of the company, directors, or some of them, with agents appointed for the purpose, or the company, after such report was submitted, examined the mine, and the subject-matter of such report, and did not object to it, but went on, and expended the company's money, under Bouscher's direction, then you must not find any damages for the company, no matter what such report contained."

The mechanic's lien law in force at the time of the transaction is entitled "An act to secure liens to mechanics and others." Section 4 reads: "All miners, laborers, and others who work or labor to the amount of \$25 or more, in or upon any mine, lode, or deposit, * * * shall have, and may each respectively claim and hold, a lien. * * *" Section 1 thereof also reads: "All artizans, mechanics, and others who shall perform work or labor * * * for the construction or repair of any building, or other superstructure, shall have, and may claim and hold, a lien. * * *"

Alvin Marsh, for appellant, Bouscher. *H. M. Orahood* and *J. E. Rockwell*, for appellee, Rara Avis Gold & Silver Min. Co.

HELM, J. There is nothing in the pleadings or evidence that calls for the second instruction given on behalf of plaintiff below, or for any instruction whatever upon the subject-matter therein contained. The damages which defendant sought to recoup were—*First*, \$1,045.23 of its funds, alleged to have been wrongfully appropriated by plaintiff to his own use; and, *second*, such a sum as would compensate the injuries occasioned by plaintiff's negligent and unskillful working of the property, and his negligent and wasteful use of defendant's money. No controversy exists in the case as to the accuracy or good faith of plaintiff's report touching the amount or value of ore visible in the mine and on the dump, nor is there a claim for damages in any way arising out of this report. The jury were probably misled by the instruction in question, and the judgment must be reversed.

Other serious, perhaps fatal, objections are urged under the assignment of error relating to this part of the charge; but, in view of the foregoing conclusion, it is wholly unnecessary to discuss them. As the cause will be remanded for a new trial, however, we feel bound to consider a further question which had received careful attention in the arguments filed. Plaintiff's services in planning and superintending development work upon the mines, and in planning and supervising the erection of the mill and machinery, are work and labor in or upon the property, within the meaning of the statute. Such services are similar to those performed by the architect who draws the plans, and personally superintends the construction of a building. The latter is, under statutes containing the words "any person," or the equivalent expression "and others," performing labor, etc., uniformly allowed a lien. *Kneel. Mech. Liens*, § 13a; *Phil. Mech. Liens*, § 158.

But, besides the foregoing services, plaintiff demanded, and the court recognized, a statutory lien for labor as disbursing agent and accountant. Statutes of the kind under consideration are to be construed liberally in favor of the classes sought to be protected thereby. But it would be palpable judicial legislation for courts to extend their provisions so as to include demands not fairly covered by the language used. *Barnard v. McKenzie*, 4 Colo. 251; *Edgar v. Salisbury*, 17 Mo. 271. Hence, while liens are allowed for many kinds of labor that the authorities term "incidental," such incidental labor must be directly done for, and connected with, or actually incorporated into, the building or improvement. It will not do to extend the protection given to services indirectly and remotely associated with the construction work. The cook who prepares food for the employes, the blacksmith who shoes the horses or repairs the implements in use, and all similar contributors to the enterprise, are not among the favored workmen. See *Mccormick v. Los Angeles*, 40 Cal. 185. The keeping of defendant's books, and disbursement of its funds, were matters of great importance; but we cannot declare such services within the purview of the statute.

Plaintiff, if entitled to recover at all upon the *quantum meruit*, might properly have his judgment and lien for *part* of the services rendered. Their value, in such case, can be proved independently of the objectionable claims above mentioned. But since the judgment was given, and the lien allowed for his improper as well as his proper claims, the decree could, in no event, be permitted to stand.

The judgment is reversed, and the cause remanded for further proceedings.

(9 Colo. 390)

LAMPING v. KEENAN.

(Supreme Court of Colorado. December 3, 1886.)

REPLEVIN—DEFENSE ON MERITS—DEMAND AND REFUSAL.

Where the defendant, in an action of replevin before a justice of the peace, has contested the case upon the merits, on a claim of a superior right to the property, in the court below, and the judgment has been given against him, he cannot main-

tain on appeal that, as an innocent purchaser, replevin will not lie against him without a demand and his refusal to deliver up the property; and a demand is not necessary where the defendant claims the same right, both as to ownership and possession, as the plaintiff claims, and that his right is derived from the same source.

Appeal from county court, Lake county.

This was an action of replevin, brought by the plaintiff below, Thomas Keenan, against the defendant, Joseph Lamping, for the recovery of a span of mules and a set of double harness. It was originally instituted before a justice of the peace, who gave judgment for defendant, Lamping. Keenan appealed to the county court, and upon trial there recovered a judgment awarding a return of the property, or, if a return could not be had, that he recover the sum of \$95, the value of the property. The evidence shows that Thomas Keenan purchased the property from Martin Keenan, in his lifetime, who was the owner thereof, receiving a bill of sale dated September 21, 1880, and that, before and at the time of receiving the bill of sale, the purchaser was in possession of the property; that some time afterwards he leased the property to one Annie Gibbons, and then went to Kansas City. That Martin Keenan died soon after the sale; and, during the absence of the plaintiff, a creditor of the estate of deceased brought suit in attachment before a justice of the peace against the administrator, causing the writ of attachment to be levied upon the property while in the possession of said lessee; that he recovered a judgment, caused an execution to be issued thereon, and the property in controversy so seized to be sold on such execution, and that defendant, Lamping, purchased the property at the constable's sale. In further support of the defendant's title, he was permitted to introduce in evidence, against the objections of the plaintiff, a lease of the mules in controversy to one Annie D. Griffen, purporting to have been executed by the said Martin Keenan about one and a half months subsequent to his execution of the bill of sale to the plaintiff, Thomas Keenan. It was conceded that the property was in possession of the plaintiff's lessee, Annie Gibbons, at the time of the seizure on the writ of attachment. It was also conceded that no demand for the possession was made by the plaintiff prior to bringing the present action.

Charles S. Thomas, for appellant. *W. T. Rogers* and *G. H. Thompson*, for appellee.

BECK, C. J. This action having been commenced in a justice's court, no written pleadings appear in the case, but an inspection of the proceedings shows that the claims to the property in dispute set up by both parties to the controversy are precisely the same; that is to say, both parties claim ownership and right to possession by virtue thereof, and both trace title to the same source. The property was originally owned by Martin Keenan, in his lifetime. The plaintiff, Thomas Keenan, claims to have purchased it from the owner direct; while the defendant, Lamping, claims to have purchased the same at an execution sale held pursuant to judicial proceedings against the administrator of said Martin Keenan, deceased. This latter proceeding was commenced by attachment, and the property was attached to satisfy the claim of a certain creditor of the deceased. The trial of this replevin suit, therefore, was on the merits; and the plaintiff succeeded in establishing a regular and valid title, with right of possession, while the defendant signally failed to establish either. The defendant's proof showed a personal judgment against the administrator, and an execution issued against the express inhibition of the statute. The entire proceeding was consequently without any validity whatever. Gen. Laws, § 2924; *Mattison v. Childs*, 5 Colo. 78.

Counsel for appellant say that they do not claim the judgment of the justice of the peace has any binding force; nor that the sale on execution conveyed any title to the purchaser if the property sold belonged to a stranger to

the action; but they insist that the possession thus obtained by the appellant was not tortious, and that replevin will not lie in such a case, without a demand upon the purchaser, and his refusal to deliver up the property. This might be a tenable proposition if the defendant's position on the trial below had been consistent with it. But it was not so, in any view of the proceedings as presented to us by the record. His position was not that of one who had innocently come into possession of the chattels, and claimed a right to retain them until such rights should be terminated by a demand therefor by the true owner. On the contrary, his claim was that he was the true owner himself, by virtue of his purchase at the execution sale. He testified that he had paid every dollar the property was worth, and introduced other testimony to the same effect. He also attempted to impeach the plaintiff's title, and to show that it was not acquired in good faith, by proof that Martin Keenan, the vendor, treated the property, and dealt with it, as his own, long after the execution of the bill of sale to the plaintiff. The defendant having, therefore, contested the case upon the merits, on a claim of superior right to the property, the case is brought within the class of cases wherein a demand is not required. It also comes within the principle that proof of any circumstance which would satisfy a jury that a demand would have been unavailing is sufficient to excuse this proof. *Wells, Repl.* §§ 373, 374, and cases cited.

The decisions upon the question when a demand is necessary are neither uniform nor entirely reconcilable; but we think the better doctrine is that a demand is only required when it is necessary to terminate the defendant's right of possession, or to confer that right on the plaintiff; but when the plaintiff claims the ownership of the property, and the right of possession as incident to that ownership, and the defendant's right claimed is precisely the same, as in the present case, no demand is necessary. The opinions of the courts in the following cases are cited, in so far as they sustain the views above expressed: *Smith v. McLean*, 24 Iowa, 322; *Eldred v. Oconto Co.*, 83 Wis. 140; *Shoemaker v. Simpson*, 16 Kan. 43, 52; *Pyle v. Warren*, 2 Neb. 241, 253; *Homan v. Laboo*, 1 Neb. 204, 210.

For the reasons assigned, we are of the opinion that the judgment in this case should be affirmed.

(9 Colo. 371)

HINDREY v. WILLIAMS.

(Supreme Court of Colorado. December 3, 1886.)

1. CONTRACT—SEPARABLE—CONTRACT TO MAKE HAY—RATE PER TON—DESTRUCTION BY FIRE.

A contract to cut, cure, and stack hay on a ranch, at so much per ton, which does not specify what number of tons are to be cut, nor any given number of acres to be mowed, and under which neither the work to be done nor the amount to be paid is in gross, is a separable, not an entire, contract; and, where the hay is burned, the loss falls on the owner, and the contractor, being innocent, can recover for his labor notwithstanding.

2. SAME—FORFEITURE—DEFECTIVE DEFENSE.

In such a case it is a fatal defect in a defense which attempts to show that the hay was not well stacked, and had to be restacked by defendant, to fail to show that defendant paid any given sum for the restacking, or that it was worth any given amount.

3. SAME—CONDITION—MEASUREMENT—ESTOPPEL.

Where a contract by which plaintiff agreed to cut, cure, and stack hay on defendant's ranch contains a stipulation that the hay shall be measured within 30 days, and defendant fails to measure it, and it is burned, he is estopped by such default from alleging, by way of defense to plaintiff's claim, that the hay had not been measured.

4. TRIAL—VERDICT—POLLING JURY—COLORADO.

In Colorado, in civil cases, the court, on the recording of the verdict, may allow or refuse the jury to be polled, in his discretion; but, if there should be any good reason, a request by either party to test the unanimity of the jury by a poll should be allowed.

Appeal from district court, Weld county.

Action on contract. Judgment for plaintiff. Defendant appeals.

This action was brought by Williams, the appellee, in the county court of Weld county. The case was afterwards taken by appeal to the district court, where a trial was had by a jury. Verdict and judgment in favor of the plaintiff for \$814, with interest at 10 per cent. from September 15, 1888. The complaint is as follows: (1) That on or about July 20, 1881, plaintiff agreed with defendant to cut, cure, and stack grass or hay growing on defendant's ranch in Weld county, for the wages, price, or sum of \$2.75 per ton for every ton so harvested by cutting, curing, and stacking; (2) that on or about July 25, 1881, plaintiff commenced said work, and labored at it steadily with men and machinery until finished, about September 1, 1881; (3) that, during said time, plaintiff cut, cured, and stacked for defendant, as agreed, 24 stacks of hay, which contained in all 237 $\frac{1}{2}$ tons of hay by actual measurement, and also four other stacks not measured, containing about 60 tons, making in all about 297 $\frac{1}{2}$ tons of hay harvested by plaintiff, as aforesaid; (4) that defendant has not paid the price of said labor, or any part thereof, or any sum or sums whatever for harvesting said 297 $\frac{1}{2}$ tons of hay, according to agreement or otherwise; (5) jurisdictional averment. Demand of judgment for \$818.12, and costs.

The answer denies all the material allegations of the complaint, and, for a second defense, the answer alleges: (1) That defendant says that plaintiff, on or about the twentieth day of July, 1881, undertook, promised, and agreed with defendant to cut, cure, and make into hay all the grass that year growing upon defendant's ranch; and, further, to put said hay up, and leave the same in stacks, in a good, thorough, and workman-like manner, so that the same would be well protected and stand safely,—in consideration that defendant would pay him for said work, when completed as agreed, at the rate of \$2.75 per ton for so doing; that said agreement was the same referred to in complaint. (2) That plaintiff failed and neglected to carry out, perform, or finish the work so by him agreed to be done and performed, in this: said plaintiff, disregarding said contract and agreement, wholly failed to cut, cure, or stack an amount of grass that year growing on said ranch of defendant equivalent to and capable of being made into 100 tons of hay or thereabouts, if properly and in due season cut, cured, and stacked, whereby said grass, so neglected by plaintiff, went to waste, and was wholly lost to defendant; and, further, said plaintiff failed and neglected to leave upon said ranch a large portion of the hay cut by him, but negligently and carelessly suffered the same to take fire and burn, and thus become utterly destroyed by and through the negligence of plaintiff and his employees,—said hay, so destroyed by fire, being about 100 tons. And defendant further says that the hay which was cut and stacked, and left upon said ranch, was not stacked in good, thorough, or workman-like manner; but, on the contrary, was stacked in such a careless and unworkman-like manner that the major portion and nearly all of said hay so stacked fell down, whereby it became exposed to rain, and became greatly deteriorated in quality and value. (3) That, by reason of the failure of plaintiff to perform his contract and agreement as aforesaid, and his failure to cut a large portion of defendant's grass as agreed, and the negligence of plaintiff in allowing and causing a portion of said hay cut by him to burn, and by his failure to stack said hay left by him on the ranch in a good or workman-like manner, defendant was damaged in the sum of \$1,000. (4) Demand of judgment against plaintiff in the sum of \$1,000, and costs.

The terms of the agreement, as shown by the evidence, are sufficiently stated in the opinion.

Haynes, Dunning & Annis, for appellant. *James W. McCreery*, for appellee.

ELBERT, J. This is not the case of an entire contract "where an entire promise is made on an entire consideration." It consequently does not fall within the class of cases cited by counsel for the appellant, where, in case of loss by fire or otherwise before the work is completed, the owner loses his property, and the laborer his work. It is a separable contract. No given number of tons were to be cut. No specific number of acres were to be mowed. Neither the work to be done, nor the amount to be paid, was in gross. The plaintiff was to "cut, cure, and stack hay upon the defendant's ranch at \$2.75 per ton, to be measured in thirty days." Of the legal character of such a contract there can be no difference of opinion. 1 Add. Cont. 392 *et seq.*; 2 Pars. Cont. 517 *et seq.* Under it the plaintiff cut, cured, and stacked 296 tons of hay. Two hundred and thirty-six tons were measured, and no controversy arises respecting them. Sixty tons were destroyed by fire, and the contention is as to where the loss must fall. Two points are made by the appellant: *First*, that *all* the hay was not stacked; *second*, that it was not measured. If all the hay cut was not stacked, it would not preclude the plaintiff from recovering compensation for what was stacked; nor does it appear that he was allowed to recover for hay unstacked, either burned or unburned. If the fact that the 60 tons burned were not measured could in any case affect the right of the plaintiff to recover therefor, it can have no such effect in this case, in view of the evidence showing that the time in which it should have been measured had expired, and that the default was that of the defendant.

The loss must fall upon the party having the title to the property destroyed. The hay was cut, cured, and stacked on the ranch of the defendant. The grass, before the cutting, was the property of the defendant. It was none the less so after it was cut, cured, and stacked. The plaintiff had expended labor upon the grass at an agreed price per ton,—had made it into hay,—but he had no property in the product. The legal possession was also that of the defendant, and neither delivery nor acceptance is a feature in the case. If it can be said that the hay, after it was stacked, was to any extent in the care and custody of the plaintiff, the evidence shows that he exercised reasonable diligence and prudence touching its safety, and the jury so found. The plaintiff was entitled to recover for the 60 tons destroyed by the fire.

If the work was not well done, the defendant could recoup his damages; and this he sought to do, under his pleadings, by evidence showing that the meadow was not well cut, and also that the hay was not well stacked. The evidence, however, upon these points, was conflicting, and we see no reason for disturbing the verdict of the jury. There was a fatal defect in the case made by the defendant in this behalf, in this: that, while the evidence tends to show that a portion of the hay was not well stacked, it does not show that the defendant paid any given sum for the restacking, or that it was worth any given amount. The jury were left to conjecture how much, if anything, the restacking was worth. In view of this, the objection that the plaintiff, Williams, was permitted to testify "all that was stacked was reported to me, from time to time, as perfectly sound and good," becomes unimportant. If the testimony thus objected to can be taken (which is doubtful) to refer to the character of the stacking, and not to the condition of the hay when stacked, it nevertheless concerns an issue upon which, as we have seen, the defendant could not recover by reason of his failure to prove any damage.

The second assignment argued by counsel goes to the refusal of the court to poll the jury, before the verdict was recorded, upon the request of the defendant. Upon this point our statute is silent. It provides that the names of the jurors, upon their return into court, shall be called, "and they shall be asked by the court or the clerk whether they have agreed upon their verdict; and, if the foreman answers in the affirmative, they shall, on being required,

declare the same;" and, further, that "when the verdict is given, and is not informal or insufficient, the clerk shall immediately record it in full in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict. If any juror disagree, the jury shall be again sent out; but, if no disagreement be expressed, the verdict shall be complete, and the jury shall be discharged from the case." Sections 177, 179, Amended Code.

Upon the right of a party to demand a poll of the jury before the verdict is recorded, the rulings differ in different states. In some of the states, in both civil and criminal cases, it is regarded as a right which may not be denied. *Jackson v. Hawks*, 2 Wend. 619; *Fox v. Smith*, 3 Cow. 23; *James v. State*, 55 Miss. 57; *Johnson v. Howe*, 2 Gilman, 342; *Blackley v. Sheldon*, 7 Johns. 32; *Rigg v. Cook*, 4 Gilman, 386; *Labar v. Koplin*, 4 N. Y. 550; *Hubble v. Patterson*, 1 Mo. 392; *Stewart v. People*, 28 Mich. 76. To some extent these decisions rest upon the proposition that opportunity should be given to the juror to correct a verdict which he has mistaken, or about which, upon further reflection, he has doubt; and it is to be observed that such opportunity is fully provided for by the provisions of the Code above quoted. In other of the states it is regarded as a matter resting entirely in the discretion of the court, but which the court will generally allow when there are any circumstances of suspicion attending the delivery of the verdict. *Blum v. Pate*, 20 Cal. 70; *Martin v. Maverick*, 1 McCord, 24; *Landis v. Dayton*, Wright, 659; *Rutland v. Hathorn*, 36 Ga. 380; *Fellowes' Case*, 5 Greenl. 333; *Com. v. Roby*, 12 Pick. 513; Proff. Jury Trial, 465. It is a matter of practice, and in civil cases we see no reason for holding that either party may demand that the jury be polled as a matter of right. We think that such a request may safely and properly be left as resting in the sound discretion of the court. If there should be any good reason for allowing either party, by a poll, to test the unanimity of the jury, the request should be granted.

The foregoing constitutes all the assignments argued by counsel. The judgment of the court below must be affirmed.

(4 Or. 207)

RAMSEY v. PETTINGILL.

(*Supreme Court of Oregon*. November 29, 1886.)

REVIEW, WRIT OF—JUDGMENT APPEALABLE—TIME FOR APPEAL PASSED—CIVIL CODE
OR. § 575; GEN. LAWS, § 119.

Under the Oregon statute (Civil Code, § 575, and Gen. Laws, p. 478, § 119) providing that a writ of review will lie from a justice's court to the circuit court in cases where there is no appeal, a review will not be allowed where an appeal could have been taken, but the party seeking a review neglected to take an appeal within the time limited therefor.

Appeal from the judgment of the circuit court, Josephine county, Oregon, dismissing the writ of review, sued out by appellant, to determine the regularity of a judgment rendered against him, and in favor of the respondent, in the justice's court for Wolf Creek precinct, in said county. The writ of review was sued out after the time for appeal had passed.

George H. Burnett, for appellant, Ramsey. *W. H. Holmes* and *B. N. Hayden*, for respondent, Pettingill.

STRAHAN, J. The Civil Code, § 575, provides: "The writ shall be allowed in all cases where there is no appeal, or other plain, speedy, or adequate remedy, or where the inferior court, officer, or tribunal, in the exercise of judicial functions, appears to have exercised such functions erroneously, or to have exceeded its or his jurisdiction, to the injury of some substantial right of the plaintiff, and not otherwise."

In construing this section of the Code, the course of judicial opinion has not been uniform in this state. One case decided that appeal and review were

concurrent remedies. *Schirott v. Philippi*, 3 Or. 484; following *Blanchard v. Bennett*, 1 Or. 329.

In *Evans v. Christian*, 4 Or. 375, this court held that appeal and review were not concurrent remedies, and, to that extent, overruled the preceding cases on that subject. In that case it was further said: "We do not question the correctness of the decision of the court in *Schirott v. Phillippi*, so far as it determined the real question in that case. That was that a writ of review might issue in a case (otherwise proper) when the right to an appeal once existed, but had been lost by lapse of time. *Miliken v. Huber*, 21 Cal. 166; *People v. Shepard*, 28 Cal. 115."

I have examined both of these cases. Neither of them supports the doctrine stated. The first holds directly the reverse. In that case the court said: "If there was an appeal in this case, the limitation, by statute, of the right to bring that appeal within one year, does not make it, *after a year has been suffered to elapse* without taking an appeal, a case in which there was *no appeal*. In any view of the case, therefore, the writ was improperly issued." Further: "If it was the exercise of an appellate jurisdiction, it could not be done, by the proceeding of a writ of *certiorari*, after the time to exercise the *right of appeal* had elapsed." *Miliken v. Huber, supra*. In the second case cited the court appears to have decided that the remedy of the defendant was by appeal, and not by writ of review. The other matter stated in the extract was not referred to or noticed. Subsequent cases in California on the subject show that this court, in *Evans v. Christian, supra*, misapprehended the real point in *Miliken v. Huber, supra*. Thus, in *Bennett v. Wallace*, 43 Cal. 25, it is said: " * * * But it is insisted that, as the time limited by statute for the taking of the appeal has been suffered to elapse, the case has thereby become one in which there is no appeal, and is *thus* brought within the terms of the statute referred to. This view is answered by *Miliken v. Huber*, 21 Cal. 166. The statute was intended to supply a remedy where none existed in the first instance, and not to supplement one *lost through the laches of the party himself*." *Newman v. Superior Court*, 62 Cal. 545.

It thus appears that the rule of practice supposed to have been sanctioned by this court in *Evans v. Christian, supra*, is not supported by authority, and has never been satisfactory to the bar; and, in my opinion, it is at variance with the true construction of the Code. If an appeal is given by law, then it must be deemed to be an *adequate remedy*, and a party aggrieved must avail himself of it. He cannot be suffered to neglect this remedy until he has lost his right of appeal, and then claim that he has thereby gained a new remedy by his laches. The law favors the diligent, but we have yet to learn that a litigant ought to be rewarded because of his negligence. In many of the states the right to the writ of *certiorari* is discretionary. In those cases, if a party once had a right of appeal, *certiorari* is never allowed unless his failure to appeal is excused or accounted for in some satisfactory manner. *State v. County Court of Nodaway Co.*, 80 Mo. 500; *Poe v. Machine-works*, 24 W. Va. 517; *Payne v. McCabe*, 37 Ark. 318; *Tilton v. Larimer Co. A. Ass'n*, 6 Colo. 288.

I concur in what was said on this subject by the supreme court of Michigan in *Galloway v. Corbitt*, 52 Mich. 460; S. C. 18 N. W. Rep. 218: "This court has heretofore expressed its disapprobation of the practice of taking advantage of technical errors in the proceedings before justices of the peace by the process of *certiorari*; thus converting what was designed to be a speedy and inexpensive court for the trial of causes into a costly and dilatory tribunal, and often, in its practical operation, through serious delays, defeating the ends of justice; and we are of the opinion that, except for errors which go to the foundation of the action, the proper remedy is by appeal." *Erie Pres. Co. v. Witherspoon*, 49 Mich. 377; S. C. 18 N. W. Rep. 781.

It is proper to say, in this connection, that no attorney or party is respon-

sible for this practice. They did not introduce it, and they could not abolish it. It owes its origin entirely to what must be regarded as an oversight on the part of this court; and, as long as that rule is recognized here, it must be expected that parties will avail themselves of it. Therefore the case of *Evans v. Christian, supra*, and other cases in this court which hold that a party may have a writ of review in cases where he once had a right of appeal, but lost it by lapse of time, or neglected or omitted to avail himself of it, must be regarded as overruled. The writ of review can issue "where there is no appeal;" but where the right of appeal once existed, and is lost by lapse of time, the controversy cannot be reopened by means of the writ.

The application of these principles disposes of this case. Here the appellant had a right of appeal from the judgment of the justice in favor of Pettigill. He did not avail himself of that right within the time limited by law. I do not think the right to have a writ of review exists in such case. It follows, therefore, that the judgment of the court below must be affirmed.

ON PETITION FOR REHEARING.

(December 18, 1886.)

STRAHAN, J. The appellant has filed a petition for a rehearing in this cause, mainly for the reason that, in the opinion filed, section 119, p. 478, Gen. Laws, was not noticed. In reaching the conclusion already announced the effect of that section was considered, but by oversight it was not referred to. It is insisted, in effect, that section 119 makes appeal and review concurrent remedies, and that the party can pursue either at his pleasure. That section provides: "No provision of this act in relation to appeals, or the right of appeal in either civil or criminal cases, must be construed so as to prevent either party to a judgment given in a justice's court from having the same reviewed in the circuit court for errors in law appearing upon the face of such judgment, or the proceeding connected therewith, *as provided in title 1, chapter 7, of the Code of Civil Procedure.*" That title authorizes review "when there is no appeal," and therefore section 119 must be held to recognize the right of review, subject to that limitation. As I understand it, *Evans v. Christian*, 4 Or. 875, and *Sellers v. City of Corvallis*, 5 Or. 272, each involved this construction of section 119, and to that extent they are approved. If section 119 had been construed to give a general right of review, as now contended for by appellant's counsel, the court could not have reached the conclusion which it did in those cases. The rehearing will be denied.

(14 Or. 300)

STATE v. SAUNDERS.

(Supreme Court of Oregon. December 15, 1886.)

1. EVIDENCE—DYING DECLARATIONS—CONSTITUTIONAL LAW.

In a trial for murder the admission of declarations of the deceased as to the cause of his death is not a violation of the constitutional right of the accused to meet the witnesses face to face.

2. SAME—WHEN ADMISSIBLE.

There being other evidence of the killing does not necessarily preclude the admission of dying declarations.¹

3. SAME—WHETHER CONCLUSIONS OF DECEASED OR NOT.

The statement of deceased, "He shot me like a dog," is descriptive of the manner of the killing, and not inadmissible as a conclusion of the deceased.¹

4. JURY—COMPETENCY—CHALLENGES FOR CAUSE—DISCRETION OF COURT.

The allowance of challenges for cause is a matter of discretion for the trial court; and where, in a trial for murder, it appeared that the jurors challenged had, to some extent, formed an opinion as to the guilt or innocence of the accused, which they

¹ As to when dying declarations are admissible in evidence, and of what such declarations must consist, see *State v. Leeper*, (Iowa,) 30 N. W. Rep. 501, and note.

said would require evidence to remove, but thought they could try the case impartially, and their impressions had been formed from newspaper accounts and general rumor, the judgment will not be reversed; the discretion of the court not appearing to have been abused.

5. CRIMINAL LAW—INSTRUCTION AS TO KEEPING JURIES TOGETHER TILL THEY AGREE.
An instruction telling the jury the effect of a disagreement at common law, and of how juries were kept together until they did agree, the mitigation of the rule in the United States, and remarking to them that they would have to remain together and could not separate until they agreed on a verdict, and brought it into court, is not error.

6. WITNESS—CROSS-EXAMINATION—ACCUSED WITNESS IN OWN BEHALF.

Under Laws Or. 1880, p. 28, providing that, when the accused offers himself as a witness in his own behalf, "the offer, when so made, shall be deemed to have given to the prosecution a right to cross-examine him upon all the facts to which he has testified, tending to his conviction or acquittal," it is error to permit the accused to be asked on his cross-examination questions not relating to facts to which he has testified on his examination in chief with a view to discrediting him.¹

Weatherford & Blackburn and *John Burnett*, for appellant, Saunders. *J. Whitney* and *William M. Ramsey*, for the State.

THAYER, J. The appellant was indicted, tried, and convicted of murder in the first decree before the circuit court for the county of Linn. From that conviction he has appealed to this court, and alleges several grounds of error for which he claims the judgment should be reversed and a new trial granted. The main errors assigned are: *First*, the admission of the dying declaration of the party whom he is alleged to have murdered; *second*, permitting improper questions to be asked the appellant when on the stand as a witness in his own behalf, and compelling him to answer them; *third*, erroneous instructions given by the court to the jury in regard to the manner of their deliberations, of the necessity of their agreeing upon a verdict, and remarking to them in the charge that they would be kept together until they had agreed upon their verdict; and, *fourth*, error in the court in overruling certain challenges made for cause to certain of the jurors drawn to try the appellant upon the charge. We have examined these various grounds with a considerable diligence, and will briefly state the conclusions at which we have arrived.

In regard to evidence of dying declarations in such a case, it is contended by the appellant's counsel that they are not admissible at all, in view of the constitutional immunity that a party accused of an offense shall have the right to be confronted by the witnesses against him; and that, if receivable at all, it must be in a case where no other evidence of the killing is obtainable; that their admission as evidence is only upon the ground of necessity, which did not exist in this case, as the killing was admitted. This character of testimony has been regarded as competent for a very long time,—long before the adoption of the constitutional guaranty in favor of accused parties above referred to, and has universally been admitted since,—and we could not determine that the bill of rights contained in the constitution of this state had changed the rule without exhibiting great arrogance upon our part. The appellant's counsel seemed to think that the declaration that "in all criminal prosecutions the accused shall have the right to meet the witnesses face to face" could have been nothing less than that they should be living and present in court when their testimony is delivered. But the right to offer that character of proof is not restricted to the side of the prosecutor; it is equally admissible in favor of the party charged with the death. 1 Greenl. Ev. § 159. The objection to it, therefore, might, if sustained, operate very injuriously to an accused; and the clause in the bill of rights, if construed as the counsel contended it should be, have the effect to deprive the latter of an important right. The rule, although sanctioned by constitutional declaration,

¹See *State v. Pfefferle*, (Kan.) *ante*, 406, and note; *State v. Elliott*, (Mo.) 2 S. W. Rep. 411; *State v. Beeman*, Id. 407.

like all general rules, has its exceptions. It does not apply to such documentary evidence to establish collateral facts as would be admissible under the rules of common law in other cases, (Cooley, Const. Lim. note 2, 318;) and the exceptions to it, as Judge Cooley says, at same page of that work, "are of cases which are excluded from its reasons by their peculiar circumstances." The admission of dying declarations has uniformly been held to be one of the exceptions; and it would be folly for this court to attempt to overthrow the numerous decisions to that effect. There being other evidence of the killing would not, necessarily, preclude the admission of such declarations. They are admitted upon the presumption that there is no other evidence as satisfactory, though, doubtless, the origin of the rule was the inability to prove the act by any other testimony. The trial judge has so much better opportunity than this court to determine questions of that character that it would not be proper to interfere with the decision of the former, unless a clear case of error is shown to have been committed.

Complaint is made, also, that the declarations of the party slain in the present case were not as to facts entirely, but embraced conclusions,—that part of them, particularly, in which the deceased said: "He shot me down like a dog." Declarations of a party *in extremis*, in order to be admissible, must be as to facts, and not to conclusions. They are permitted as to those things to which the deceased would have been competent to testify if sworn in the case. 1 Greenl. Ev. § 159. But I do not think the expression of the deceased a conclusion. It was given as part of his narrative relating to the affair, and I think it was merely intended to illustrate the lack of provocation, and the wantonness in which the appellant did the act. It was descriptive of the manner in which the act was committed. It conveyed the idea that the appellant disregarded the claims of humanity, and, without giving him any warning, wantonly shot him. It was the statement of a fact made by way of illustration.

The overruling of certain of appellant's challenges to jurors called to try the case is another question left largely to the discretion of the presiding judge at the trial. Cases of homicide are calculated to create excitement and comment; and, where information is so readily and generally diffused throughout the entire community as in this age of newspapers, the acts and circumstances attending such an affair are liable to be known and understood extensively. It becomes difficult, therefore, to select a jury in a community where it has occurred, without drawing jurors who know more or less about the case. The person accused of a crime is entitled to a fair and impartial trial. But does it necessarily follow that because men read and are informed in regard to the current events of the day, that they are thereby disqualified to act as such jurors? This depends much upon the credulity of the person, and the tenacity with which they adhere to preconceived notions. It hardly seems possible that a sensible person would allow impressions from such a source to affect his deliberations and verdict as a juror in so important a matter. The judge who tries the case determines the sufficiency of the challenge to the juror. If made, as in this case, for actual bias, and is denied by the opposite party, testimony is given upon the question, and upon that testimony the sufficiency of the challenge is determined. The point to be determined is whether there exists such a state of mind upon the part of the juror, in reference to the party challenging, that he cannot try the case impartially, and without prejudice to the party's substantial rights; and this, the statute says, must be determined by the exercise of a sound discretion. The evidence in this case upon the question of the qualification of the jurors challenged, showed that they had, to some extent, formed an opinion as to the guilt or innocence of the accused which they said would require evidence to remove, but thought they could try the case impartially. The trial judge heard their testimony, had an opportunity to observe their manner, and deemed them qualified to sit in the

case. Unless, therefore, we conclude there has been an abuse of discretion, we have no right to interfere in the decision upon that point. It was a question of fact to be determined. The impression or opinion the jurors had formed was from newspaper accounts and general rumor, and the circuit court had a better understanding of the extent of the opinion than we can obtain from the bill of exceptions. This court ought not to reverse a judgment upon such grounds, unless the evidence of the juror's incompetency is pretty clear and certain,—at least shows some cogent circumstances against it,—circumstances of a nature calculated to impress upon the mind of the juror a conviction, such as having heard the testimony in the case, read a detailed statement of it, or been told it by some one claiming to know.

The objection to the instructions to the jury, as to their duties, telling them the effect of a disagreement at common law, and of how juries were kept together until they did agree, the mitigation of the rule in the United States, and remarking to them that they would have to remain together, and could not separate, until they agreed on a verdict, and brought it into court, cannot be entertained. It was proper for the court to inform the jury respecting their duty; advise them how they should consider the matter before them, and the course to pursue in reaching a conclusion. Nor should the concluding remark in the charge be construed as any determination to keep them together until they had agreed, or an indication that the case, in the mind of the court, was so plain that they would not be justified in failing to agree. The court was evidently endeavoring to administer the law fairly and honestly, and I am satisfied that the apprehension of counsel that the course pursued was improper arises from a zeal for their client, and an overzealousness that his rights, under the law, have been disregarded. The court had a responsibility to discharge, and, so far as anything appears in the transcript, did it conscientiously. The jury must have understood that they would be discharged if not able to agree from what the court expressly told them.

The next and last ground of error involves the right of the attorney for the state to examine the appellant while on the stand as a witness. This presents the most serious question in the case by far. It appears that the appellant offered himself as a witness in his own behalf, and testified to the circumstances of the killing. After having given in his evidence upon that point, the state's attorney asked him the following questions: "Did you not kill a man in Texas before coming here?" "How often have you been without it [referring to a pistol] within the last six months?" "Was it not true that when at Corvallis you were at target practice most of the time?" "You are a center shot?" To each of which questions the appellant's counsel objected, upon the grounds that it was improper, immaterial, incompetent, and not cross-examination. The court overruled the several objections, and required the appellant to answer the questions, and he made qualified affirmative answers to them all. To each of the rulings upon the admissibility of this evidence the appellant's counsel saved an exception.

The discussion of these exceptions has taken a wide range. Authorities from a number of the states have been cited to show that, when a defendant in a criminal case becomes a witness in his own behalf, he subjects himself to the same liabilities on cross-examination as other witnesses. In support of this proposition counsel for the state have cited decisions from Maine, New Hampshire, New York, Iowa, Missouri, Nevada, Connecticut, Maryland, Massachusetts, and perhaps other states,—at least they could have cited decisions from Indiana, and probably from Minnesota, to the same effect. I have examined the statutes of several of those states, and, so far as I have been able to ascertain, have found that they provide that the defendant is entitled to offer himself generally as a witness in his own behalf, and no restriction is placed upon the extent of the cross-examination. The statute of this state which permits a defendant in a criminal case to offer himself as a wit-

ness in his own behalf provides that the offer, when so made, shall be deemed to have given to the prosecution a right to cross-examine him upon all the facts to which he has testified tending to his conviction or acquittal. Laws 1880, pp. 28, 29. The question, therefore, is how far he subjects himself to cross-examination under that statute. It is very likely that, if the statute contained no limitation as to the extent of the cross-examination of a defendant in such a case, he would occupy the same footing as any other witness, if he chose to take the stand, although some of the decisions from the states in which no limitation is imposed upon the cross-examination hold that the cross-examination of a defendant, in such a case, should not there be allowed the same latitude permitted in the cross-examination of a witness not a party defendant. The ground of the distinction was an apprehension that the defendant, in such case, might be convicted of one offense upon his admission that he had committed others. *People v. Brown*, 72 N. Y. 571. It seems to me that this distinction is very properly made, conceding that an ordinary witness may be interrogated upon his cross-examination as to whether he has not committed other offenses that cannot affect him beyond his credit in the particular case, unless it expose him to prosecution, and then he can claim his privilege; but, as regards the party accused, such examination operates as a two-edged sword. It would not only impair his credit as a witness, but create a strong prejudice in the minds of the jury against him, and be a material aid towards convicting him. Unless, therefore, a defendant in a criminal prosecution is as pure as the icicles which form on Diana's temple, he had better keep off the witness stand if the prosecution is at liberty to ransack his past life. Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against him, and conduce more to his conviction, than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this,—knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case if they think him a scamp or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence except so far as it tended to impeach the testimony of the party; but what good would that do? And it is not at all improbable but that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender. Such a practice would necessarily prevent the party accused from ever offering himself as a witness, which would leave the jury to conjecture, and speculate why he pursued such course, and often, very probably, they would draw an unfavorable inference from the circumstance.

The legislature of this state evidently believed, when it adopted the act referred to, that the cross-examination of the defendant as a witness should be restricted. No one will claim, who reads the act, but that such restriction was intended. The question, however, is how far it extends. Counsel for the state insists that it extends no further than to prevent the prosecution from compelling the defendant to be a witness against himself; that he may be required to answer any question that will cast discredit upon his testimony without overstepping the limit imposed by the legislature. But how can he testify to his own infamy, as we have shown, without prejudicing his defense, and furnishing an argument in favor of his guilt? If he were shown to be a person who had been guilty of similar acts, whose history was marked by a career of crime, and who had been a constant violator of the law, would it not render it more reasonable that he was guilty in the particular case? And why not follow the plain reading of the statute, and its obvious meaning? It says that, when he offers his testimony as a witness in his own behalf, "he

shall be deemed to have given to the prosecution a right to cross-examine him upon all facts to which he has testified." There is no mistaking the intention of the legislature in the matter. It permitted the defendant in a criminal prosecution to be a witness in his own behalf, and subjected him to a cross-examination as to the facts to which he should testify, and the courts cannot extend the right beyond that.

Three of the states of the Union have adopted similar provisions,—California, Missouri, and Michigan,—and their courts have construed them.

In *People v. O'Brien*, 66 Cal. 602, S. C. 6 Pac. Rep. 695, the accused in a prosecution for embezzlement offered himself as a witness. Upon his examination in chief his testimony was confined to the alleged embezzlement; but upon cross-examination he was examined generally as a witness in the case, which course was objected to by his counsel. The supreme court in bank, after referring to an article in the constitution of that state which declares that no person shall be compelled, in any criminal case, to be a witness against himself, and to the statute which provided that, if he offered himself as a witness, he might be cross-examined as to all matters about which he was examined in chief, held that it was only under and by virtue of that provision that the defendant in such a case could be a witness at all; and that when called in his own behalf, and examined respecting a particular fact or matter in the case, the right of cross-examination was confined to the fact or matter testified to on the examination in chief; that such was the express language of the statute; and that, when the court allowed the prosecution to make the defendant a general witness in its behalf, it invaded a right secured to the defendant, not only by the statute, but by the constitution.

In *State v. Porter*, 75 Mo. 171, 177, in determining a similar question under a late statute of that state, the court says: "The court erred in permitting the state's attorney to cross-examine the defendant in relation to matters to which he did not testify in his own examination in chief. Under the act of 1877 it was held, in *State v. Clinton*, 67 Mo. 380; *State v. Cox*, Id. 392; *State v. Rugan*, 68 Mo. 214; and *State v. Testerman*, Id. 408,—that, if a defendant in a criminal cause availed himself of the privilege of testifying in his own behalf, the same latitude of cross-examination would be allowed the state as in the case of any other witness; but that act was amended at the last session of the general assembly, and he now can be cross-examined only as to matters testified to by him in his examination in chief."

In *Gale v. People*, 26 Mich. 157, where it appears a defendant had made a statement in a criminal prosecution against him, in accordance with the laws of that state, and upon which the prosecution was entitled to cross-examine him, a similar question was determined. In passing upon the case, Judge COOLEY, who delivered the opinion of the court, at page 159, said: "A more serious question arises upon the cross-examination of the defendant. His statement covered the whole case, and he was cross-examined on it without objection. The prosecution then, after inquiring about the former place of residence of respondent, produced several letters in view of the jury, and, from what they purported to contain, interrogated the respondent whether he had lived or been in a number of places named, and whether at one he had not been arrested on a charge of murder, and at others also had been arrested, and at others still been put in jail. All of these questions were objected to, but were sustained by the court, and were answered. The court, however, informed the prisoner, after the first had been put and answered, that it was his privilege to answer any question, or to decline to answer, just as he saw fit. If the questions were improper, it must be apparent that the error was not cured by the instruction to the prisoner that he might decline to answer at his option. When the judge sustained the exceptions, he decided, in effect, that they were proper to be put and answered; and, had the prisoner declined to answer any of them, he would have been put in the position be-

fore the jury of coming upon the stand in his own exculpation, and then refusing to make his disclosure as full as the rules of law required. An unfavorable inference upon the minds of the jury must inevitably have been produced, which, in this case, would have been increased by the exhibition of letters, brought out before the jury for no purpose that we can conceive unless to convey the impression that they contained damaging disclosures regarding the prisoner, which he must either admit, or falsify the facts. If, therefore, the questions were improper in themselves, the error was a serious one. And we have no doubt of their impropriety. The statute provides that the defendant in a criminal case shall be at liberty to make a statement to the court or jury, and may be cross-examined upon any such statement." And after referring to *People v. Thomas*, 9 Mich. 321, where it was held that a cross-examination on such a statement would not be allowed to go beyond it,—could not extend over the entire issue, as it might if he were a general witness, or into any of the collateral inquiries whereby a witness' credit or memory is sometimes tested,—and after expressing an approval of that case, the learned judge proceeded: "We have frequently had occasion to remark on the benevolent purpose which the statute of 1861 had in view, and to observe that practically it had tended to the furtherance of justice; but it can only have this effect when administered in the spirit which led to its adoption. Few men, however innocent, could safely go upon the stand to answer a criminal charge if they must, at their peril, be prepared to give satisfactory answers to questions regarding their whole former life, or, if they declined to do so, have their triers informed that the information they declined to give it was proper for the prosecution to call out, and that the refusal to respond to the questions justly subjected them to unfavorable inferences. Such would be the practical result of a refusal to answer an interrogatory which the court had sustained after objection made.

This court, at the March term, 1885, had occasion to pass upon the effect of this same statute in the case of *State v. Lurch*, 12 Or. 99; S. C. 6 Pac. Rep. 408. That was a case of uttering a forged note. The defendant offered himself as a witness, and, after his examination in chief, the state's attorney asked him to write his name, and that of the other party to the note which he was alleged to have forged, and the court required him to do so, against the objection of his counsel. The court held that it was error, and reversed the judgment upon the ground that the prosecution, in its cross-examination, was confined to the matters to which the defendant had testified.

It is claimed by the appellant's counsel that the questions propounded to appellant when on the stand as a witness could not properly have been put to a general witness. That matter was pretty thoroughly considered by this court in *State v. Bacon*, 9 Pac. Rep. 393. The court there held that it was in the discretion of the trial court to permit a witness to be asked, on cross-examination, whether he had ever been arrested for a felony when the object of the question was to test the credibility of the witness, and not simply to disgrace him. Whether the questions asked the appellant, before referred to, tended to discredit him is very doubtful to my mind. It seems to me that they were more calculated to elicit from him a state of facts tending to show that he was a kind of man that would be likely to commit a homicide. But, be that as it may, I am satisfied that the counsel for the state had no right to ask the questions, as the appellant had not testified to any such facts. The inquiry related to a purely collateral matter, and was highly prejudicial to the appellant. The right to call out such evidence gave the prosecuting attorney the right to comment upon it, and to draw inferences and deductions therefrom; and no character of proof, in my opinion, would be more potent to influence a conviction than that. I think it was entirely improper to permit such inquiries to be made, and for that reason the judgment of the conviction should be reversed, and a new trial ordered.

LORD, C. J., (*concurring.*) The question here is whether our statute fixes a limitation to the cross-examination that does not exist in the case of other witnesses. Quite a number of cases were cited to the effect that, when a defendant in a criminal action offers himself as a witness in his own behalf, he occupies the position of any other witness,—may be cross-examined as to any matter pertinent to the issue, may be contradicted and impeached as any other witness, and may be subjected to the same tests. The fact that he is a party makes no difference. It neither increases nor diminishes his rights or privileges as a witness, but subjects him to the same latitude and same limitation in his cross-examination as are applicable to any other witness. It will be noted, however, that the statutes under which these decisions have been made have fixed no limitation as to the rights of the party defendant when he voluntarily places himself upon the witness stand, although the reasoning of some of them is broad enough to cover the case in hand under our statute. Our statute provides that, when the party accused offers himself as a witness in his own behalf, he shall be deemed to have given to the prosecution a right to cross-examine him upon all facts to which he has testified tending to his conviction or acquittal. Does this allow the accused, when a witness in his own behalf, to be cross-examined on matters not relevant to the issue, for the purpose of affecting his credibility? As to a witness other than the accused, the practice of asking such questions has been left to the sound discretion of the court trying the case. The reason assigned for such a mode of interrogation is to aid the jury in judging the character of the witness from his own voluntary admissions. In a note to *Rex v. Pitcher*, 12 E. C. L. 60, it is said that "the law as to what questions may be asked in cross-examination, the answers to which have a direct tendency to degrade the witness, is very obscurely laid down in the books." It is there said, however, that, "in practice, the asking of questions to degrade the witness is regulated by the discretion of the learned judge in each particular case." For this reason an appellate court will not reverse, unless it is manifest from the record that there has been an abuse of discretion; such as allowing the cross-examination to take an unreasonable range in collateral matter not affecting the credibility of the witness. From the necessity of the case, it is difficult, perhaps impossible, to lay down any precise or definite rule fixing the limits of such cross-examination. Necessarily, it must be left to the sound discretion of the trial court, subject only to review for its abuse. This, then, being the case, in the absence of any definite rule to guide the trial court, is there not a necessity for the exercise of greater caution in permitting such questions when the accused is a witness on his own trial, and a liability to prejudice his cause which is not incurred from the disparagement of other witnesses by such voluntary admissions? "He goes," said CHURCH, C. J., "upon the stand under a cloud. He stands charged with a criminal offense not only, but is under the strongest possible temptation to give evidence favorable to himself. His evidence, therefore, is looked upon with suspicion and distrust; and if, in addition to this, he may be subjected to a cross-examination upon every incident of his life, and every charge of vice or crime which may be made against him, and which has no bearing upon the charge for which he is being tried, he may be so prejudiced in the minds of the jury as frequently to induce them to convict upon evidence which would otherwise be deemed insufficient." It is true, this is only an argument against the abuse of discretion in the trial court; but does it not show the increased danger or liability to prejudice the cause of the defendant to permit such inquiries in cross-examination to be made of him when a witness in his own behalf? And is this not the reason why the statute, in effect, says that his cross-examination shall be limited, restricted, or confined to relevant matters only,—to facts to which he has testified tending to his conviction or acquittal?

The cases cited from Missouri, Michigan, and California, under a statute

of similar import, hold that the defendant's rights, as a party, add a limitation that does not exist in the case of another witness. In New York, Massachusetts, Indiana, Ohio, and other states where the statutes have no words of limitation, it is held that the defendant, while occupying the witness stand, was entitled to the same rights and privileges, and was subject to the same rules of evidence, as any other witness. The general rule in respect to any witness on cross-examination is that he may be cross-examined as to any facts and circumstances testified to by him on his direct examination; and, personally, I have been inclined to think that our statute was but a mere reaffirmation of this rule as to the accused, and that, when he voluntarily took the witness stand, he subjected himself to the same tests as are applied to any other witness, and, in the sound discretion of the trial court, may be cross-examined as to collateral facts calculated to test his credibility. But the question is debatable, and somewhat involved in doubt, and upon which there is some diversity of judicial utterances, and in such case I feel constrained to resolve my doubts *in favorem vitae*.

STRAHAN, J., having been of counsel, did not sit in this case.

(71 Cal. 183)

REYNOLDS v. LINCOLN and others. (No. 9,628.)

(*Supreme Court of California. September 29, 1886.*)

1. EXECUTION—SALE—JUDGMENT BY CONFESSION—EVIDENCE.

A judgment by confession on a statement not signed by the party personally is void, and a sheriff's deed under execution thereon is not admissible in evidence as to the title of the land sold.

2. SAME—SATISFIED JUDGMENT.

A sale of land under a satisfied judgment is a nullity, and does not affect the title.

3. EVIDENCE—COPY OF DOCUMENT, WHERE NO ORIGINAL PROVED.

Where there is no proof that the original of articles of association of a company ever existed, it is not error to exclude that which purports to be a copy.

4. TAXATION—SALE TO HIGHEST BIDDER—ST. CAL. 1861, PAGE 120, § 5, ST. CAL. 1862, PAGE 520—TAX DEED—EVIDENCE.

Under St. Cal. 1861, p. 120, § 5, and St. Cal. 1862, p. 520, requiring lands at tax sale to be sold "for the smallest quantity that the purchaser would take and pay the judgment, and all costs," a sale to the highest bidder simply, is void, and the tax deed is not admissible as evidence.

5. ESTOPPEL—JUDGMENT IN EJECTMENT—SUIT TO QUIET TITLE.

Where one brings ejectment on an equity, and the judgment is adverse for the reason that the equity cannot be considered in the action of ejectment, such judgment is not a bar to a suit on the same equity, by one in possession, to quiet title.¹

6. EQUITY—SUIT TO QUIET TITLE—JOINDER OF PARTIES.

In an action to quiet title by one holding an equity, one holding the legal title, without any beneficial interest, may be joined as co-defendant.

7. APPEAL—MISJOINER OF CAUSES OF ACTION NOT AFFECTING SUBSTANTIAL RIGHTS.

Whether or not a cause of action to quiet title is improperly joined with one against a trustee of real estate having no beneficial interest, if the plaintiff is entitled to a conveyance from the trustee, and the trustee could have recovered from the other defendant in the cause of action to quiet title, the substantial rights of the parties are not affected, and judgment will not be reversed for such error.

In bank. Appeal from superior court, Sacramento county.

This action was originally brought to quiet title to the premises described in the complaint. Plaintiff applied to the court for leave to file an amended complaint, in which Francis E. Lynch was made a party defendant, and in which another and separate cause of action was set out in addition to that in the original complaint. This leave was granted. The first count of the

¹See note at end of case.

amended complaint avers, in the usual form, that defendants Lincoln and Lynch "claim some estate or interest in the said premises adverse to the * * *, but which plaintiff avers is unfounded; and that said defendants have no estate, right, or title, either at law or in equity, in or to said premises. The second cause of action is that, in 1863, all the parties owning or claiming any interest in the premises conveyed the same to Martin and defendant Lynch, as trustees; that the object of the trial has failed; that Martin has died; that plaintiff holds the entire estates of all the beneficiaries under the trust deed, and asks that Lynch, the surviving trustee, convey to him. Defendant Lincoln excepted to the order making Lynch a party, and demurred to the amended complaint upon the grounds of a misjoinder of parties defendant, and an improper joinder of causes of action.

John Reynolds, for respondent. *J. H. McKune* and *A. C. Freeman*, for appellants.

THORNTON, J. There was no error in excluding the sheriff's deed to Milliken. The judgment on which the sale was made, and upon which the deed was executed, was void. The judgment was one by confession, and was made under the act of 1850. See St. 1850, p. 454, § 293.

The statement was not signed by the parties personally, as required by the statute. Cheever's name was signed to the statement by his attorneys, Kewen & Morrison. This was not sufficient. *Chapin v. Thompson*, 20 Cal. 687, 688. See, also, *French v. Edwards*, 2 Pac. Coast Law J. 149, where this judgment and deed were passed on, and held void. Further, it appears that an execution was issued on this judgment, and satisfied, on the first of October, 1850. Some six months afterwards, this judgment so satisfied was assigned to one of the defendants, and another execution was afterwards issued, on which the sale was made to Milliken. This sale under a satisfied judgment could not affect the title. *French v. Edwards, supra*.

We see no error in excluding the paper purporting to be a copy of the articles of association of the Sutter Land Company. There was no proof that the original of such articles ever existed.

The court did not err in excluding the tax deed to Lincoln. The return shows that the sale was made to the highest bidder, and not, as required by the statute, "for the smallest quantity that the purchaser would take, and pay the judgment and all costs." See St. 1861, p. 120, § 5; St. 1862, p. 520. The sale was not made as required by the law, and was void. The recitals to the contrary in the deed cannot be regarded. The deed does not follow the return, (see *French v. Edwards*, 18 Wall. 506,) and must be held void.

The judgment in *Vance v. Lincoln* was not a bar. Vance did not hold at that time the legal title. It was outstanding in the trustees Martin and Lynch. His title, at most, was an equity, which could not be considered in his action of ejectment against Lincoln. On this equity Reynolds sues here, and the judgment in *Vance v. Lincoln* could not bar the consideration of such equity. The court did not err, therefore, in ruling out the judgment roll in *Vance v. Lincoln*.

The evidence in this cause did not disclose an adverse possession in Lincoln sufficient to vest him with title. The court was correct in refusing to sustain such a position.

As Reynolds, under the judgment in this case, is entitled to a conveyance from the trustee, who has not appealed, and the trustee could have recovered of Lincoln, no injustice is done the latter in holding Reynolds clothed with the legal title of the trustee, and, on that title, adjudged to recover the whole tract against Lincoln.

There was no misjoinder of parties here. On that point we concur in the opinion of the commissioners (9 Pac. Rep. 176,) and adopt that portion of their opinion. Conceding that there is a misjoinder of causes of action, still

this does not affect the substantial rights of the parties, and the judgment should not be reversed for such error. Code Civil Proc. § 475.

Judgment and order affirmed.

We concur: MORRISON, C. J.; ROSS, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J.; MYRICK, J.

NOTE.

A judgment in an action of forcible entry and detainer is not a bar to an action in ejectment for the same premises, between the same parties, *Riverside Co. v. Townsend*, (Ill.) 9 N. E. Rep. 65; nor is one in trespass, *Keyser v. Sutherland*, (Mich.) 26 N. W. Rep. 865; nor the dismissal of a bill for partition *Bigley v. Jones*, (Pa.) 7 Atl. Rep. 54. See, also, *Fish v. Benson*, (Cal.) *post*, 454.

As to what is necessary to constitute an estoppel by judgment, see *Riverside Co. v. Townsend*, (Ill.) 9 N. E. Rep. 65, and note.

(70 Cal. 553)

MAGEE v. MC MANUS. (No. 9,411.)

(Supreme Court of California. August 31, 1886.)

1. SPECIFIC PERFORMANCE—CERTAINTY—BURDEN OF PROOF.

A court of equity will not decree specific performance of a contract unless the thing agreed to be done is definite and certain in its terms and in itself; and the party asking for performance must make out, by clear and satisfactory proof, the existence of the contract as he alleges it.

2. SAME—AGREEMENT OF MARRIED WOMAN TO MAKE NOTE AND MORTGAGE.

A verbal agreement between a married woman and a person who was her accommodation indorser, to the effect that, in consideration of his indorsing another note for her, she would execute a note and mortgage in his favor in *such amount* as to secure him against loss, her note to be made payable at the same time as the accommodation note, and to bear the same rate of interest, is not such a contract as can be specifically enforced; the agreement not being final, and being indefinite and uncertain in its terms.

3. SAME—DILIGENCE ON PART OF PLAINTIFF—STATUTE OF FRAUDS—CIVIL CODE CAL. §§ 2772, 2794, SUBD. 2.

A verbal agreement between a married woman and her accommodation indorser, whereby, in consideration of further indorsement, she agrees to execute her note and mortgage in his favor, is not within the California statute of frauds, (Civil Code, §§ 2772, 2794, subd. 2;) and the surety, after making such indorsement, has the right, at any time within which the promise can be fulfilled, to call for performance. But a failure to do so, until after she is brought under liability by the accommodation note falling due, will operate as a waiver of the right, when, at that time, the verbal contract in its original shape cannot be performed.

4. SAME—REMEDY AT LAW.

An accommodation indorser who pays the note of his principal is entitled to be subrogated to the rights of the creditor whose claim against the principal he pays; and although, in a suit in equity by the surety for the specific performance of a contract of indemnity by his principal, the court finds that the principal is insolvent, yet if it appears that she has homestead property, and does not appear that she is a married woman, or the head of a family, or that the homestead is not of the value of \$1,000 upon lands worth several thousands of dollars, there is nothing shown to prevent the enforcement of a judgment at law, and therefore the surety is not entitled to relief in equity.

Department 2. Appeal from superior court, Marin county.

Specific performance.

Bowers & Crowley, for plaintiff and respondent. *Thos. F. Barry*, for defendant and appellant.

MCKEE, J. In this case the defendant was required, by the judgment of the court below, "forthwith to execute and deliver to plaintiff a note and mortgage, to-wit, her promissory note in the sum of \$1,664.40, payable to plaintiff on demand, and bearing interest at the rate of 7 per cent. per annum from the fourth day of October, 1882, secured by her mortgage on the lands and premises described in plaintiff's amended complaint,—the same being a certain lot of land and premises situate, lying, and being in the township of

Nicasio, county of Marin, state of California;" and from the judgment and an order denying a motion for a new trial the defendant appealed.

The judgment was rendered in an action to compel specific performance of a contract to execute a note and mortgage.

By the allegations of the complaint it appears that the plaintiff had become liable to the Bank of Sonoma County upon two promissory notes, one for \$500 and the other for \$300, which had been executed by him as an accommodation surety for the defendant. Each of the notes bore interest at $1\frac{1}{4}$ per cent. per month, payable quarterly, or to be compounded. On the twenty-third of June, 1881, both notes were past due and unpaid. As principal debtor, the defendant had paid the interest upon them as it became due, but failed to pay any part of the principal. She had not at that time the means to pay any part of it; and she wanted to negotiate with the bank for a fresh loan. To enable her to do so, she applied to the plaintiff to become surety for her upon a new note to the bank; promising him that, if he would join her in the execution of a note payable six months after date to the bank in the sum of \$600, with interest at the rate of 1 per cent. per month, payable every six months, or to compound,—upon which she could get the money from the bank,—she would, on demand, secure him against liability for her upon the three notes by giving him her individual note secured by mortgage upon her homestead property; the note to be made payable to him "at the same time as the \$600 note, * * * in a sum equal to the whole amount then due, and for which he was liable on the first two notes, and also upon the \$600 note, * * * with accruing interest," and "to bear the same rate of interest," and the mortgage to be made "in such amount as to secure plaintiff against any liability by reason of his becoming her surety as aforesaid." The plaintiff consented, and upon the faith of the promise made by the defendant he joined her in the execution of a note payable to the bank for \$600, upon which she procured the money from the bank; but she failed and refused to keep her promise, made default in the payment of any part of the principal and interest of the three notes; and, when the \$600 note became due, the plaintiff was compelled by the bank to pay \$1,664.40, in satisfaction of the three notes which he had signed as the accommodation surety of the defendant. The payment was made on the fourth of October, 1882.

The finding of the court states that, at the time and under the circumstances set forth in the complaint, the plaintiff, as the accommodation surety of the defendant, did join the defendant in the execution of a note for \$600, which she had discounted by the Bank of Sonoma County; and that, in consideration of the execution of the note by the plaintiff, she verbally promised and agreed to secure him against liability already incurred upon the two notes, and to be incurred upon the \$600 note, by her individual note, payable to himself, as stated in the complaint, and secured by a mortgage to be made "in such amount and terms to secure him against any liability by reason of his becoming her security as aforesaid." It is also found by the court that the plaintiff performed his part of the contract; that the defendant refused to execute and deliver to the plaintiff her note and mortgage according to her promise; that, after the twenty-first June, 1881, she made default in the payment of any part of the principal or interest of the three notes; that, after the \$600 note became due, the plaintiff, on the fourth of October, 1882, had to pay to the bank for the defendant, in satisfaction of the three notes, the sum of \$1,664.40, and that the defendant is insolvent.

It is a cardinal principle of natural justice that a person shall perform his agreement. Upon that principle a court of equity, in the exercise of well-regulated and judicial discretion, enforces the actual accomplishment of a thing stipulated for, on the ground that what is lawfully agreed to be done ought to be done. But the thing agreed to be done must be definite and certain in its terms and in itself; and the party who claims performance must

make out, by clear and satisfactory proof, the existence of the contract as he alleges it. That has not been done in this case. The contract as it is stated in the finding of the court is not the contract as it is alleged in the complaint. Instead of a contract founded upon a consideration to become surety for the defendant upon a promissory note payable "six months after date," as alleged in the complaint, the court finds it was a contract made in consideration of becoming surety upon a note payable "one year after date." The consideration of a contract is a material part thereof. Two similar contracts, founded upon different considerations, cannot be regarded as one and the same. However, whether the true contract be that which the court finds, or that which the plaintiff alleges, it is indefinite and uncertain, not only as to the time of the payment of the note and mortgage to be executed, but as to the amount for which the mortgage was to be given, and the rate of interest upon the debt. It appears that these things were to be the subject of future ascertainment and agreement, so that the mortgage, when executed, would be sufficient security for the plaintiff. As, therefore, the agreement was not final, and it was indefinite and uncertain in its terms and in itself, specific performance of it could not be enforced in equity. *Morrison v. Rossignol*, 5 Cal. 64; *Los Angeles, etc., Co. v. Phillips*, 56 Cal. 539; *Potts v. Whitehead*, 20 N. J. Eq. 55.

Irvine v. Armstrong, 17 N. W. Rep. 343, cited in argument by respondent's counsel, does not conflict with these views. In that case "the terms of the notes and mortgage were definitely agreed upon."

Besides, the contract as it is alleged in the complaint was not a parol contract for the sale of real property, or any interest therein. In its nature it was a purely mercantile contract, whereby the defendant undertook to indemnify the plaintiff, in a particular mode, against any loss or damage on account of becoming surety for her. The undertaking was not within the statute of frauds, (sections 2772, 2794, subd. 2, Civil Code; *Lerch v. Gallop*, 8 Pac. Rep. 322;) and the person to whom the promise was made, after complying with it on his part by becoming surety for the promisor, had the right, at any time within which the promise could be fulfilled according to its terms, to call for performance. But such a right may be waived, (*Price v. Dyer*, 17 Ves. 356;) and, if it be waived by delay to call for performance until performance becomes impracticable in the mode prescribed by the promise, specific performance will not be decreed. Equity only enforces performance of a contract as it is made by the parties themselves. It has no power to make a contract for them. *Grey v. Tubbs*, 43 Cal. 359.

We think the plaintiff waived his right to call for a specific performance of the contract of indemnity in its original shape. The case shows that there was no subsequent ascertainment or agreement as to the amount and terms of the mortgage to be executed as security. There was no demand made for its execution within "six months" or "one year" after the date of the contract. It is alleged in the complaint "that on the thirtieth of August, 1882, plaintiff demanded of defendant execution of a note and mortgage in accordance with her agreement." The court finds "that the plaintiff demanded performance prior to the commencement of the action," and the action was commenced in October, 1882. So that, in fact, there was no demand made for performance until after the plaintiff was brought under liability by the debt falling due, and at that time the verbal contract in its original shape could not be performed. Yet, as a surety brought under liability to pay the debt of his principal, the plaintiff had the right, upon the doctrine of exoneration, if the principal was insolvent, to be substituted to any subsisting securities for the payment of the debt, and to be subrogated to the benefit of such securities. In case of the insolvency of the principal this right attaches and may be enforced *before* payment, and also *after* payment, whether the principal be solvent or insolvent.

In *McConnell v. Scott*, 15 Ohio, 401, a surety, after a judgment taken against himself and his principal, and before payment of the judgment, was held entitled to any credits of the principal, and to have them appropriated in payment of the judgment. And a like right was enforced in favor of a surety in *York v. Landis*, 65 N. C. 536, after payment of the debt of the principal. 1 Story, Eq. 322; 2 Story, Eq. § 780.

The cases of *McCorkle v. Brown*, 9 Smedes & M. 167, and *Pratt v. Carroll*, 8 Cranch, 471, have no application. Both cases involved rights arising out of contracts for the sale of real property by vendors who claimed enforceable vendors' liens upon the lands for the payment of unpaid portions of the purchase money. In neither was there any question of rights arising out of the contract to indemnity.

It is alleged in the complaint, and the court finds, that the defendant is insolvent. But, as there were no subsisting liens or securities for the payment of the debt to the creditor, no question of subrogation to securities could arise either before or after payment of the debt. When the plaintiff paid the debt to the creditor, he acquired all the rights of the creditor for the purpose of obtaining reimbursement. Section 779, Code Civil Proc. The only right which he acquired was an action at law to recover what he had paid, and his remedy for the enforcement of that right was ample and adequate; for, while it is alleged that the defendant is insolvent, it is admitted that she is the owner of certain land and premises which she claimed as her homestead. Although it is not alleged, it may be inferred, that the defendant is an unmarried woman; but it nowhere appears, in any way, whether she was or is the head of a family, or whether the value of the homestead exceeds or falls short of the statutory limitation. There is no allegation at all as to value. If it was a \$1,000 homestead upon premises which were worth several thousand dollars, there is nothing to prevent the plaintiff from enforcing by execution any judgment which he may recover. Sections 1241 and 1245, Civil Code. Where a party has an adequate remedy at law, he is not entitled to relief in equity.

Judgment and order reversed, and cause remanded for further proceedings.

We concur: SHARPSTEIN, J.; THORNTON, J.

(71 Cal. 428)

FISH and others v. BENSON and Wife. (No. 9,451.)

(Supreme Court of California. December 18, 1886.)

1. APPEAL—MOTION TO DISMISS.

If notice of the motion for the new trial was not given, or the bill of exceptions was not filed in time, and these facts appear in the record, they may constitute a reason for affirming the order denying the new trial, but are no ground for dismissing the appeal from the order.

2. SAME—RECORD—AFFIDAVITS NOT IDENTIFIED, NOT LEGALLY PART OF.

Affidavits, copies of which are contained in the transcript, but not in any way authenticated or identified as having been used in the motion for a new trial, constitute no part of the record which can be considered upon appeal.

3. SAME—INSUFFICIENT IDENTIFICATION.

The fact that the court, in its order overruling a motion for a new trial, referred to certain affidavits of A., B., and C., and that there are found in the record affidavits of A., B., and C., is not a sufficient identification of the affidavits.

4. JURY—RIGHT TO TRIAL BY—EQUITABLE DEFENSE TO COMMON-LAW ACTION.

Where, in an action of ejectment, the cross-complaint of defendant sets up the defense, and makes a case involving the application of equitable doctrines, and seeks relief that only a court of equity can give, the defendant is not entitled to a jury trial.

5. ESTOPPEL—JUDGMENT—FORCIBLE ENTRY AND DETAINER—EJECTMENT.

A judgment roll, in an action of forcible entry and detainer of real property, is not admissible in an action between the same parties, involving the title to the same property, since the title to real property cannot be tried in that action.¹

¹See *Reynolds v. Lincoln*, (Cal.) *ante*, 449.

6. VENDOR AND VENDEE—BONA FIDE PURCHASER—ADEQUACY OF CONSIDERATION.

Plaintiff, claiming to be a *bona fide* purchaser of real property, paid \$9,000 for property which, with a clear title, would have been worth \$30,000. But action pending, involving the title to part, rendered it of no value, though for the purposes of this transaction it might fairly be considered worth \$18,000. *Held*, that the consideration was not so small as to be notice to the purchaser of his grantor's fraud.

7. SAME—FRAUD—WHEN DEED VOIDABLE AND NOT VOID.

Where a party who is not incompetent to execute a conveyance by reason of mental incapacity or unsoundness of mind is induced to execute and deliver a conveyance by fraud, the deed is not void, but voidable; and a *bona fide* purchaser for value from the grantee acquires title free from the equities against his grantor.

8. SAME—NOTICE OF CONTRACT NOT NOTICE OF NON-PERFORMANCE OF ITS TERMS.

A contract for sale of real estate, duly recorded, is notice of its conditions; but if it provides that, when the deed shall be delivered, the trade shall be ended, a purchaser is not bound by notice of the contract after the deed is delivered; and if the party waives the conditions precedent of the contract, and delivers his deed, he cannot be heard to assert the non-performance of the conditions as against a *bona fide* purchaser of his grantee.

9. TRIAL—BY COURT—FINDINGS—WHETHER CONTRADICTING OR NOT THE PLEADINGS OF PREVAILING PARTY.

The court having found for plaintiffs, a finding that B., one of the plaintiffs, acting for himself, and F., another plaintiff, purchased the land in question, was objected to as contrary to plaintiffs' answer to defendants' cross-complaint. The cross-complaint had averred conveyance to B. and F., which the answer admitted. The answer further avers that defendant S. and F. and B. were purchasers for fair value without notice, and that plaintiffs purchased the property in question by deed to said F. and B. *Held*, that the answer does not state that S. bought jointly with F. and B., but indicate the opposite, and therefore there is no contradiction.

Commissioners' decision.

In bank. Appeal from superior court, Contra Costa county.

Flournoy, Mhoon & Flournoy, for appellants. *Edward P. Cole*, for respondent.

SEARLS, C. This is an action of ejectment to recover certain premises situate in Contra Costa county. Plaintiffs had judgment, from which, and from an order denying a new trial, the defendants appeal.

Respondents move to dismiss the appeal, so far as it relates to the order denying a new trial. The appeal was taken within the 60 days, provided by statute therefor, after entry of the order denying the new trial. If the notice of the motion was not given, or the bill of exceptions not filed, in time, and this is made to properly appear in the record, the fact may constitute a reason for affirming the order denying the new trial, but is no ground for dismissing the appeal from the order. In other words, an appeal is given, as matter of right, from an order granting or denying a new trial. If the proceedings on the motion, anterior to the order, are irregular or defective, such irregularity or defect is not cause for dismissing the appeal, but may, upon a proper showing, be passed upon in determining the same. In the view we have taken, it may be conceded to the appellants that the proceedings on motion for new trial were had in time, and that the bill of exceptions is properly before us.

To the consideration of the affidavits found in the record, objection is made by respondents upon the ground that they are not identified as having been used on the motion for a new trial. These affidavits are marked as filed by the clerk of the court in which the action is pending, but are not contained in and form no part of the bill of exceptions and statement certified by the judge, and are not identified by him in any way as having been used on the motion, unless a reference, in the order denying a new trial, to the affidavits of certain persons in such order named, whose names are appended to some

of the affidavits in the record, can be deemed to identify them, or a portion of them.

In *Johnson v. Mutr*, 43 Cal. 542, the court, in referring to affidavits on motion for a new trial, said: "But in such a case it is required that the affidavits should be identified by the indorsement of the judge or clerk, made at the time of hearing, that they were read or referred to on the hearing. It is evident that a mere ordinary indorsement of filing is not sufficient to identify the papers as having been used upon the hearing of the motion. They may have been deposited with the clerk for other and quite different purposes."

In *Pieper v. Centinela L. Co.*, 56 Cal. 178, it was held that papers used upon a motion in the court below, and certified by the judge as having been so used, were properly authenticated.

In *Walsh v. Hutchings*, 60 Cal. 228, papers appeared in the transcript as printed, purporting to be an affidavit of defendant and a counter-affidavit of the plaintiff, but not embodied in a bill of exceptions, and not certified or identified by the judge who heard the motion as having been used on such motion; and, although certified by the clerk as true and correct copies of the papers used on the hearing of the motion, this court held that "it is not for the clerk to determine what papers or evidence the court acted upon," and discarded the affidavits.

In *Nash v. Harris*, 57 Cal. 242, this court said: "We cannot indulge in presumptions of papers which were used in the court below on the hearing of a motion. To be considered, they must be made a part of the record of the case by a bill of exceptions, or to be authenticated by the judge who tried the case in such a way as to leave no doubt, when found in the transcript, that they are the papers which were before him when he acted, and upon which he decided. Unauthenticated papers in a transcript, in which there is no bill of exceptions, constitute no part of a record which can be considered upon appeal."

Tested by the rules thus established by this court for the verification of its records, the affidavits, copies of which are contained in the transcript, but not in any way authenticated or identified as having been used on the motion for a new trial, constitute no part of the record which can be considered on this appeal.

If it be urged that the court below, in its order overruling the motion, referred to the affidavits of A., B., and C.; that there is found in the record affidavits of A., B., and C., and therefore as to such affidavits the identification is sufficient,—the response must be *non constat* that the affidavits found in the transcript are those referred to in the order. The court or judge not having designated those in the transcript as having been used on the motion, to presume from the evidence afforded that they were in fact used on the motion would lead to a loose system, under which abuses would be most certain to occur. The practice under which the judge who heard a motion certifies to a bill of exceptions or statement containing the papers used at the hearing, or identifies the papers considered on the hearing, in such manner as to leave no doubt of the fact of their having been so used, is simple and efficacious, and cannot with safety be departed from. We are therefore of opinion that none of the affidavits set out in the transcript as a foundation or in support of the motion for new trial can be considered on this appeal.

This view disposes of so much of the motion for a new trial as is based upon accident and surprise, and newly-discovered evidence. We say disposes of that branch of the motion, for the reason that the record, aside from the affidavits, affords no sufficient showing to warrant a new trial on such grounds.

Defendant's right to a trial by jury. The action, as hereinbefore stated, is ejectment. Defendants filed a cross-complaint in which they show, in substance, that defendant H. A. Benson, in 1881, was seized in fee of the de-

manded premises, then worth \$50,000, and certain personal property worth \$6,000; that he was 63 years of age, and, in consequence of sickness and trouble, had become weak, debilitated, and deranged; all of which facts were well known to J. C. Beatty, C. F. Jones, and J. C. Fisk, who, with a view and intent to defraud him, wrongfully combined and conspired to mislead and cheat him, induced him to sell and convey his property to Jones, and to receive in payment therefor certain Texas land-warrants, represented to be of great value, though, in fact, of trifling value. Numerous other fraudulent acts on the part of Jones, Beatty, and Fisk are set out in apt language, whereby Benson was imposed upon, cheated, and defrauded in the transaction; avers an offer to return the land-warrants and a demand of a reconveyance of the property, and prays that it may be adjudged and decreed that Jones, Beatty, and Fisk were guilty of fraud and undue influence in the purchase of the property; that plaintiffs became purchasers with notice of such fraud; and that the conveyances from Benson to Jones, and by said Jones to the plaintiffs Fish and Blum be canceled and annulled, and that Benson be reinvested with the real property, and that the plaintiffs be compelled to reconvey to him the demanded premises, and that, if they refuse so to do, commissioners be appointed by the court to make, execute, and deliver such reconveyance.

The cross-complaint states facts which, if true, constitute a cause of action of which a court of equity has jurisdiction, and the relief sought is such as can only be obtained in equity. It was entirely distinct from the action of ejectment; and, if successful, would result in divesting the plaintiffs of their legal title. Being an action cognizable in equity, and distinct from the legal action, it was the duty of the court below to first determine the issues involved under the cross-complaint; for the reason that, if the defendants succeeded on these issues, it would defeat the right of plaintiffs to recover in their action at law, however perfect their legal right. *Lestrade v. Barth*, 19 Cal. 660; *Weber v. Marshall*, Id. 447.

The fact that the cross-complaint charged fraud did not entitle defendants to a jury trial. Both courts of law and of equity, in proper cases, have jurisdiction in cases of fraud; and, when the facts constituting a fraud and the relief sought are such as are cognizable in a court of law, the parties are entitled to a jury trial; but where the case, as made by the pleadings, involves the application of the doctrines of equity, and the granting of relief which can be obtained in a court of equity, and not elsewhere, the parties are not entitled to a jury trial. *Societe Francaise v. Selheimer*, 57 Cal. 623; *Jones v. Gardner*, Id. 641; *Lorenz v. Jacobs*, 59 Cal. 262; *McLaughlin v. Del Re*, 64 Cal. 472; S. C. 2 Pac. Rep. 244; *Cahoon v. Levy*, 5 Cal. 294; *Koppikus v. State Capitol Com'rs*, 16 Cal. 248.

The court did not, therefore, err in separating the two causes of action, and trying the issues under the cross-complaint without the interposition of a jury, except as to the three special issues which were submitted to and tried by a jury; and, as the court might have tried all of these issues, it follows there was no error in refusing to submit the 16 additional issues to the jury, as requested by counsel for defendants.

A jury trial was not denied by the court upon the issues made on the common-law side of the case, but was expressly waived by the parties, and the case on those issues was submitted to the court upon the testimony previously taken upon the trial of the equitable action.

At the trial defendants offered in evidence a judgment roll in the case of *Fish et al. v. Benson et al.*, (No. 236,) to the introduction of which plaintiffs objected, and their objection was sustained by the court. To this ruling an exception was taken, and the action of the court assigned as error. The judgment-roll in question is the record of an action of unlawful detainer, instituted September 12, 1881, by Fish, Blum, and Stovell, who are plaintiffs in

this action, as plaintiffs, against I. J. Truman, Henry Johnston, Henry A. Benson, and Emeline Benson as defendants.

The complaint avers that on the fifth day of May, 1881, C. J. Jones, the grantor of plaintiffs, leased and demised the demanded premises to I. J. Truman for a term which expired September 1, 1881; that said Truman entered into possession under the lease; that the other defendants are subtenants under Truman; that the lease has expired; and that defendants refuse to yield up possession to plaintiffs, although duly notified so to do, and demands possession, with treble damages. A demurrer was interposed to the complaint, which was sustained under the doctrine of *Martin v. Spilvalo*, 56 Cal. 128, upon the ground that no sufficient notice to defendants was averred, whereupon the complaint was amended.

Defendants Benson and wife answered, denying the leasing of the premises to Truman by Jones, and the ownership of either Jones or plaintiffs; deny that they are the subtenants of Truman, or that Truman is in possession through them; and set up that they are, and for many years have been, in possession and the owners in fee of the premises. They also plead the pendency of this action.

Defendant Truman answered, setting out a copy of the alleged lease, which specifies that Truman is to harvest certain crops upon the land, and divide the same between the parties as therein specified, to gather and sell the fruit growing thereon, and divide the proceeds; and that for such purpose he may have charge of the orchard, and remove the fruit up to November, 1881, and may enter and remove hay and barley which may be upon the ranch after September 1st, the date of the expiration of the lease. It is also provided that, if Jones shall sell the ranch prior to September 1st, he shall have the right to place the purchaser in possession, etc. Truman denies that the other defendants are or ever were his subtenants, or that he continues in possession, or that he failed to surrender possession, or that he has been in possession since September 1, 1881, and denies, as do Benson and wife by an amendment to their answer, that three days' notice in writing was given them, or any or either of them, to quit or deliver or surrender the premises.

Johnston answered, denying substantially the allegations of the complaint.

A trial was had, verdict for defendants, and judgment in their favor for costs was entered thereon November 18, 1881.

The judgment in the action of forcible detainer did not involve the question of title to the demanded premises, and was no bar to the action of ejectment. *Kirsch v. Smith*, 64 Cal. 13.

"Judgments in actions of forcible entry and unlawful detainer are, to the same extent as judgments in other actions, conclusive upon the questions within the issues, and determined by the court or confessed by the parties. The title to the property is never in issue in these actions; and therefore the judgment, whether for the plaintiff or defendant, cannot affect the title." *Freem. Judgm.* § 802.

The whole issue in the action of unlawful detainer related to the possession of defendants as tenants or subtenants of the plaintiffs subsequent to May 5, 1881, and to their holding over as such tenants after the expiration of the lease and notice to quit; and whether defendants had or had not title or possession except under the lease was not a question to be determined in the cause; and the judgment roll was not, therefore, evidence of title in the defendants, or of possession, except as the tenants of the plaintiffs; and, as no issue of that character is made on either the law or equity side of this case, the judgment was not evidence for any purpose. *Freem. Judgm.* § 257.

Findings. The facts as deduced by the court from the evidence establish the formation and consummation of a deliberate scheme on the part of Jones, Beatty, and Fisk to defraud Benson of his property, in the execution of which scheme they exercised energy and perseverance worthy of a better cause. The

record is replete with evidence in support of the findings on this branch of the case. It unfolds a series of acts most reprehensible, and which it is the duty of courts of equity to condemn. We must not, however, in our zeal to punish the guilty, make our condemnation so broad as to involve the innocent.

The court below has found that plaintiffs were innocent purchasers of the demanded property for a valuable consideration, without notice of the fraud of their grantor, and without such knowledge as would reasonably put them upon inquiry. After a careful review and analysis of the testimony, we are of opinion that there is not only a substantial conflict in the evidence on this question of notice to plaintiffs, but that the proofs predominate in their favor.

Upon the question of inadequacy of the price, the court found that the demanded property with the title assured would be worth \$30,000, but that a suit for the partition of the San Pablo *rancho*, of which the upland of the demanded premises were parcel, had been pending since 1867, was hotly contested, and is still pending and undetermined, in which action an interlocutory decree had been entered adverse to the claimants Benson; that a receiver had been appointed, and his appointment affirmed by this court, who claimed possession of the land, and the right to lease the same, as well as \$3,000 back rent, etc.; also that a portion of the land designated as overflowed or salt marsh was claimed adversely to Benson by the owners of the Rancho Sobrante, which claim was pending on final survey before the United States land department, and the commissioner of the general land-office had rendered his decision sustaining said adverse claim,—in consequence of all of which, the right, title, and interest of Benson in and to the land was not worth and would not sell for what the land itself with a clear title was worth; that, in fact, the land had no market value, but that the real estate might reasonably be allowed to represent, so far as the transactions involved in this suit are concerned, a purchasing power equivalent to \$18,000.

It is a fact open to observation that most men of means do not deal in and pay their money for property, the title to which is subject to the vicissitudes attending that of the demanded premises; and of the limited number who are willing to purchase under such circumstances it is not too much to say that the purchase price will be reduced to such sum, compared with the intrinsic value of the property, as to make the chances of gain commensurate with the risk taken. We are not, therefore, under the surroundings, surprised that the property sold for no more than \$9,000 in cash, and find nothing in that fact to warrant an inference of notice to the purchasers of the fraud of Jones, their grantor; nor do we deem it sufficient, under the circumstances, to have put a reasonable man upon inquiry.

Appellants attack the findings as insufficient to warrant the conclusion that Benson conveyed the property, upon the grounds that his deed of conveyance to Jones was deposited in escrow with Haven; that the dispatch which he sent to Haven, from Texas, where he and Jones then were, under which the deed was delivered to the agent of Jones, was procured to be sent by the fraud of Jones, and by the exercise of undue influence on his part over Benson; and therefore that the deed thus procured did not vest title in the grantee; and *Harding v. Handy*, 11 Wheat. 125, and *Allore v. Jewell*, 94 U. S. 506, are cited in support of these positions.

A reference to these cases shows that in each of them the grantors were so incapacitated by age and disease as to be, if not insane, at least incapable of comprehending fully the nature and effect of the transactions in which they were engaged, when they executed the deeds; and, as against the grantees, they were set aside, although in one of the cases more than six years had elapsed between the delivery of the deed and suit brought.

In the present case the findings are against the incompetency of Benson,

and established (1) the fraud practiced upon him by Jones, Beatty, and Fisk, whereby he was induced to convey his property and order the deed to be delivered to the grantee; and (2) that plaintiffs are innocent purchasers, etc.

Whatever the rule may be as to vesting of title in the grantee, or in an innocent purchaser, etc., under the latter, in cases where the grantor is incompetent to execute a conveyance of his property by reason of mental incapacity or unsoundness of mind,—questions which do not arise here,—we are clearly of opinion that where, as in the present case, there were parties competent to contract, and where a deed was executed and delivered through the fraudulent devices of the grantee, the conveyance was not *void*, but *voidable*, and liable as between the parties to be rescinded. Civil Code, §§ 1566, 1567, 1689. The title, in such cases, vests in the grantee, subject to be divested by a rescission of the sale. But where the grantee has, in turn, conveyed the property to an innocent purchaser for a valuable consideration without notice, the right of the defrauded grantor to recover his property ceases.

Pomeroy in his work on Equity Jurisprudence, (volume 2, § 777,) states the rule thus: "Where a conveyance has been obtained by the grantee's fraud, so that it would be set aside at the suit of the defrauded grantor, but the fraudulent grantee has in turn conveyed to a *bona fide* purchaser for value and without notice, the latter will take and hold the property free from all these equities, protected against the equitable remedies of the original defrauded owner."

We see nothing in the contention of appellants that the contract of March 1, 1881, between Benson and Jones, was notice to plaintiffs of certain conditions precedent to the delivery of the deed which can render them liable. That contract was properly recorded, and imparted notice of its terms and conditions to all the world; but it provided that when the deed was delivered the trade should be fully completed and ended, and neither party should have any claim upon the other. According to the cross-complaint, a new agreement was made between the parties after they arrived in Texas, and, through the fraudulent practices of Jones, Benson was induced to and did, as the evidence and findings show, on the fourteenth day of May, direct the delivery of the deed, which was accordingly done.

Plaintiffs, at the date of their purchase, were informed the deed had been delivered by direction of Benson, and, in corroboration of the statement, the agent and attorney in fact of Jones produced and delivered it to them as a muniment of their title. That Benson was entirely willing to deliver the deed, and ordered it to be delivered, there can be no doubt. If the purchasers, Blum and Fish, were bound to take notice of anything by virtue of the contract, it was of its contents as it existed and remained in force; and Benson cannot be heard to say he waived the conditions precedent to the delivery of the deed and delivered it, and at the same time hold Blum and Fish to a responsibility based upon the non-performance of the conditions which he had thus waived.

The nineteenth finding, or so much thereof as finds "that Blum, acting for himself and his copartner Fish, purchased the land described in the cross-complaint from Jones," etc., is objected to as being contrary to the sworn answer to the cross-complaint. The cross-complaint avers that "Walter Stowell claims some interest in said land, the nature and extent of which the defendants are ignorant, but that said Stowell took and obtained said interest and claim in said land with full knowledge and notice of said fraud and undue influence aforesaid, and that his grantors were not innocent purchasers of said land for value." The cross-complaint had previously charged that the land was conveyed by Beatty and Fisk, as attorneys in fact for Jones, to "L. J. Fish and Simon Blum for the alleged sum of nine thousand, five hundred dollars," and the prayer of the cross-complaint asks that the deed be set aside and canceled.

The answer to the cross-complaint admits the purchase from Jones by Fish and Blum; avers that it was without notice of fraud on the part of their grantor, etc.; says the deed to them was executed and delivered on the seventeenth day of May, 1881; and subsequently, after denying that Stowell took or obtained his interest or claim in said land with notice, etc., avers that the said Stowell and the said Blum and Fish were each and all of them purchasers for fair value of all said land, without any knowledge, notice, or suspicion of any of the alleged frauds and evil practices set forth in the bill. * * * They deny that said Stowell has paid no part of any sum of money or other consideration for said land, or any interest therein; but they allege that he paid his proportion of the purchase money, which was one-half, at the date and delivery of the deed to him, which was on the _____ day of May, 1881. So, too, the answer states that "plaintiffs, further answering, say that they purchased the said real estate from the said C. J. Jones, by deed bearing date the seventeenth day of May, 1881, for the consideration of \$9,000. The said deed was duly executed and delivered on said day, * * * and said deed * * * grants, bargains, sells, and conveys unto the said Lafayette J. Fish and Simon Blum and to their assigns, forever," etc.

The term here used at the outset would indicate that all the plaintiffs were meant; but, when it proceeds to describe the deed, it clearly appears that it is the conveyance to Fish and Blum, which is being referred to.

We fail to find in these pleadings any allegation that Stowell purchased jointly with Fish and Blum, but, on the contrary, the inference from the cross-complaint and answer is irresistible that he did not do so; and the fact that the answer, after stating the facts as to the several purchases by Stowell and the other plaintiffs, proceeds to aver that Stowell, Blum, and Fish were each and all of them purchasers for fair value, without notice, etc., does not modify this inference. No doubt, the pleadings might have been more specific and precise, but they were not calculated to mislead the defendants; and, indeed, so far as the answer sets up, the particulars of the conveyances were immaterial averments.

The cross-complaint charged the plaintiffs as purchasers with notice of the fraud of their grantors. The answer denied such notice, averred their good faith and a valuable consideration. Beyond this it was not necessary to go. It devolved upon defendants, under the allegations of their cross-complaint, to prove the conveyances (if denied) which they alleged to have been made. This they did by offering in evidence (1) the deed from Jones to Blum and Fish, dated May 17, 1881; (2) the deed from Blum and Fish for an undivided one-half of the premises, dated June 2, 1881. We are of opinion that the pleadings, taken together, do not show a joint purchase by Blum, Fish, and Stowell, and therefore that the nineteenth finding is not subject to the criticism of being contrary to the answer.

We deem it unnecessary to discuss the other objections made to the findings of the court, as, upon examination, we think them insufficient to warrant a reversal of the cause.

The judgment of the court below, and the order appealed from, should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(70 Cal. 566)

SWAMP LAND DIST. NO. 307 v. GWYNN AND OTHERS. (No. 11,596.)

(Supreme Court of California. August 31, 1886.)

1. **DRAINS AND DRAINAGE—ASSESSMENT—ASSESSORS NEED NOT ACT JOINTLY—SECTION 3456, POL. CODE CAL.**
Commissioners appointed to make an assessment for swamp-land purposes need not act jointly in viewing the lands.
2. **SAME—VIEW OF LANDS—FINDING OF COURT.**
The lands being mostly covered with water, and the commissioners having been at a point where they could look over the whole area, and see every part except a few parcels along its eastern margin, hidden by trees, the finding of the court that they viewed all the lands, and each and every tract thereof, was not, as a matter of law, erroneous.
3. **SAME—ASSESSMENT BOOKS—PRIMA FACIE EVIDENCE—CAN BE CONTRADICTED.**
The assessment books being merely *prima facie* evidence of the facts in them contained, evidence was competent to show that the assessment was not made according to law, and the exclusion of such evidence was error.
4. **SAME—WARRANTS—TENDER.**
A tender of a warrant in payment of an assessment, which tender was only for the purpose of having the assessment indorsed upon it, and not to be given up and canceled, is not sufficient.

Commissioners' decision.

Department 2. Appeal from superior court, Yolo county.

Section 3465, Pol. Code Cal. provides, in regard to the payment of assessments for swamp-land purposes: "Where payment is made in the warrants of the district, legal interest must be computed thereon from the date thereof to the time of such payment, when said warrant must be surrendered to the treasurer, and by him canceled."

The opinion states the facts of the case.

W. H. Beatty and S. C. Denson, for appellants. *Armstrong & Hinckson*, for respondent.

BELCHER, C. C. This is an action to enforce payment of an assessment made for reclamation of swamp lands. The plaintiff recovered judgment, from which, and an order denying a new trial, the defendants appeal.

1. Under the provisions of the Code, when an assessment for swamp-land purposes is to be made, three commissioners must be appointed, who are disinterested persons and residents of the county, "and who must view and assess upon the lands situated within the district a charge proportionate to the whole expense, and to the benefits which will result from such works." Section 3456, Pol. Code. Under the statutes formerly in force, the commissioners were required to jointly view the land, and, failing to do that, their assessment was void. *People v. Coghill*, 47 Cal. 361; *People v. Hagar*, 49 Cal. 229. Now they are not required to act jointly in viewing the lands. It is sufficient if, as they did here, two go together, and the other alone, to view it.

But, if this be so, it is urged that they did not sufficiently view the land to enable them to make a valid assessment. The court found that they viewed all the lands in the district, and each and every tract thereof, and there was evidence, we think, tending to sustain the finding. It is true, the lands were mostly covered with water, but the commissioners were at a point where they could look over the whole area of the district, and see every part of it, with the exception of a few small parcels along its eastern margin, which were hidden from view by trees. Their duty was to make such an examination of the lands of the district as would enable them to form an intelligent judgment as to the benefits which each part would receive from the completed works of reclamation, and, as matter of law, we cannot say that they failed to perform their duty.

2. It is alleged in the complaint that the commissioners, after viewing each tract of land, assessed upon the same charges proportionate to the entire expense, and the benefits which would result to each tract from the works of reclamation, and on the same day made a list of the charges assessed by them, etc. The defendants, by their answer, denied that the commissioners assessed upon the several tracts of land charges proportionate to the entire expense, and to the benefits which would result to each tract from the works of reclamation. And they alleged that the commissioners did not make any examination, computation, or estimate as to the result or effect of the proposed work of reclamation upon each tract of land in the district, but arbitrarily assumed that each and every acre of land in the district should be assessed for an equal share of the entire sum to be raised; and, without considering whether some tracts would be benefited by the proposed work more or less than other tracts, arbitrarily assessed each tract at the same rate per acre, when in fact some tracts, if the proposed works should be carried out and completed, would be greatly benefited and enhanced in value, while other tracts would be benefited very little if at all. And they further alleged that the assessment was unfair, unequal, and unjust to the defendants, for that the lands described in the complaint would not be benefited to the same extent as other lands of other owners in the district.

At the trial the plaintiff, after introducing certain preliminary proofs, offered in evidence the assessment roll, with the certificate attached thereto, signed by the commissioners. Among other things the commissioners certify that "we did view said lands, and assess said sum of \$39,000 as a charge upon the lands within said district, for the purpose of completing the reclamation of said district, which charge was and is made proportionate to the whole expense, and to the benefit which will result from such works of reclamation." The defendants objected to the assessment roll being received in evidence, and, in support of their objection, sought to prove by one of the commissioners that, in making the assessment, and apportioning the money to be raised among the several tracts of land in the district, the commissioners never considered, discussed, or in any way referred to the proportional benefits to be derived to each piece of land by reason of the work to be done for which the assessment was levied, but arbitrarily, and without considering the question of benefits to any piece of land in the district, assessed an equal sum upon each acre, in obedience to what they understood to be a by-law of the district; and, further, that some of the tracts of land in the district would be benefited very much more than other tracts by the work of reclamation. The plaintiff objected to each of the several questions asked, upon the ground that it was irrelevant, immaterial, and incompetent, and the court sustained the objection; the defendants reserving an exception. Thereupon the court overruled the objections to the assessment roll, and admitted it in evidence, and the defendants excepted to that ruling.

It was proved that, about 10 days after viewing the land, the commissioners met at the office of the attorney for plaintiff, and found the assessment roll there, and nearly written up; that the attorney then, under their instructions, computed the amount to be charged against each tract, and entered the same on the roll, and that thereupon they signed the certificate. It is argued for the respondent that, when the commissioners signed the certificate, the assessment roll became a record of official acts, and could not afterwards be impeached or questioned, except for fraud; and, in support of this contention, among other authorities, sections 1920 and 1926 of the Code of Civil Procedure are called to our attention. Those sections read as follows:

"Sec. 1920. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are *prima facie* evidence of the facts stated therein."

"Sec. 1926. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is *prima facie* evidence of the facts stated in such entry."

Conceding that, when the commissioners signed the certificate, it became an official record, and evidence of all the facts recited in it, still it was only *prima facie* evidence, and, as such, was subject to be contradicted.

"*Prima facie* evidence is that which suffices for the proof of a particular fact until contradicted and overcome by other evidence. For example, the certificate of a recording officer is *prima facie* evidence of a record, but it may afterwards be rejected upon proof that there is no such record." Section 1833, Code Civil Proc.

The commissioners were required to assess upon the lands "a charge proportionate to the whole expense, and to the benefits which will result from such works." When special duties are enjoined upon commissioners, as in this case, the law must be strictly complied with, and any substantial departure from its requirements will render their acts void. *People v. Coghill*, 47 Cal. 361; *People v. Hagar*, 49 Cal. 229; *People v. Ahern*, 52 Cal. 208.

We think that, notwithstanding the certificate signed by the commissioners, the defendants were entitled to prove, if they could, that the assessment involved in this case was not made in conformity to the requirements of the law, and so was not binding upon them, and that the court erred in excluding the proper evidence.

3. Without expressing any opinion as to the validity of the warrant tendered in satisfaction of the assessments sued for, we think the court did not err in finding that the assessments were not in fact satisfied by the tender. As pleaded and proved, the warrant was for a larger sum than the aggregate amount of the assessments, and was owned by D. O. Mills & Co., a banking corporation doing business at Sacramento. Under some arrangements made with the defendants it was tendered to the county treasurer only for the purpose of having the assessments indorsed upon it, and not to be given up and canceled. This was not sufficient. Pol. Code, § 3465. Nor was the tender in court at the trial of any avail. Such a tender is not authorized by any statute that we are aware of.

For the error above noted the judgment and order should be reversed, and the cause remanded for a new trial.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(70 Cal. 544)

PLUMMER v. BROWN. (No. 11,335.)

(Supreme Court of California. August 31, 1886.)

1. PUBLIC LANDS—LAND-OFFICERS—CONCLUSIVENESS OF JUDGMENTS—FRAUD—TRUST.

The land-officers of the United States, on the hearing and determination of a contest between two rival claimants, act judicially, and their judgment is conclusive at law.¹ But if the successful contestant has acquired, pursuant to the judgment, the legal title affected with any fraud or trust in relation to it, he will be regarded in equity as trustee of the true owner, who may, by proper proceedings in equity, compel a conveyance to himself of the legal title.

2. TRUST—ACTION TO MAKE PATENTEE OF PUBLIC LAND A TRUSTEE—FRAUD AND PERJURY—PLEADING.

In a complaint seeking that the patentee of United States lands be declared trustee for plaintiff on the ground that, in a contest regarding the land, the United States land-officers decided against plaintiff in consequence of the fraud and perjury of the patentee, the allegations of fraud and perjury were in general terms.

¹See note at end of case.

Held, bad, because no issue can be raised as to what was fraudulent and perjured. The complaint should have set forth the false and fraudulent act and statements with particularity.

Department 2. Appeal from superior court, Los Angeles county.
Edwin Baxter, for plaintiff and appellant. *Bicknell & White* and *C. Cabot*, for defendant and respondent.

McKEE, J. The only question for consideration on this appeal is whether the court below erred in sustaining a demurrer to the complaint upon the ground that it did not contain facts sufficient to constitute a cause of action. It appears from the allegations contained in the complaint that there was a contest between the plaintiff and John A. Brown before the register and receiver of the United States land-office about the right to purchase from the United States, under the pre-emption and homestead laws, a tract of public land in Los Angeles county, described as the S. E. $\frac{1}{4}$ of section 23, in township 1 S., range 14 W., San Bernardino meridian, the official plat and map of which had been filed in the year 1875 in the proper United States land-office. The commissioner affirmed the decision. Plummer then appealed to the secretary of the interior, and that officer also affirmed the decision; after which there was issued a patent, pursuant to the judgment, to Brown, confirmatory of his right to the land, under the provisions of the homestead law.

Notwithstanding the judgment, the plaintiff insists that the land ought to have been awarded to him, because, as it is alleged, he established his right to purchase it, under the laws of the United States, by satisfactory proof; and the register and receiver would have awarded it to him if he had not been imposed upon by "false and perjured testimony," which misled and deceived him, and biased him to decide in Brown's favor, upon facts which were found upon "the false and perjured testimony" and "incompetent and irrelevant evidence" given by Brown, by which, it is also alleged, the other officers of the land department were likewise fraudulently induced to affirm the judgment in Brown's favor. Upon these grounds the plaintiff asks for a decree declaring that Brown holds the legal title to the land in trust for the plaintiff, and that he be compelled to convey it to the plaintiff.

On the hearing and determination of a contest between two rival claimants of the right to purchase a tract of public land under the land laws of the United States, the register and receiver of the land department acts judicially; and his judgment, especially after it has been affirmed on appeal, is final and conclusive upon the contestants. So, also, is the patent issued upon the judgment. Neither can be collaterally assailed. *Garland v. Wyn*, 20 How. 6; *Lyle v. Arkansas*, 9 How. 328; *Cunningham v. Ashley*, 14 How. 382; *Barnard v. Ashley*, 18 How. 18. But, while the judgment is conclusive at law, there is no doubt of the equitable doctrine that if the successful contestant has acquired, pursuant to the judgment, the legal title, affected with any fraud or trust in relation to it, he will be regarded in equity as a trustee of the true owner, and the owner may, by a proper proceeding in equity, compel a conveyance to himself of the legal title. *Stark v. Starrs*, 6 Wall. 402; *Johnson v. Towsley*, 13 Wall. 72.

To entitle the alleged owner, however, to such equitable relief, he must show that he occupies such a *status* as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given, and that they were thereby induced to give judgment in his favor. These things must be distinctly alleged and clearly proven. *Payne v. Elliot*, 54 Cal. 339; *Kentfield v. Hayes*, 57 Cal. 409; *Chapman v. Quinn*, 56 Cal. 266; *Burrell v. Haw*, 48 Cal. 225; *Powers v. Leith*, 53 Cal. 711; *Hosmer v. Duggan*, 56 Cal. 257; *Aurrecochea v. Sinclair*, 60 Cal. 532.

The complaint under consideration contains no sufficient allegations of such issuable facts, and it does show affirmatively that the plaintiff was not entitled to the relief which he demands; for it appears that in the contest as to the right to purchase the land, which was the subject of the controversy, there were three issues presented, namely: (1) Had Brown settled upon and occupied the land before the plaintiff entered upon it? (2) Did Brown abandon his occupation, or did the plaintiff invade it? (3) Was the plaintiff a qualified pre-emptor?—and that those issues were found against the plaintiff, and in favor of Brown. It follows, therefore, as the issues were decided against the plaintiff, that he was a trespasser upon Brown's possession, and was not a qualified pre-emptor; so that he had no right of entry upon the land, and he acquired no pre-emption right by his unlawful entry upon it by which he could control the legal title issued to Brown pursuant to the judgment in his favor. *Atherton v. Fowler*, 96 U. S. 513; *Hosmer v. Wallace*, 97 U. S. 580.

But it is contended that the judgment is not conclusive against the plaintiff, because it was rendered "upon the false and perjured testimony" and "incompetent and immaterial evidence" of Brown, which the register admitted, "notwithstanding Brown repeatedly refused to submit to cross-examination," and "was prevailed upon, by Brown and his attorneys, to give it weight and credence, notwithstanding it was shown by record to be false and perjured," and "notwithstanding it was clearly inadmissible under all rules of law and of courts, and clearly incompetent and irrelevant;" and thereby "said officers were misled and deceived, and their judgment biased, by said defendant and his attorneys, and, in consequence thereof, said land-officers, * * * contrary to the law and contrary to undisputed facts, thereupon ruled and decided erroneously, falsely, illegally, and inequitably that said defendant Brown was entitled to said land, and awarded the same to him."

In these allegations there is nothing of an issuable character as to what evidence was false or perjured, incompetent and irrelevant, upon which a court could judicially determine whether, as evidence, it was improperly admitted or illegally considered; nor is there in them anything which shows what was the evidence upon which the decision was made, or that it was evidence which did not justify the decision, or showed that the decision was contrary to law. The allegations are of a general nature, and wholly insufficient. A person against whom charges of fraud and perjury are made is entitled to specific averments of the acts of fraud of which he is accused, so that he may admit or deny the acts, and present issues which the court may hear and decide.

In *Vance v. Burbank*, 101 U. S. 519, the rule is thus stated: "Where fraud and misrepresentations are relied upon as ground of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegation of fraud and misrepresentations will not suffice." See, also, *Marquez v. Frisbie*, 101 U. S. 478; *Quinby v. Conlan*, 104 U. S. 426; *U. S. v. Atherton*, 102 U. S. 372; *Steel v. Smelting, etc., Co.*, 106 U. S. 453; *S. C. 1 Sup. Ct. Rep.* 389.

The demurrer to the complaint was properly sustained. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

NOTE.

The findings of the land department as to questions of fact, or of mixed questions of law and fact, properly before it, are conclusive on the courts. *Jeffords v. Hine*, (Ariz.) 11 Pac. Rep. 351; *Van Sant v. Butler*, (Neb.) 27 N. W. Rep. 299; and all facts essential to the validity of a patent granted by it will be conclusively presumed in a collateral proceeding. *Ferry v. Street*, (Utah,) 11 Pac. Rep. 571; *Turner v. Donnelly*, (Cal.) *post*, 469. But see *Corbett v. Wood*, (Minn.) 21 N. W. Rep. 734.

(70 Cal. 560)

KELLY, Ex'x, etc., v. MURPHY. (No. 11,543.)*(Supreme Court of California. August 31, 1886.)***1. EXCEPTIONS—BILL MUST CONTAIN FACTS ON WHICH EXCEPTION BASED.**

Where a defendant excepts to the admission of testimony on the ground that no bill of particulars has been furnished in compliance with his demand therefor, the exception cannot be considered if the bill of exceptions does not show the demand. In order to make his exception available on appeal, he must embody the facts on which it was based in his bill of exceptions.

2. PARTNERSHIP—DISSOLUTION—NOTICE—EVIDENCE.

The notice of dissolution of a firm, and that one of the members would thereafter conduct the business, is evidence of the facts therein contained, and admissible on the question in whose possession the firm property remained after the dissolution.

3. EVIDENCE—MATERIALITY—WHETHER ONE DOES BUSINESS IN HIS OWN NAME OR FOR ANOTHER.

As evidence that a business was carried on by a deceased person in his own name, and not for another, evidence of parties who sold deceased goods in his own name, and their bills, are admissible.

4. SALE—NON-DELIVERY—VOID AS TO EXECUTOR OF VENDOR.

A sale without delivery or a continued change of possession is void as against vendor's executor, since he stands in the relation of trustee of the estate of deceased for the benefit of others.

5. HUSBAND AND WIFE—MARRIAGE—PLEADING.

In an action by an executrix for conversion of goods of deceased by the defendant, sued as Margaret Murphy, averments in the answer that defendant's true name is Margaret Murphy Wearman, (the name of the deceased being Wearman,) and that she owned the goods in question as her separate goods, independent of her husband, the said William Wearman, the deceased, are not sufficient allegations of coverture to support proof thereof.

Commissioners' decision.

Department 2. Appeal from superior court, Yuba county.

J. H. Cruddock, for respondent. *E. G. Fuller*, (*S. M. Bliss*, of counsel,) for appellant.

SEARLS, C. This is an action by the plaintiff, as executrix of the last will of William Wearman, to recover from the defendant damages for the conversion of certain personal property belonging to the estate of deceased. Plaintiff had judgment for \$2,000, and costs, from which judgment defendant appeals. At the outset of the trial, defendant objected to the introduction of any evidence in support of the claim of plaintiff, upon the ground that he had served upon plaintiff's attorney a notice calling for a bill of particulars, which had not been furnished as required by section 454 of the Code of Civil Procedure. The objection was overruled by the court, and an exception taken.

1. There is nothing in the bill of exceptions to show that any demand for a bill of particulars was ever made. If defendant desired to avail himself of the benefit of his exceptions, it was incumbent on him to so embody the facts upon which the ruling was based in his bill of exceptions that this court could, with all the facts before it, pass upon the question.

The complaint was defective, in that it did not describe with sufficient particularity the goods alleged to have been converted by defendant, and, in the face of a special demurrer for that cause, could have been held bad; but it stated a cause of action, and, no objection having been made on the ground indicated, it was sufficient.

The notice of dissolution of the firm of Wearman & Serrett, and that Wearman would thereafter conduct the business, etc., was properly admitted in evidence. As published in the newspaper, this notice was such a public declaration as may reasonably be supposed to have come to defendant, and was a circumstance proper to be considered in determining who was conducting

the saloon business, and in whose possession the disputed property remained after the dissolution.

Like considerations apply to the admission of the evidence of Marcuse and others tending to show that they sold goods to Wearman in his own name, and to introduce their bills for such goods to show they were charged to said Wearman individually, and not to defendant. As evidence that the business was conducted by Wearman ostensibly for himself and in his name, and not for or in the name of defendant, the evidence was proper.

The evidence as to the ownership of the property was conflicting, and we are not warranted in disturbing the findings on the ground that they are not supported by evidence.

There was evidence tending to show that, notwithstanding the sale of the property to the defendant, as claimed by her, such sale was not accompanied by an immediate delivery, and followed by a continued change of possession of the things transferred, and as a consequence of these facts, if they existed, the sale was void, not only as against creditors, but also as against any person on whom the estate of Wearman, the vendor, devolved in trust for the benefit of others than himself. Civil Code, § 3440. Plaintiff, as the executrix of the last will of William Wearman, deceased, the vendor of defendant, is a trustee, in whom the estate rests for the benefit of others, within the meaning of the Code.

There was not a delivery and continued change of possession of the property within the meaning of the rule enunciated in *Stevens v. Irvin*, 15 Cal. 503, which has been steadily adhered to in this state as a correct exposition of the law in numerous cases. *Dean v. Walkenhorst*, 64 Cal. 78; *Watson v. Rodgers*, 53 Cal. 401; *Wideman v. Franks*, 3 Pac. Rep. 494; *Grum v. Barney*, 55 Cal. 254.

There was no error in excluding the evidence offered on behalf of the defendant to show that she and Wearman lived together as husband and wife. If she desired to show coverture, it was incumbent upon her to plead it. In her answer she avers—*First*, “that her true name is Margaret Murphy Wearman;” *second*, that she owned and possessed the goods and chattels in her own separate right, “and controlled the same as her separate property, independent of her husband, the said William Wearman, now deceased.” Beyond these expressions there is nothing in the pleadings to show that the relation of husband and wife existed between defendant and plaintiff’s testator. As allegations showing the relation of husband and wife, they are wholly insufficient.

Again, the offer to prove that defendant and plaintiff’s testator lived together as man and wife was not an offer to prove marriage. *Letters v. Cady*, 10 Cal. 533. Marriage being properly averred, the evidence indicated would tend to prove the fact,—nothing more. Taking the pleadings with the proffered testimony, and the only inference we can draw from them is, not that defendant desired to show that she had intermarried with the deceased, but that they had lived together as man and wife.

We are of opinion the judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(70 Cal. 597)

TURNER v. DONNELLY. (No. 8,883.)

(Supreme Court of California. September 2, 1886.)

- 1. PUBLIC LANDS—PATENT—AGREEMENT OF OWNERS TO CONVEY TO EACH OTHER SUCH PORTIONS OF LAND THEN HELD AS MIGHT BE EMBRACED IN THE PATENT TO EACH THEREAFTER—VALIDITY—REV. ST. U. S. §§ 2263, 2274.**

Where parties who had purchased and improved land, without reference to the government subdivisions, entered into an agreement with each other that when the land was surveyed, and they obtained titles for the same from the government, that they would abide by their lines and subdivisions, as they then owned and possessed them, and would each of them deed to the other the parts of sections, or one-quarter sections, as they might purchase them of the United States, that was in possession of the party at that time, and bound themselves to convey to each other all the title they might obtain to lands of the United States, so as to give to each the land he then had in possession, according to each one's lines and fences then standing, held that, when they were not settlers upon the same legal subdivision, and did not have their improvements on the same subdivision, in the sense as contemplated by section 2274, Rev. St. U. S., and the lands patented to each, and referred to in their agreement, were not contiguous, but at least half a mile apart, and in two different sections, the agreement was void, under section 2263 of the Revised Statutes of the United States and the rulings of the supreme court of California in *Damrell v. Meyer*, 40 Cal. 166, 170, and *Hudson v. Johnson*, 45 Cal. 21, 25.

- 2. SAME—PATENT—ATTACK IN COLLATERAL PROCEEDING—EJECTMENT.**

A patent once issued for public land remains good, as to all the world, until canceled for fraud, in an action brought by the United States government, and in a collateral proceeding, such as ejectment, cannot be successfully assailed.¹

Department 2. Appeal from superior court, Santa Clara county.

Action of ejectment to recover possession of certain lands. Judgment for plaintiff. Defendant appealed.

Archer & Bowden, for appellant. *D. M. Delmas*, for respondent.

FOOTE, C. An action of ejectment for certain lands, in which the plaintiff obtained judgment, from which the defendant appealed. The former had a patent from the United States government to the land sued for, which was the basis of his claim. The defendant, in his cross-complaint, set out that, prior to the land sued for having been surveyed, pre-empted, or patented, an agreement in writing had been entered into between himself and the plaintiff that when they each should obtain title to the lands which they then occupied and claimed, that if the defendant's patent, thus obtained, contained any lands which the plaintiff then had in possession, that the plaintiff would abide by the lines and actual subdivisions as they then respectively owned and possessed them, so as to give to the defendant the land thus actually in his possession, and that he, the plaintiff, would execute to the defendant a conveyance to any portion of the land then in the defendant's possession to which he should thereafter obtain title; that the defendant has always been, since that agreement, in possession of the land sued for, and has remained in possession of it since the date of the patent issued to the plaintiff; that the plaintiff, although a patent has been issued to him of the land, refuses to convey it to the defendant, and prays that the plaintiff be held to be the defendant's trustee as to the land, and directed to convey it to the defendant, etc.

According to the findings of the court, the cause coming here on the judgment roll alone, it appears that—

"(1) At the time of the commencement of this action, and ever since the twentieth of August, 1878, the plaintiff, Thomas Turner, was, and still is, the owner of the real estate situate in the county of Santa Clara, state of California, described as follows, to-wit: The north-east quarter of the north-east quarter of section thirty-two, (32,) in township ten (10) S., range five (5) E., Mount Diablo meridian, and the south-east quarter of section twenty-nine,

¹See *Plummer v. Brown*, (Cal.) *ante*, 464.

(29,) in township ten (10) S., of range five (5) E., Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California.

"(2) Thereafter, on said twentieth day of August, 1878, and before the commencement of this action, said defendant, Peter Donnelly, against plaintiff's will, entered on said premises, and ousted the plaintiff therefrom, and from thence hitherto has, and still does, detain the possession thereof from said plaintiff.

"(3) On the twenty-eighth day of September, 1871, the plaintiff, Thomas Turner, and the defendant, Peter Donnelly, were severally in possession, as *bona fide* settlers and residents thereon, of certain unsurveyed lands of the United States, being in the township hereinabove mentioned, the plaintiff being in possession of a portion of the south-east quarter of section 29, and the said defendant of a large tract of about six hundred acres, including portions of section 29, and a portion of the south-east quarter thereof, and section 30. The house and residence of the plaintiff were on the south-east $\frac{1}{4}$ of section 29, and the house and residence of said defendant were on section 30. The lands so respectively occupied were contiguous to each other, each tract being inclosed by a fence. The fences were built without reference to any government surveys or subdivisions, the lands not having yet been surveyed or subdivided by the government.

"(4) On the day last aforesaid, the plaintiff and defendant, together with other parties, signed and executed a written agreement, which is in the following words:

"CANADA VALLEY, September 28, 1871.

"Whereas, we, the undersigned, citizens of Canada Valley, have purchased and improved our lands without reference to the government subdivisions, and as our lines and fences do not correspond with the government subdivisions, therefore we, and each of us, whose names are subscribed to this agreement, do severally and individually agree, each with the other, that when the land is surveyed, and we obtain titles for the same from the government, or of the railroad company, that we will abide by our lines and subdivisions as we now own and possess them, and will each of us deed to the other the parts of sections or one-quarter sections, as we may purchase them of the United States, or of the railroad company, that is in possession of said party at this time; and hereby binding ourselves to convey all the title we may obtain to lands of the United States, or railroad company, to each other, so as to give each man the land that he now has in possession, according to each and every man's lines and fences now standing.

"PETER DONNELLY, MARY DONNELLY, THOS. KIRKHAM, PETER TURNER, THOMAS TURNER, JOHN KIRKHAM, E. K. ROBINSON, JAMES DONNELLY, MATHEW RAHEAL, PATRICK K. ROGART, DAVID N. NEEL, JAMES RAHEAL, JOSE B. GUTSWICK. Attest: WILLIAM ISAAC."

"(5) In the year 1873 said township was surveyed and subdivided by the United States government. As thus surveyed, the south-east $\frac{1}{4}$ of section 29 lay mostly inside of plaintiff's inclosure; but about forty acres thereof were inside of defendant's inclosure.

"(6) On the twentieth of August, 1878, the United States issued its patent to Thomas Turner in the following words:

"The United States of America, to all Whom these Presents shall come,
Greeting:

"(Certificate No. 8,014.)

"Whereas, Thomas Turner of Santa Clara county, California, has deposited in the general land-office of the United States a certificate of the register of the land-office at San Francisco, whereby it appears that full payment has been made by the said Thomas Turner, according to the provisions of the act of congress of the twenty-fourth of April, 1820, entitled "An act making fur-

ther provision for the sale of the public lands," and the acts supplemental thereto, for the south-east quarter of section 29, in township 10 south, of range 5 east, Mount Diablo meridian, in the district of lands subject to sale at San Francisco, California, containing one hundred and sixty acres, according to the official plat of the survey of the said lands returned to the general land-office by the surveyor general, which said tract has been purchased by the said Thomas Turner: Now, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Thomas Turner, and to his heirs, the said tract above described, to have and hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Thomas Turner, and to his heirs and assigns, forever; subject to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

"In testimony whereof, I, Rutherford B. Hayes, president of the United States of America, have caused these letters to be made patent, and the seal of the general land-office to be hereunto affixed.

"Given under my hand, at the city of Washington, the twentieth day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of the independence of the United States the one hundred and third.

[Seal.]

"By the President, R. B. HAYES.

"By Wm. H. Crook, Secretary.

"Recorded vol. 10, page 243.

"S. W. CLARK, Recorder of the General Land-office."

"And on the twentieth day of September, 1878, it issued its patent to Peter Donnelly in the following words:

"The United States of America, to all Whom these Presents shall come, Greeting:

"(Certificate No. 5,768.)

"Whereas, Peter Donnelly, of Santa Clara county, Cal., has deposited in the general land-office of the United States a certificate of the land-office at San Francisco, Cal., whereby it appears that full payment has been made by the said Peter Donnelly according to the provisions of the act of congress of the twenty-fourth of April, 1820, entitled "An act making further provisions for the sale of public lands," for the lot numbered two, and the south-east quarter of the north-west quarter, and the south half of the north-east quarter, of section 30, township 10 S., of range 5 E., Mount Diablo meridian, in the district of lands subject to sale at San Francisco, Cal., containing one hundred and sixty-two acres and fifty-five hundredths of an acre, according to the official plat of the survey of the said lands returned to the general land-office by the surveyor general, which said tract has been purchased by the said Peter Donnelly: now, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the said Peter Donnelly, and to his heirs, the said tract above described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Peter Donnelly, and his heirs and assigns, forever; subject to any vested and accrued water-rights for mining, agricultural, man-

ufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and also subject to the rights of the proprietor to a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

" In testimony whereof, I, Ulysses S. Grant, president of the United States of America, have caused these letters to be made patent, and the seal of the general land-office to be hereunto affixed.

" Given under my hand, at the city of Washington, the twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the independence of the United States, the one hundred and first.

[Seal.]

" By the President, U. S. GRANT.

" By W. M. H. CROOK, Acting Secretary.

" Recorded vol. 9, page 440.

" S. W. CLARK, Recorder of the General Land-office.

" Recorded at the request of Jas. C. Zuck, the fourth day of December, 1876, at 55 minutes past 8 o'clock A. M.

" Wm. B. HARDY, Recorder.

" By A. S. WILLIAMS, Deputy.'

"The lands thus patented to plaintiff and defendant, respectively, are not contiguous to each other, but are at least one-half mile apart, and the defendant has no title whatever to any lands in section 29."

The court below, in addition to the facts already found in said case, filed the following, its additional finding of fact therein:

"(6) That said plaintiff suffered no damages by reason of the said entry of defendant and ouster of plaintiff from the premises in controversy; that during the detention of said premises from plaintiff by defendant, as aforesaid, the rents, issues, and profits thereof were of no value, nor are they now of any value whatever."

Upon this state of facts, since the parties were not settlers upon the same legal subdivision, and did not have their improvements on the same subdivision, in the sense as contemplated by section 2274, Rev. St. U. S., and the lands patented to each, and referred to in the within contract, were not contiguous, but at least half mile apart, and in two different sections, we are of opinion that the agreement under which the defendant claims an equitable title to the plaintiff's land was void, under section 2263, Rev. St. U. S., and the rulings of this court in *Damrell v. Meyer*, 40 Cal. 166, 170, and *Hudson v. Johnson*, 45 Cal. 21, 25, and authorities there cited. And the patent, once issued to the plaintiff, remained good as to all the world, until canceled for fraud, in an action brought by the United States government. Even granting that he, in making his application to pre-empt the land, had made a false oath, the defendant could not take advantage of this collateral matter to enforce his void agreement with the plaintiff. And the validity of the patent to the plaintiff, on account of his alleged false oath, could not be successfully assailed in such a collateral proceeding as the one resorted to by the defendant here. *Moore v. Wilkinson*, 13 Cal. 478, 488; *Yount v. Howell*, 14 Cal. 465-470. We are therefore of opinion that no prejudicial error is shown by the record to have been committed by the trial court, and that the judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(70 Cal. 586)

GULF OF CALIFORNIA NAV. & EXP. CO. v. STATE INVESTMENT & INS. CO.
(No. 9,111.)

(*Supreme Court of California. September 2, 1886.*)

1. MARINE INSURANCE—ACTION ON POLICY—BODY OF POLICY—INDORSEMENT—CONSTRUCTION.

A marine time policy, during its continuance, permitted a vessel insured to prosecute voyages anywhere upon the navigable waters of the globe, except that it was prohibited from using certain enumerated ports. But upon the back of the policy this indorsement was made: "Vessel to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance." *Held*, that the meaning of the indorsement was either that, while the vessel was employed in the Gulf of California, her captain might act as her pilot "without prejudice to the insurance," or that permission already granted in the body of the policy to navigate the Gulf of California was again given in the written indorsement, and that the captain might, while so navigating the ship, act as her pilot "without prejudice to the insurance."

2. TRIAL—ISSUE—EVIDENCE—INSTRUCTION.

Where no issue is made up upon a fact in a cause upon which evidence can be properly submitted, the court will refuse to instruct the jury upon it.

Commissioners' decision.

Department 2. Appeal from superior court, city and county of San Francisco.

Action on a marine insurance policy. There was a trial to a jury, and a verdict and judgment rendered for the plaintiff. Defendant appealed.

Milton Andrus and Chas. Page, for appellant. *Whittemore & McKee*, for respondent.

Foote, C. The plaintiff brought suit against the defendant on an insurance policy which the former had obtained from the latter upon a certain vessel. The cause being tried by a jury, the plaintiff had judgment for the amount of the policy, and from that, and an order denying a new trial, the defendant appeals. According to the terms of the policy as written, without the indorsement hereafter to be noticed, it was a time policy, which, during its continuance, permitted the vessel insured to prosecute voyages anywhere upon the navigable waters of the globe, except that it was prohibited from using certain enumerated ports. But upon the back of the policy, by agreement of the parties thereto, these words were written, and punctuated as follows: "Vessel to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance."

One allegation of the complaint is "that said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, totally lost by the perils of the sea." The defendant meets this statement by the following language in its answer: "This defendant, on its information and belief, denies that said vessel, while employed in the Gulf of California, was, on the ninth day of January, 1881, or at any other time, totally lost by perils of the sea."

Upon the question of the sufficiency of the denial by the defendant of the plaintiff's allegation of "a total loss of the vessel by the perils of the sea," the defendant, in its brief, at page 6, says: "We are prepared to admit that the denial would be insufficient in this case if the action had been on a policy which covered a vessel generally against perils of the sea;" citing *Doll v. Good*, 38 Cal. 289, 290; 1 Wait, Pr. 422.

The plaintiff contends that its right to recover did not depend upon the fact that the total loss of the vessel took place in the Gulf of California, but by reason of the fact that it had a right to recover, in case of such loss, whether it took place in the Gulf of California, or in any other navigable waters not prohibited to the vessel in the policy; and that the defendant's denial, in the form in which it was stated, admitted a total loss of the vessel by the perils of the sea, which is claimed, and not that it took place in said gulf, was the

material issue raised by the pleadings. So that the main question in this case, and that upon which all the others raised by the parties really depend, is, what construction is properly to be placed upon the words of the written indorsement on the policy?

The last words of it are, "without prejudice to this insurance." The natural inquiry is, what privilege or privileges were to be conceded "without prejudice to the insurance," and what else, if anything, did the sentence contain? It was unpunctuated save by a period at the end thereof.

We are of opinion that its meaning was either that, while the vessel was employed in the Gulf of California, her captain might act as her pilot "without prejudice to the insurance," or that permission already granted in the body of the policy, to navigate the Gulf of California, was again given in the written indorsement, and that the captain might, while so navigating the ship, act as her pilot "without prejudice to the insurance." It is much more reasonable to suppose one of these two to be the proper interpretation of the language in question than the one for which the defendant contends; viz., that the vessel was thereby restricted from all the waters which it was privileged to navigate in the body of the policy, and confined by the indorsement to the Gulf of California, as its navigable waters, where its captain was privileged to act as pilot.

Where so important and material a restriction, opposed, too, to the terms of the original contract, is intended to be made, it would seem that such intention, in order to bind the insured, should be expressed in plain and unambiguous terms. The construction which the defendant asks to have placed upon the words of the indorsement, taking all those words as written and punctuated, seems to us to be strained and unnatural. The circumstances, also, that surround the transaction are, we think, not calculated to induce the belief of the correctness of the defendant's construction of the language of the indorsement.

The plaintiff already had the right, before that indorsement was made, to navigate with its vessel the Gulf of California, but we may well suppose that it desired its captain to act, while in those waters, as the ship's pilot, and that it sought the modification of the policy with such end in view. And that must have been the prime object; for it did not need any permission, as we have seen, to run its vessel in said gulf,—that it already possessed; and it should not be presumed, under such state of facts, that this permission was given as asked, but only on condition that the other waters in which the vessel had been originally permitted to voyage should be entirely abandoned, unless such an intention had been most plainly and unmistakably expressed.

Nor can we believe that either of the parties to the modification of the policy, at the time it occurred, had such an understanding of its terms as that for which the defendant contends; for, had that been the case, the restrictive words, if any such were intended, would have been made as plain of comprehension as are those granting a privilege; and that they were not so is additional evidence in favor of the plaintiff's contention.

We think, therefore, that, considering the terms of the policy, which is made a part of the complaint, and the averments of that pleading, that the denial of the defendant was an admission of the truth of the material fact that the vessel was totally lost by perils of the sea, against which the defendant had insured her, and that the fact of her being lost or not in the *Gulf of California* was immaterial.

The defendant also contends that the court should have instructed the jury that plaintiff's verdict should be reduced by the sum of \$610; claiming that this sum of money, which was the proceeds of the sale of the abandoned vessel, was presumed to have been received by the plaintiff, and defendant should have credit therefor. But there was no averment in the answer of any such

liability of the plaintiff, or the facts out of which it grew. And the allegation in the complaint, of non-payment by the defendant of the plaintiff's demand, was not denied in the answer, nor was any payment to the plaintiff of any sum of money whatever therein averred. Thus no issue upon this point existed, or was made up, upon which evidence could properly have been submitted to the jury, or upon which they should have been instructed by the court. The instruction was therefore properly refused.

The propriety of the refusal by the trial court of the motion for nonsuit, to grant the defendant's instructions, and the granting of those given to the jury, and its order denying the motion for a new trial, all depended upon the questions above discussed. Hence the judgment and order last mentioned should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(70 Cal. 591)

WARE v. WALKER. (No. 8,905.)

(*Supreme Court of California.* September 2, 1886.)

1. PLEADING—AMENDED COMPLAINT—MOTION TO STRIKE OUT.

Where suit was brought, in the name of several plaintiffs, against several defendants, to enjoin the obstruction of a flow of water into a ditch of one of the plaintiffs, and an amended complaint was filed wherein one of them alone was named as plaintiff, and one alone as defendant, held, on a motion to strike out the amended pleading, that, the cause of action being the same, the motion was properly denied.

2. APPEAL—EVIDENCE—FINDINGS OF TRIAL COURT.

Where, in the trial of a suit to enjoin a defendant from obstructing the flow of water into plaintiff's ditch, the findings of the court below are sustained by the evidence, they will not, on appeal, be disturbed. *Trenor v. Central Pac. R. Co.*, 50 Cal. 230.

3. WATERS AND WATER-COURSES—APPROPRIATION OF WATER AS AGAINST A SUBSEQUENT PURCHASER—GRANT.

The findings of the court in this case considered, and held, that the plaintiff, by the construction of his ditch, and the appropriation and user of the water of the stream, acquired, as against the defendant, a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant.

Commissioners' decision.

Department 2. Appeal from superior court, Santa Clara county.

J. Alexander Yoell, for appellant. *S. O. Houghton*, for respondent.

FOOTE, C. The plaintiff obtained a final decree in this action, perpetually enjoining the defendant, Walker, from interfering with the ditch or dam of Ware, or his associates, in the bed of the Arroyo de Los Gatos, upon the land of the defendant, or from obstructing the flow of the water of said arroyo into said ditch, and for costs. From that judgment, and an order refusing him a new trial, the defendant appeals.

His first contention is that the court erred in not granting his motion to strike out the second amended complaint filed in the action. It appears that the cause of action, to-wit, the interference of the defendant with certain water-rights of the plaintiff, and a certain ditch and dam in which he had an interest, by obstructing the flow of the water therein from the Arroyo de Los Gatos, from which it was appropriated by plaintiff, was the same cause of action as stated in all the complaints, three in number, filed in the action, and the remedy of injunction was prayed for in all of them. Further, it appears that originally the action was brought by several plaintiffs, against the present and other defendants; such other defendants being joined because

they had not voluntarily become parties plaintiff, although no injury was alleged to have been done by them, that being wholly charged against defendant, Walker.

The first complaint was demurred to, and the demurral sustained. An amended complaint was then filed, which was also demurred to, and the demurral sustained. A second amended complaint was then filed, wherein Ware alone was named as plaintiff, and Walker alone as defendant. That complaint the defendant moved to strike out, because it was not, as he claimed, a complaint proper to the original action, not being between the same parties, or stating the same cause of action.

The cause of action, as we have seen, was certainly the same. The fact that by reason of the demurrer which the defendant filed, and which was sustained, the plaintiff was compelled to discontinue his action as to all the plaintiffs who had not a joint cause of action with Ware, cannot be just cause of complaint by the defendant, for his objection obliged the plaintiff thus to frame his pleading. And the fact that the cause was discontinued as to those defendants brought in because they could not be made to join as plaintiffs, but against whom no cause of action was ever stated, was a mere discontinuance as to them, to which proceeding Walker has no legal right to object. *Browner v. Davis*, 15 Cal. 11, 12. Therefore the motion to strike out had no merit, and was properly denied.

There was evidence to support all the findings, and hence they should not on appeal be disturbed. *Trenor v. Central Pac. R. Co.*, 50 Cal. 230.

It is urged by the appellant that the findings do not support the judgment. By them it is substantially declared, among other things, that the plaintiff, with others, appropriated certain water of the Arroyo de Los Gatos at a time when the land now owned and possessed by the defendant was still the property of the United States government, and that said water was taken out from the bed of said stream, at said time, with the approval of the party then in possession of said land, and who afterwards obtained a patent for it; that as part of the ditch which conducted the water to the plaintiff's land the bed of said arroyo was used; that after a time, when the defendant had become the owner of said land, he was not willing to allow the plaintiff to appropriate and use said water; and that, when the plaintiff undertook (by reason of the changes in the bed of the stream having diverted the flow of water away from the head of his ditch) to go higher up in the bed of said stream, which belonged to the defendant, and construct therein, at another point on his (defendant's) land, a certain dam and extension of the ditch, so as to again cause said water to flow into it, the defendant tore down the dam, and obstructed so much of the ditch as was upon his land above the original point of appropriation. It was to prevent further action of that kind, and to maintain his control over the water, thus flowing over a portion of the defendant's land, where the original ditch had not run, that the plaintiff brought the present action.

The conduct of the defendant in the premises, according to the findings, was not justifiable. The plaintiff was entitled to use the water of the stream, to which he had obtained the right of appropriation prior to the defendant's ownership of the land, through which the water flowed in its natural current. All that the plaintiff did in securing to himself the continued use of the water to which he had thus become entitled was to go higher up in the bed of the stream than he had originally done, and dig out a small ditch or channel in the gravelly surface thereof through a bar that had been formed by freshets in the stream, and erect, at the head of such ditch, a wing-dam to divert the waters of the stream, in the usual quantity that he had hitherto used, down along its bed into his original ditch. At no point where he thus used the bed of said stream (owing to the height of the banks thereof) could the defendant make any beneficial use of the water thus taken; and no portion of his land, available for any useful purpose, was invaded or taken. In fact, all that the

plaintiff did was to remove obstructions to the flow of its waters from the bed of the stream, higher up on the defendant's land than the point from whence such waters could be originally diverted into the ditch.

The plaintiff did nothing more of injury to the defendant than if he had removed a number of fallen trees which might have been washed down by the floods of winter, and which had lain across the stream, obstructing the flow of the water, and causing it to run upon the further side away from the plaintiff's ditch; and such action was lawful. The plaintiff, by the construction of his ditch and the appropriation and user of the water of the stream, acquired, as against the defendant, a subsequent purchaser from the United States, as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant. Where the use of a thing is granted, everything is granted essential to such use. Such a right carries with it an implied authority to do all that is necessary to secure the enjoyment of such easement.

"The express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one." Gale & W. Easem. (Amer. Ed.) 231. So, also, "in the civil law, the right to a servitude drew with it the right to such secondary servitudes as were essential for its enjoyment." Id. Again, it is said that "by the civil law the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude." Id. 232. "But, in entering upon the neighboring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound, not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labors might have caused to the servient tenement." Id. 235.

The stream had become obstructed by the deposits, from natural causes, of gravel in its bed, so as to prevent the flow of water to plaintiff's ditch. The defendant, as owner of the servient tenement, was under no obligation to remove these obstructions to the enjoyment by plaintiff of his right to the water.

The duty of making the repairs essential to his enjoyment of the easement devolved upon the plaintiff. Gale & W. Easem. 215; *Taylor v. Whitehead*, 2 Doug. 745. In the exercise of this right, plaintiff in a reasonable and proper manner, and, as is found by the court, without damage to the defendant, made such an alignment of the stream, and performed such acts as were essential to his enjoyment of the water. This he had a right to do. *Prescott v. White*, 21 Pick. 341; *Prescott v. Williams*, 5 Metc. 429.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Cal. Unrep. 728)

KAHN v. BAUER, Treasurer. (No. 11,764.)

(Supreme Court of California. December 22, 1886.)

MANDAMUS—MOTION TO QUASH—AFFIDAVIT FOR.

On a motion to quash a writ of *mandamus* compelling a state officer to redeem certain bonds in accordance with a state law, an affidavit which states, in substance, that the validity of the bonds had been passed on in the United States courts is insufficient.

In bank. Motion to quash alternative writ of mandate.

An alternative writ of mandate had issued in this case, compelling defendant to advertise for the redemption of the Montgomery avenue bonds, as provided in the act of April 1, 1872, (St. 1871-72, p. 919.) A motion was made to quash the writ, based on an affidavit which stated, in sub-

stance, that the validity of the bonds in question had been passed on in other actions, by the circuit court of the United States, and also that a writ of error was pending in the supreme court of the United States.

D. M. Delmas, for petitioner. *John L. Love* and *P. G. Galpin*, for respondent.

BY THE COURT. The facts stated in the affidavit on which the motion to quash the writ heretofore issued in this case is made, are insufficient to authorize this court to grant the motion.

The motion must be denied, with leave to respondent to answer within 10 days.

(2 Cal. Unrep. 729)

KAHN v. BOARD OF SUP'RS OF CITY AND COUNTY OF SAN FRANCISCO. (No. 11,765.)

(*Supreme Court of California*. December 22, 1886.)

In bank.

D. M. Delmas, for petitioner. *John L. Love* and *P. G. Galpin*, for respondent.

BY THE COURT. On the authority of *Kahn v. Bauer*, *ante*, 477. (No. 11,764, this day decided,) motion denied, with leave to respondent to answer within 10 days.

(71 Cal. 444)

HAGGIN and others v. CLARK. (No. 9,280.)

(*Supreme Court of California*. December 27, 1886.)

1. JUDGMENT—SATISFACTION—DECISION ON APPEAL.

The decision of the supreme court, on an appeal in a case determining the proportion of the judgment to which, as between himself and his co-plaintiff, the appellant is entitled, becomes the law of the case to the extent thus determined, and upon a tender thereof by the defendant he becomes entitled to a satisfaction of the judgment.

2. SAME—MOTION TO SATISFY—PRACTICE.

Where the findings in a cause show that two plaintiffs are entitled to recover, and show the share or interest which each plaintiff has in the subject-matter of the litigation, neither oral testimony nor affidavits can be received, on a motion to have the judgment satisfied, to show that the interest of the plaintiffs in the judgment is other or different from that shown in the findings.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco. *Moses G. Cobb*, for appellants. *E. D. Sawyer*, for respondents.

SEARLS, C. This cause was decided by Department 2 on the thirtieth day of January, 1886, in an opinion to be found in 9 Pac. Rep. 736. A reargument in bank was ordered, and we are again called upon to review the cause.

It is claimed that in the former opinion too much weight was given to the previous decision in the same case, (61 Cal. 1,) and that what we extracted from the last-named decision as the *law of the case*, and treated as *res adjudicata*, on the question at issue, was in reality *obiter dicta*, or at least based upon a record in no respects binding upon the plaintiffs Haggin and Le Roy. The following summary will suffice to an understanding of the salient points involved in the case.

On the second day of May, 1864, Theodore Le Roy, as the assignee of Jacob P. Leese, recovered judgment in ejectment against defendant Clark for the undivided four-sixteenths of certain premises situate in the city and county of San Francisco. On the twenty-second of March, 1865, Haggin and Le Roy, as plaintiffs, recovered judgment against said Clark for possession of the same land, according to their respective interests; that is to say, the said Haggin four-sixteenths, and said Le Roy eight-sixteenths, undivided. On the eighteenth day of June, 1866, Theodore Le Roy and Rudolph Steinbach conveyed to Haggin seven-sixteenths, undivided, of, in, and to said land, which in-

cluded the four-sixteenths of said land formerly owned by said Haggin, which still left said Le Roy the owner of nine-sixteenths of said land.

Two actions were brought against Clark to recover mesne profits of the land during the period of his wrongful possession. One of these actions was brought by Le Roy, and the other by Haggin and Le Roy. By consent of counsel, the two actions were tried together, upon an agreement that, in case of recovery by plaintiffs, one-half of the amount found in their favor should be awarded in each case. The causes were tried by the court without a jury, and all of the foregoing facts, as to title and the quantity of interest, appear in the findings of fact. Judgment was rendered in each case, about September 11, 1874, in favor of the plaintiff or plaintiffs therein for \$5,400, and certain further sums by way of interest, which interest was, however, on appeal to this court, stricken out and disallowed, with costs to defendant, and thereafter judgment was entered in the court below for \$5,400, with legal interest thereon from date of entry; and at the same time, and as a part of the same judgment, defendant recovered his costs of appeal, taxed at \$79.50. Pending the appeal to this court, defendant Clark took from Le Roy an assignment of all his interest in the two judgments, and subsequently the court below ordered them satisfied on payment to Haggin of the share or proportion due him as per the findings in the case. This appeal is from the order so made satisfying the judgments in *Le Roy and Haggin v. Clark*.

The question presented for determination is this: Where the findings in a cause show that two plaintiffs are entitled to recover, and show the share or interest which each plaintiff has in the subject-matter of the action, can oral testimony or affidavits be received, on a motion to have the judgment satisfied, to show that the interest of the plaintiffs in the judgment is other or different from that shown in the findings?

By section 578 of the Code of Civil Procedure it is provided that the judgment may, "when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

In the present case it appears that the court did, by its findings, determine the interests of the respective plaintiffs as between themselves. We must presume, in favor of the findings, (in the absence of the pleadings,) that they are responsive to the issues made in the case. It is true, the appellant contends that there was nothing in the pleadings warranting these findings, but the pleadings, which are the only legitimate evidence on the subject, were not offered to substantiate their position. We must therefore hold that under the presumption in favor of the findings above referred to, that some necessity existed for the findings of the court, and that they were warranted by the issues in the cause.

In view of this position, it was not in order for plaintiff Haggin, upon a motion to have the judgment satisfied, to show by affidavits and deeds that his interest all along was greater than that found by the court. *Non constat* but this very evidence may have been introduced upon the trial, and overcome by the admissions of the pleadings or by other evidence. If injustice was done the appellant, he had his redress by a motion for a new trial or appeal to correct the error; but he cannot waive all these rights, and by a motion founded upon oral evidence or affidavits try the facts of the cause anew, or any portion of them, in a manner not known to the practice of our courts.

We may infer that it was in view of this reasoning that this court, when the cause was here before, (61 Cal. 1,) indicated as the *data* upon which the amount due Haggin was to be determined the proportion or interest to which the findings showed him to be entitled. We see no reason for modifying what was said in the opinion heretofore rendered by Department 2 on this appeal, to the effect that, the relative rights of the parties having been settled on the former appeal, (61 Cal. 1,) such decision became the law of the case. Waiving this conclusion, however, and we are of opinion that, if appellant has a

remedy, it must be by appropriate action against his co-plaintiff, who he shows occupied the relation of a trustee to himself, and not by the means invoked on this motion.

We are of opinion the former decision of Department 2, affirming the order of the court below, should stand as the decision in the cause.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the order is affirmed.

(71 Cal. 470)

PARTRIDGE v. SHEPARD and others. (No. 9,404.)

(*Supreme Court of California. December 29, 1886.*)

1. LIS PENDENS—EJECTMENT—CONVEYANCE—JUDGMENT BY STIPULATION—CALIFORNIA PRACTICE ACT, § 263.

A judgment by stipulation of parties will bind them; and those in privity with them; and as, by section 263 of the practice act of California, "an action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action," a judgment by stipulation will be a bar to a claim of title under a deed made by a person in possession, during the pendency of an action against him for the recovery of the land conveyed.

2. EJECTMENT—EVIDENCE—AFFIDAVIT TO SHOW FORMER JUDGMENT VALID.

In an action of ejectment, the defendant having introduced the record of a former judgment in evidence, as evidence of his title, the introduction of an affidavit to show that there was no fraud in the entry of that judgment was error, but, as the judgment was not subject to collateral attack in the action of ejectment, the error was harmless, and not ground for reversal.

3. SAME—SHOWING TITLE OUT OF PLAINTIFF'S GRANTOR AT TIME OF DEED—DEED OF TRUST—PAYMENT AND RECONVEYANCE.

A deed of trust is a conveyance of the legal title; and where, in an action of ejectment, the plaintiff claims under a conveyance made June 15, 1872, a deed of trust executed by his grantors January 29, 1872, is admissible as tending to show that the title was not in plaintiff's grantors at the time his conveyance was made. The questions of the payment of the debt which the deed of trust was given to secure, and of the reconveyance of the land, do not affect the admissibility of the deed.

4. SAME—PAYMENT OF TAXES—STATUTE OF LIMITATIONS—CODE CIVIL PROC. CAL. § 325.

In an action of ejectment, evidence of the payment of taxes by the defendant is properly admitted under the plea of the statute of limitations. Code Civil Proc. Cal. § 325.¹

5. SAME—PAYING TAXES—LANDS SECURITY FOR A LOAN.

In an action of ejectment, the plaintiff, as a witness for himself, having testified to paying taxes and street assessments on a part of the premises in dispute on which one D. lived at the time, and that he had tried to get money out of D., and had spoken of moneys advanced to D. and his wife, a question asked him, on cross-examination, as to whether he held the property as security for the debt, was proper, as tending to show that he was not making the payment testified to for himself, as owner, but for D.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco. *E. A. & G. E. Lawrence*, for appellant. *Page Eells*, for respondents.

SEARLS, C. This is an action of ejectment to recover portions of blocks 370, 371, 376, and 377, Western addition, San Francisco. The cause was tried by a jury, and a verdict rendered in favor of defendants, upon which judgment was entered. Plaintiff moved for a new trial, which was refused, and this appeal is by plaintiff from the judgment and order denying his motion. The complaint avers that on the second day of June, 1878, plaintiff

¹See *Jaques v. Lester*, (Ill.) 8 N. E. Rep. 795, and note; *Peoria, D. & E. Ry. Co. v. Forsyth*, Id. 766; *McNoble v. Justiniano*, (Cal.) 11 Pac. Rep. 742; *Ross v. Evans*, (Cal.) 4 Pac. Rep. 443.

was the owner and in possession of the demanded premises, and that on the third day of June, 1878, defendants entered and ousted him therefrom. Defendants Shepard and Judson answered separately,—the former by way of general denial of the allegations of the complaint, and the latter, in addition to a denial of the allegations of the complaint, pleaded the statute of limitations of five years, also that the claim of the plaintiff is barred by the provisions of the statute of March 5, 1864, entitled "An act to limit the time for the commencement of civil actions in certain cases;" and in a supplemental answer defendant pleads a former recovery by him and Gilbert J. Place of the same premises by a judgment of the district court of the Fourth judicial district of the state of California in and for the city and county of San Francisco, rendered in their favor, and against Paul Molloy, Michael Dalton, Richard Donovan, and others, on or about March 27, 1873.

At the trial there was testimony on behalf of plaintiff tending to show that, in 1868, Richard Donovan went to live upon the demanded premises with his family; that he inclosed the same, in company with Michael Dalton, with a good fence, and pastured his goats and a horse thereon; that in October, 1865, Dalton built a house on the premises, as Donovan had previously done; that they cultivated a portion of the premises for a couple of years, and held the land as tenants in common. Michael Dalton and Margaret C. Dalton, his wife, conveyed to the plaintiff herein their interest in the demanded premises, by deed dated June 15, 1872, and recorded February 3, 1873. On the twenty-third day of February, 1866, R. Donovan, M. Dalton, and Margaret Dalton, his wife, conveyed, to Alfred Borel, 50-vara lot No. 4, in block 377.

On the eighth of March, 1867, Richard Donovan, Michael Dalton, and Margaret, his wife, executed an agreement to Alfred Borel, in which the conveyance of lot 4, in block 377, is recited, and it is agreed that, upon a division of the property, Borel should be at liberty to so locate the interests of the grantors in the deed of lot 4, block 377, as to protect his (Borel's) title to said lot 4; and, in the event said lot should not be set off to Borel in a division of the property, then the parties of the first part convey to said Borel an equivalent amount of land, of equal quantity and value, in the tract of which they were the owners, etc. The deed from Donovan, Dalton, and wife to Borel was afterwards stricken out by the court upon the ground that lot 4, in block 377, was not in controversy in this action; and the agreement above referred to was also, on motion of defendants, stricken out, upon the ground that it did not appear that Borel had failed to procure title to lot 4, in block 377. A deed from Borel to plaintiff, Partridge, dated March 8, 1867, of lot 4, in block 377, was offered in evidence; and, on objection of defendants, was ruled out, upon the ground that the land therein described is not in controversy in this action.

Defendants Egbert, Judson, and Shepard introduced the judgment roll in *Egbert, Judson and Gilbert J. Place v. R. Donovan, Michael Dalton, and others, as defendants*, being an action of ejectment to recover by the plaintiffs therein possession of certain premises therein described, and which are shown to embrace the demanded premises in this action. That action was commenced as early as 1865; the answer of Michael Dalton having been filed March 31, 1865, and that of Donovan, May 13, 1865. Defendants denied plaintiffs' title, set up the statute of limitations in bar of the recovery, and some other defenses. On the twenty-seventh day of March, 1873, Richard Donovan, Michael Dalton, James Casey, and Daniel Cronin, defendants in said cause, appeared in court by counsel, withdrew the answers by them respectively filed, and consented that judgment be entered in favor of plaintiffs in accordance with the prayer of their complaint, whereupon judgment was entered by the court in favor of plaintiffs, and against said defendants, for the recovery of the possession of the premises described in the complaint. A writ of possession issued to the sheriff of the city and county of San Francisco, on

the twenty-eighth day of March, 1873, which was returned July 28, 1873, by the sheriff. The return shows that plaintiffs were placed in possession of that portion of the premises described in the map attached thereto, and made part of the return.

Defendants introduced evidence tending to show possession in themselves continuously since 1873; also deed from Jose R. Valencia and Torevia Tan-faran to Richard Donovan, dated February 4, 1863, conveying the demanded premises; also a quitclaim deed from Richard Donovan to Richard Whoulihan, dated February 28, 1863, conveying the Donovan and Dalton tract, except a lot on the south side of Page street, 20 feet front by 80 feet deep. On the twenty-eighth of February, 1863, Richard Whoulihan conveyed the one undivided half of the same premises to Susannah Donovan, wife of Richard Donovan, in consideration of love and affection. Defendants deraign title from Susannah Donovan and Richard Donovan by sundry mesne conveyances. Defendants also introduced a deed from Dalton and wife to E. W. Burr and Benjamin D. Dean, of the second part, and Savings & Loan Society, of the third part, being a deed of trust dated January 29, 1872, given to secure the payment of \$2,000 and interest to the third party, and all further indebtedness, not exceeding \$3,000. This deed conveys a lot on the south-west corner of Page and Fillmore streets, fronting 68 feet on Fillmore by 120 feet on Page street, and being a portion of block 371; also the undivided one-half of the residue of the demanded premises.

The first point made by appellant is that the court below erred in overruling his objection to the question put to plaintiff Partridge, who was a witness in his own behalf, and whom the court permitted defendants' counsel to ask, on cross-examination, as follows: "You held it [the property] as security for the debt, did you not?" The witness had testified to paying taxes and street assessments, not only upon lot 4, in block 377, but upon the lot where Dalton lived, and upon other portions of the property; that he had tried to get money out of Dalton, but could not, and the latter had come to him to pay his (Dalton's) taxes, and had spoken of "moneys advanced to Dalton and his wife." Under these circumstances it was proper, on cross-examination, to ascertain whether plaintiff was paying taxes and street assessments upon the property as an owner and for himself, or for Dalton; and, if he claimed the property as security for such payment, it would tend in some degree to show that he was not making the payment for himself, but for Dalton. The answer of the witness was: "Well, partially. Yes; partially. I was saving myself at the same time,—saving the property for which I have a deed." Conceding the question to have been improper, there was nothing in the answer which could have in the least injured plaintiff.

It is objected to the judgment roll in *Judson et al. v. Molloy* that it was a "consent judgment." We know of no good reason why a judgment entered by consent of parties, in a cause in which the court has jurisdiction of the subject-matter and of the parties, is less efficacious than if entered after a trial of the issues. It may be impeached, like any other judicial record, by evidence of a want of jurisdiction in the court rendering it, by showing collusion between the parties, or by proof of fraud on the part of the party offering the record. Code Civil Proc. § 1916; Freem. Judgm. § 330; *Semple v. Wright*, 32 Cal. 659; *Sechrist v. Zimmerman*, 55 Pa. St. 446; *McCreery v. Fuller*, 63 Cal. 30. We conclude, therefore, that a judgment by stipulation of parties will bind them, and those in privity with them.

The action, as before stated, was commenced as early as 1865, pending which, and in 1869, Partridge took a conveyance of lot 6, in block 371, from Dalton, one of the defendants in that action, and subsequently, on the fifteenth day of June, 1872, plaintiff took a conveyance from Dalton and wife of all their interest in the demanded premises. The former deed was recorded November 30, 1870, and the latter on the third day of February, 1873. There is no evi-

dence that defendants Judson and Shepard had any notice in fact of these deeds, or of either of them, or any interest in plaintiff; but, on the contrary, the evidence shows that they did not have such knowledge. Judson paid the defendants Donovan and Dalton some \$12,000, to end the litigation, and procure the judgment in his favor; but we fail to see in this any evidence of fraud or collusion.

No notice of the pendency of the action was, so far as appears, filed in the office of the recorder. Prior to May 1, 1872, the provision of the practice act, § 27, in relation to filing notice of the pendency of actions, did not apply to the action of ejectment. *Long v. Neville*, 29 Cal. 131; *Watson v. Dowling*, 26 Cal. 125. By the act of March 2, 1872, which took effect May 1, 1872, the practice act was so amended that notice of the pendency of an action applied alike to causes affecting the right to possession of real property with those relating to the title. At common law the purchaser *pendente lite* of the subject of the controversy took as a mere volunteer or intruder, and was bound by the result of the controversy. *Richardson v. White*, 18 Cal. 106; *Debell v. Foxworthy's Heirs*, 9 B. Mon. 228; *Secombe v. Steele*, 20 How. 105; *Green v. White*, 7 Blackf. 242; *Baker v. Pierson*, 5 Mich. 461. By section 268 of the practice act it was provided that "an action for the recovery of real property, against a person in possession, cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action."

The defendant Dalton was in possession, and an action of ejectment was being prosecuted against him to recover possession. Pending such action, and before the amendment of March, 1872, he conveyed 50-vara lot No. 6, in block 371, a portion of the demanded premises in that cause, and a portion of which 50-vara lot is included in this action, to plaintiff, Partridge. His grantee was bound equally with himself by the judgment afterwards rendered in that action, and the judgment was admissible in evidence against the plaintiff in this cause, and plaintiff's objection thereto was properly overruled. Whether the judgment offered in evidence was a bar to the recovery by plaintiff of so much of the land as was conveyed to him by the deed of June 15, 1872, executed after the amendment of the practice act, so as to require notice of the pendency of actions of this character to be recorded, must depend upon the question whether or not the statute, when amended, applied to actions existing and pending at the date of such amendment. That question is not necessarily involved in the objection as made, because if the judgment was admissible for any purpose, or as to any part of the demanded premises, its admission was proper, and upon the question as indicated above we express no opinion.

The instruction asked by counsel for plaintiff in the following language: "I instruct you that the record of the judgment in the case of *Judson v. Molloy* against Dalton, given in evidence herein, is no bar to plaintiff's recovery herein,"—was properly refused, for the reasons given in disposing of the admissibility of the judgment as evidence.

We think the objection of plaintiff to the introduction of the affidavit of E. A. Lawrence should have been sustained. It was introduced to show that there was no fraud in the entry of the former judgment. Its introduction, however, could not injure the plaintiff, for the reason that in the present action of ejectment a collateral attack upon that judgment could not be made. Being fair upon its face, and rendered by a court of competent jurisdiction, in a proper case, it must stand until set aside by some direct proceeding for that purpose. *Freem. Judgm.* § 384. It follows that the affidavit could cut no figure, under the pleadings, in the determination of the cause, and the judgment should not be reversed on account of this error.

The deed from Dalton and wife to Burr and Dean, dated January 29, 1872, was properly admitted in evidence. It was a deed of trust given to secure the payment of money, but it conveyed the legal title. *Koch v. Briggs*, 14

Cal. 256; *Grant v. Burr*, 54 Cal. 298; *Bateman v. Burr*, 57 Cal. 480; *Durkin v. Burr*, 60 Cal. 360. It was therefore admissible to show title out of Dalton and wife prior to their conveyance of June 15, 1872, to plaintiff.

The question of the payment of the money, which the trust deed was given to secure, and of a reconveyance, did not affect the admissibility of the deed, but were questions to be determined upon proper testimony, and were, as we think, properly disposed of by the court.

The evidence of the payment of taxes by Judson was properly admitted under his plea of the statute of limitations. Code Civil Proc. § 325.

We think the evidence of adverse possession on the part of Judson was sufficient to authorize the verdict of the jury, and that, coupled with the other defenses set up and proved, defendants were clearly entitled to the judgment in their favor, and that the record presents no error calling for a reversal.

The judgment and order appealed from should therefore be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 466)

MAXWELL v. SAN LUIS OBISPO CO. (No. 9,828.)

(*Supreme Court of California. December 29, 1886.*)

TAXATION—ACTIONS TO RECOVER BACK ILLEGAL LICENSE TAX—PAYMENT UNDER DURESS.

When it appears that there was no liability to anything beyond civil and criminal prosecutions in case of refusal to pay certain license taxes, and that in such prosecutions the invalidity of the law which authorized the collection of the taxes would have been a perfect defense, a party making payment is not under such duress or compulsion that he can recover back money so paid in an action brought for that purpose.¹

Department 2.

Appeal from superior court, San Luis Obispo county.

This was an action by the respondent, Maxwell, as assignee of various parties, to recover from the defendant money paid by his assignors as license taxes for carrying on their business to the defendant, under duress, as was alleged. The defendant appealed from an order overruling its demurrer to the complaint.

J. M. Wilcoxson, William Graves, and William Leviston, for respondent, Maxwell. *J. R. Patton, F. Adams, and V. A. Gregg*, for appellant, San Luis Obispo county.

SHARPSTEIN, J. The only question which we have to consider in this case is, does the complaint state facts sufficient to constitute a cause of action? The action was brought to recover moneys alleged to have been paid by the assignors of plaintiff to the tax collector of San Luis Obispo county, and by him paid into the treasury of said county. Such an action may be maintained under some circumstances, one of which is that the money was paid under compulsion, or the legal equivalent.

"The illegality of the demand paid, constitutes, of itself, no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment." *Brumagim v. Tillinghast*, 18 Cal. 271.

In this case, plaintiff alleges that the moneys sued for were exacted and collected by the tax collector without authority of law, and as a condition precedent to the carrying on of business by the assignors of plaintiff, and by threats, and menaces of legal prosecutions, suits, actions, and processes against said assignors, and attachments, seizures, confiscations, and sequestrations,

¹See note at end of case.

which be, the said tax collector, gave out and made to said assignors, and to each of them, for the purpose of causing them, and each of them, to pay to him said moneys, and that said moneys were all paid under and by reason of such threats and menaces, and would not have been paid but for such threats and menaces.

The tax collector had no real or apparent power to execute the threats of seizures, confiscations, or sequestrations. The law under which he assumed to exact license taxes authorized him to direct suits to be brought for the recovery of such taxes, and to have attachments issue in such actions, (Pol. Code, § 3360;) and it is made a misdemeanor for any person to carry on business for which a license is required by law, without having a license, (Pen. Code, § 435.) The assignors of plaintiff were not liable to anything beyond civil and criminal prosecutions, in which the invalidity of the law which authorized the collection of license taxes would have been a perfect defense.

In *Benson v. Monroe*, 7 CUSH. 125, the court said: "It is an established rule of law that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money so paid by compulsion, unless there be fraud in the party enforcing the claim, and a knowledge that the claim is unjust. And the case is not altered by the fact that the party so paying protests that he is not answerable, and gives notice that he shall bring an action to recover the money back. He has an opportunity, in the first instance, to contest the claim at law. He has or may have a day in court. He may plead and make proof that the claim on him is such as he is not bound to pay."

In *Muscatine v. Keokuk N. P. Co.*, 45 Iowa, 185, the court said: "We are of the opinion that the mere danger of a multiplicity of suits is not sufficient to make these payments compulsory. No adjudicated case has been cited in favor of such proposition."

In *Oceanic S. N. Co. v. Tappan*, 16 Blatchf. 296, the court said: "It is stated, in general terms, in some of the decisions, that where money is paid to a public officer upon an unlawful demand to save the person paying from the infliction, under color of authority, of great or irreparable injury, from which he can only be saved by making the payment, such payment is made under an urgent and immediate necessity, and may be recovered back. But it will be found that none of these decisions were in cases where the injury apprehended by the party paying could only be inflicted by the decision of a court in favor of the validity of the claim made against him."

The question whether money paid to a tax collector, to avoid prosecution under a void law, constitutes a voluntary payment, has never before, so far as we are advised, been before this court. But it has been held that the payment of an illegal tax, under a threat to sell property in case of non-payment, was a voluntary payment. *Bank of Santa Rosa v. Chalfant*, 52 Cal. 170; *Bucknall v. Story*, 46 Cal. 589.

"When a voluntary payment is spoken of, the qualifying word is not used in its ordinary sense; and many payments are held to be voluntary which are made unwillingly, and only as a choice of evils or of risks." Cooley, Tax'n, 811. "All payments are supposed to be voluntary until the contrary appears." Id. 810.

Tested by what we must consider as an established rule, the complaint in this case does not show that the payments alleged to have been made were not voluntary, and therefore fails to state facts sufficient to constitute a cause of action.

Judgment reversed, and the court below is directed to sustain the demurrer to the complaint.

We concur: MCKEE, J.; THORNTON, J.

NOTE.

The payment of a tax illegally levied is a voluntary payment, and cannot be recovered. *Balfour v. City of Portland*, 28 Fed. Rep. 738; *Sonoma Tax Case*, 13 Fed. Rep. 789, and note; *Dunnell Manufg Co. v. Newell*, (R. I.) 2 Atl. Rep. 766; *Welton v. Merrick Co.*, (Neb.) 20 N. W. Rep. 111; *Younger v. Board Sup'rs*, (Cal.) 9 Pac. Rep. 103. The contrary was held in *Jex v. City of New York*, (N. Y.) 9 N. E. Rep. 38; *Schultze v. City of New York*, (N. Y.) 8 N. E. Rep. 528; *Breucher v. Village of Port Chester*, (N. Y.) 4 N. E. Rep. 272; *Newsom v. Board Com'rs*, (Ind.) 3 N. E. Rep. 163; *Thomas v. City of Burlington*, (Iowa,) 28 N. W. Rep. 480; *Winzer v. City of Burlington*, (Iowa,) 27 N. W. Rep. 241.

(71 Cal. 479)

HEFNER v. URTON. (No. 9,018.)*(Supreme Court of California. December 29, 1886.)***1. MORTGAGE—FORECLOSURE—PARTIES.**

In the foreclosure of a mortgage it is necessary to make parties of all persons who have succeeded to any of the rights of the mortgagor in the premises, and any person who claims an interest adverse to the plaintiff, if there is to be a complete settlement of the question involved.

2. SAME—HOMESTEAD—HUSBAND AND WIFE.

Where a married man makes a declaration of homestead in premises which he has previously mortgaged, his wife acquires such an interest in the premises as to be a necessary party in foreclosure proceedings for the complete settlement of the question involved.

3. SAME—ASSISTANCE, WRIT OF—WIFE NOT MADE A PARTY.

Where a wife is a necessary party to a foreclosure proceeding, but has not been joined with her husband, a purchaser at the sale will not be entitled to a writ of assistance against the husband to obtain possession of the land.

In bank. Appeal from superior court, Sonoma county.

James W. Oates, for plaintiff and appellant. *J. T. Campbell and John Goss*, for respondent.

MYRICK, J. In January, 1876, the defendant, W. L. Urton, being the owner of certain premises, executed to the plaintiff a promissory note for \$2,000, and a mortgage upon the premises to secure the payment of the note, which mortgage was duly recorded. Urton was a married man, residing with his family on the premises. In April, 1876, Urton made and filed for record a declaration of homestead of the premises mortgaged. The note became due in January, 1877, and in February, 1881, an action of foreclosure was commenced; said W. L. Urton being the sole defendant. A decree of foreclosure was made in March, 1881. At the sale under the decree the plaintiff became the purchaser, and a deed was executed to him. After the execution of the deed the plaintiff demanded of defendant that he surrender possession. The demand being refused, plaintiff applied to the court for a writ of assistance. This application was denied, on the ground that the wife was a necessary party to determine the right to a lien upon the homestead. This is the question for consideration on this appeal.

At the time Urton executed the mortgage he had full power and authority so to do, and a lien was thereby created; and the subsequent declaration of homestead did not impair the lien. Civil Code, subd. 4, § 1241. But, in endeavoring to enforce that lien, it was necessary to make parties to the foreclosure all persons who had in the mean time succeeded to any of the rights of the mortgagor in the premises. So, also, any person who claimed an interest in the controversy adverse to the plaintiff, or who was a necessary party to a complete settlement of the question involved, should have been made a party. Urton was the owner of the premises when the mortgage was executed. By the declaration of homestead some portion of his title (just what portion is not necessary now to be determined) passed from him to his wife. He could no longer mortgage or sell unless she joined with him. She had the right of residence thereon with him and the family during their joint

lives, with some rights in case she should survive him. She had a right of redemption as his successor in interest. Code Civil Proc. subd. 1, § 701. In order to foreclose her interest, and have a complete settlement of the question involved, viz., whether the mortgage was a lien, she was a necessary party. She would have had a right to question the execution or validity of the mortgage; whether it was barred; whether it had been paid.

It will not do to say that the writ was asked for only as to the husband, and that he should not be heard to object. It would be against the policy of the law to aid in separating the family; to remove the husband, leaving the wife on the premises, and subject him to punishment as for a contempt if he should return to visit her, or supply her with food. We agree with the judge of the court below, that the wife was a necessary party to the foreclosure; and, as she was not a party, the writ was properly denied.

The case of *Graham v. Oviatt*, 58 Cal. 428, is not in conflict with the views herein expressed.

Order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.

MCKINSTRY, J. I concur in the judgment.

(2 Cal. Unrep. 729)

Ex parte BERNARD. (No. 20,259.)

(Supreme Court of California. December 30, 1886.)

ARREST—CIVIL PROCESS—AFFIDAVIT FOR—CODE CIVIL PROC. § 479.

An affidavit for an order of arrest under section 479, Code Civil Proc. Cal., need not, in order to show that the defendant's proposed departure from the state is with intent to defraud his creditors, allege that he is about to remove any of his assets or property.

Department 1. On *habeas corpus* from superior court, city and county of San Francisco.

This was a petition for a writ of *habeas corpus* filed by B. S. Bernard. The petitioner had been placed under arrest by an order of the superior court of the city and county of San Francisco, issued on an affidavit made by one Borowsky, plaintiff in an action on a contract pending in that court against the petitioner. The affidavit alleged, in substance, that the petitioner was about to depart the state with intent to defraud his creditors, but did not state or show that he was about to remove any of his assets or property from the state.

Wm. H. Sharp, for petitioner. *Crittenden Thornton* and *F. H. Merzbach*, for respondent.

BY THE COURT. We are of opinion that the affidavit on which the judge of the superior court made the order of arrest stated facts and circumstances tending to show that the petitioner was about to depart from the state with intent to defraud his creditors. We therefore decline to discharge the petitioner from arrest.

The petitioner is remanded to custody, and the writ is discharged.

(36 Kan. 554)

CITY OF TOPEKA *v.* MYERS.

(Supreme Court of Kansas. July Term, 1886.)

CRIMINAL LAW—APPEAL—REHEARING—CHANGING BILL OF EXCEPTIONS.

Upon a motion for rehearing, held, that the evidence did not show that the bill of exceptions had been changed, as claimed, since it was allowed by the lower court, and that the rehearing should therefore be refused.

Motion for rehearing. See 8 Pac. Rep. 726.

Prosecution for violation of an ordinance of the city of Topeka prohibiting the sale of intoxicating liquor. Defendant was convicted, but a reversal was ordered by the supreme court on account of the use of the following language by the prosecuting attorney in argument: "If the defendant is not guilty, why did he not take the stand? He could have easily proven that he did not keep the place." The prosecution moved for a rehearing.

PER CURIAM. The evidence produced upon the motion for a rehearing is painfully conflicting as to what actually occurred upon the trial in the court below with respect to the conduct of the counsel for appellee; but it is not necessary to determine what is proved or disproved as to those matters. The only question before us is whether the bill of exceptions embraced in the record has been changed since it was allowed and signed by the district court. The evidence does not establish that any change therein has been made. Under these circumstances, the motion for a rehearing must be overruled.

(19 Nov. 370)

STATE ex rel. LAUGHTON v. ADAMS, Governor. (No. 1,246.)

(*Supreme Court of Nevada.* December 31, 1886.)

MANDAMUS—To GOVERNOR OF NEVADA—BOND OF STATE OFFICER—DEMURRABLE PETITION.

A petition for a *mandamus* to compel the governor of Nevada to approve or disapprove the bond of an officer required by law to give a bond within 30 days from the time of his appointment, is demurrable for failing to aver that the bond was presented to the governor within the prescribed time.

Appeal from Second judicial district court, Ormsby county, refusing plaintiff's application for a writ of *mandamus*.

A. C. Ellis, J. R. Judge, and Wm. M. Stewart, for appellant. *R. M. Clarke*, for respondent.

BELKNAP, C. J. The relator petitioned the district court to issue its alternative writ of *mandamus*, requiring the respondent, the governor of the state, to take action, by way of approval or disapproval, of his bond as *ex officio* state librarian. By a law of the state approved February 17, 1883, and during the relator's term of office as lieutenant governor, he was appointed *ex officio* state librarian. By a subsequent law, approved March 1, 1883, he was required, before entering upon the duties of the *ex officio* office, to execute a bond, with sureties, to be approved by the governor, conditioned for the faithful discharge of the duties of the office. These facts, among others, are substantially set forth in his petition; and also the further fact that the bond upon which action was requested, was presented to the governor upon the sixteenth day of November, 1885.

The district court sustained a demurrer to the petition, based upon the ground that the facts alleged were insufficient to entitle the relator to the writ. The ruling of the district court was correct. The law declaring the causes of vacancy in public offices provides, among other grounds, that the refusal or neglect of the person appointed to give the bond required by law within 30 days from the time of his appointment shall be a ground. Gen. St. §§ 1657, 1670. If the relator was entitled to have his bond approved, he should have shown, by proper averments, that it was presented to the governor within 30 days from the date of his appointment, or such other time as the statutes provide. Failing in this, the *mandamus* was properly refused. Judgment affirmed.

(19 Nov. 371)

STATE ex rel. GALLUP v. HALLOCK. (No. 1,253.)

(*Supreme Court of Nevada.* December 31, 1886.)

STATE AND STATE OFFICERS—SALARY—APPROPRIATION FOR TWO OFFICES IN SOLIDO—FAILURE OF ONE—MANDAMUS.

Where a sum has been appropriated by the state legislature providing for the payment to the lieutenant governor of a salary *in solido* as *ex officio* adjutant gen-

eral and *ex officio* state librarian, and such official fails to qualify for the office of state librarian, and another is appointed, the state comptroller is justified in refusing to audit a compensation allowed such substituted official by the board of examiners, as the appropriation for state librarian fails.

Application for mandamus.

R. M. Clarke, for relator. *H. F. Bartine*, for respondent.

BELKNAP, C. J. A vacancy arose in the office of state librarian during the month of September, 1885, by reason of the failure of the lieutenant governor to maintain his official bond. *State v. Adams, ante*, 488. The relator was appointed to the vacancy, and has ever since acted as state librarian. The state board of examiners have allowed him, as compensation for his services, the sum of \$150 per month, aggregating the sum of \$2,250. Respondent, the state comptroller, refuses to audit and allow the claim, or draw his warrant therefor. Relator seeks, by this proceeding in *mandamus*, to compel the comptroller to do so.

Under the provisions of an act of the legislature approved February 24, 1866, entitled "An act defining the duties of the state comptroller," (section 1811, Gen. St.,) it is made the duty of this officer to audit all claims against the state for the payment of which an appropriation has been made, but of which the amount has not been definitely fixed by law, and which have been examined and passed upon by the board of examiners.

The question to be determined is whether an appropriation has been made for the payment of this claim. If it has, the comptroller should audit the claim. If not, he rightly refused to act. The fund sought to be subjected to the payment of the claim was created by the general appropriation bill of March 7, 1885, (St. 1885, p. 70.) By this law the legislature made specific appropriations of money for the support of various public institutions, the payment of salaries of officers, and such other matters as are usually embraced in laws of this character. The first section of the act appropriates the various sums of money thereafter named for the purposes particularly expressed. Section four of the act reads as follows:

"Sec. 4. For salary of lieutenant governor, as *ex officio* adjutant general and *ex officio* state librarian, five thousand four hundred dollars."

At the time this appropriation was made, the law of February 17, 1883, defining the *ex officio* duties of the lieutenant governor, was, and has ever since been, in force. This law is as follows:

"Section 1. The lieutenant governor shall be *ex officio* adjutant general of the state and *ex officio* state librarian, and for the services he shall render as such, and while acting as governor in the absence of the governor from the state, he shall receive an annual salary of two thousand seven hundred dollars, to be paid at the same time and in the same manner as other state officers are paid, and no extra clerical labor shall be employed at the state's expense in said library, save and except while he is otherwise employed on other official duties." Section 1777, Gen. St.

It is contended, in behalf of relator, that the compensation of the lieutenant governor is fixed by the law of 1881, (St. 1881, p. 44,) and that it was not within the power of the legislature, as contemplated by the act of 1883, to make any change in the compensation of the lieutenant governor to take effect during Mr. Laughton's term of office. Such change, it is claimed, is in violation of article 15, § 9, of the constitution, which provides: "The legislature may at any time provide by law for increasing or diminishing the salary or compensation of any of the officers whose salary or compensation is fixed in the constitution, provided no such change of salary or compensation shall apply to any officer during the term for which he may have been elected."

In *Crosmen v. Nightingill*, 1 Nev. 274, it was held that the compensation of the lieutenant governor, as such, was not fixed in the constitution, but

only a *per diem* for services actually rendered as president of the senate. This decision sustains the act of 1883 in changing the compensation of the lieutenant governor, to take effect during the term of the incumbent. The money appropriated by the act of 1885 was intended for the payment of the compensation of the lieutenant governor for the two years then succeeding, as fixed by the law of 1883, in consideration of the performance of the duties enjoined upon him by law. This intention is shown by a consideration of the statute of 1883, in connection with the language of the statute of 1885, declaring the purpose of the appropriation to be the payment of the lieutenant governor for services as *ex officio* state librarian and *ex officio* adjutant general, and the sum appropriated was set apart *in solido* for the payment of all of the services to be rendered by this officer. Conditions have arisen which prevent the employment of the fund in this manner, and the appropriation has become inoperative. But the legislature itself would have segregated the fund had segregation been contemplated.

We conclude that no portion of the appropriation can be employed in payment of relator's claim. Writ denied.

LEONARD, J. I concur in the judgment.

HAWLEY, J., (*concurring*.) It is the duty of respondent, as state comptroller, "to audit all claims against the state for the payment of which an appropriation has been made, but of which the amount has not been definitely fixed by law, and which shall have been examined and passed upon by the board of examiners," and he shall allow, of such claims, "such an amount as he shall decree just and legal, not exceeding the amount allowed by said board," and draw warrants on the treasurer for such amounts as shall be allowed. Gen. St. 1811. The statute also provides that "no warrant shall be drawn on the treasury, except there be an unexhausted specific appropriation by law to meet the same." Gen. St. 1812.

The claim presented by relator is not of that class, within the contemplation of the framers of the constitution, to be "considered and acted upon by the board of examiners." Article 5, § 21. The legislature did not intend that this claim should, in any event, be passed upon by the board of examiners, and audited by the state comptroller. It should not be treated the same as claims coming within the appropriations for the support of different state institutions, and other cases, where the value of the services rendered, and of the supplies furnished, cannot, from the very nature of the claims, be ascertained in advance, and for the payment of which a gross sum is always appropriated. It belongs to an entirely different class, to-wit, the salary and compensation of public officers, the amount of which is definitely fixed either under the provisions of the constitution or by the statute.

The appropriation of \$5,400 was intended as compensation for the services to be rendered by the state librarian and adjutant general. The legislature, supposing that the lieutenant governor would comply with the laws then in force, and perform the duties of these offices, appropriated a definite and fixed amount as compensation for the services to be rendered therein. It is true that the appropriation, as made by the legislature, includes compensation for the services performed by relator as state librarian; but it also includes compensation for the services of the lieutenant governor as *ex officio* adjutant general, which is a separate and distinct office. The amount appropriated cannot be segregated, as the statute does not declare what portion of the amount was intended as compensation for the services of the state librarian, or what portion was intended for the services of the adjutant general. The fact that these offices are held by different persons—a condition of affairs not contemplated by the legislature when the appropriation was made—makes it apparent, as stated in the opinion of the chief justice, that this appropriation has

become inoperative, and cannot be used as compensation for the services rendered in either office.

In *Kinsey v. Kellogg* the court said: "When the act of 1876 was passed, there was a person who was discharging the duties of clerk, recorder, and auditor, and, unless subsequent legislation should require otherwise, one person would continue to fill the three separate offices. It was to this condition of things that the law was made applicable, and the compensation provided by it was provided as compensation to the clerk, the recorder, and the auditor. The law did not determine how much should be paid to each of the three officers,—a matter of no consequence so long as the three offices were in one man. But when the organization of the county government was changed, and the person who was clerk was not auditor nor recorder, it is clear that no one of the three officers was entitled to receive the compensation intended for the three; and, as the act of 1876 did not provide for the event, the act, by force of its own expressions, became inoperative when the event occurred." 65 Cal. 115, and 8 Pac. Rep. 405.

In the case at bar there is a general appropriation for the entire services to be rendered in two separate and distinct offices; but there is no specific appropriation of any sum of money for the payment of the particular claim and demand of relator as state librarian; and, as there is no "unexhausted *specific* appropriation by law to meet the same," it was the duty of the state comptroller to refuse to draw any warrant therefor. Owing to the existing condition of affairs, it will devolve upon the legislature to determine, in accordance with the justice of the case, the amounts which the relator and the lieutenant governor are respectively entitled to receive.

For the reasons stated, I concur in the conclusion that the writ of *mandamus* should be denied.

(71 Cal. 456)

THOMAS v. ENGLAND and another. (No. 9,805.)

(*Supreme Court of California*. December 28, 1886.)

1. WAYS—PRIVATE—PRESCRIPTION—ADVERSE POSSESSION— IMPLIED CONSENT OF OWNER OF SERVIENT ESTATE.

The laws of California, fixing the time in which a right by prescription shall be acquired, have not changed the common-law requirements as to the manner of acquiring such right. It must still be by adverse possession; and, one of the requisites of adverse possession being that it shall not be with the consent, express or implied, of the owner of the alleged servient estate, where, in an action to establish a right of way, the court finds that the use of the way by plaintiff, claiming title by prescription, was with the implied consent of the owner of the land over which the way passed, a judgment for defendant is proper.¹

2. SAME—QUESTION FOR JURY.

The question whether a possession is adverse is for the jury, or the court sitting as such, and, in an action to establish a right of way by prescription, the finding of the court on that question, in the absence of the testimony from the record, will be presumed to be correct.

Commissioners' decision.

Department 1. Appeal from superior court, San Benito county.

Montgomery & Scott and *Brotherton & Herrington*, for appellant. *N. C. Briggs*, for respondent.

SEARLS, C. This is an action to establish a right of way over the land of defendants, and to bar and enjoin them from closing or obstructing the same. The claim of plaintiff is that on the first day of September, 1874, he entered upon the land over which the right of way is claimed, constructed a roadway thereon, and thence hitherto, until the fourteenth of February, 1884, main-

¹See *Kripp v. Curtis*, (Cal.) 11 Pac. Rep. 879, and note; *South Branch R. Co. v. Parker*, (N. J.) 5 Atl. Rep. 641.

tained said roadway, and continuously maintained said roadway under a claim of right, adversely to the defendants and their predecessors. The answer denies the adverse user of the right of way, avers that it was by permission of the owner of the land, and states facts which, if true, would constitute a license from the owner to plaintiff. Certain interrogatories were submitted to a jury, and passed upon by them. The court adopted these findings, and prepared others in addition thereto, upon which judgment was rendered in favor of defendants. Plaintiff appeals from the judgment.

Respondent moves to dismiss the appeal upon the grounds: (1) That it does not appear that the notice of appeal was ever filed; (2) that it does not appear that the notice, if filed, was filed before the filing of the undertaking on appeal herein.

The objections are met by the record and certificate of the clerk of the court below, showing the notice of appeal to have been filed October 18, 1884, and that the undertaking on appeal was filed the same day. The motion to dismiss should be denied. In former times prescription implied a claim to an incorporeal hereditament arising from the same having been enjoyed for so long a time that there was no existing evidence as to the period when such user and enjoyment commenced. Its origin must have been at a time "whereof the memory of man runneth not to the contrary." Prescription, as known to the common law, applied to the manner of acquiring or losing a *right* by the effect of the lapse of time, as contradistinguished from the mode of acquiring title to a thing itself by the effect given to a long possession or enjoyment of it. The former applied to intangible rights capable of enjoyment without title to the thing out of which they flow, or to which they attach, while the latter related to the thing itself. Prescription, as understood and interpreted in modern times, raises a legal presumption of title under a grant, but is not conclusive, and may be rebutted by other evidence. 1 Greenl. Ev. § 17; *Sargent v. Ballard*, 9 Pick. 251; *Corning v. Gould*, 16 Wend. 531.

In this state, however, under section 1007 of the Civil Code, "occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all." This section merely fixes the time in which a right by prescription shall be acquired, but does not alter the requisites which before the Code were essential to the growth of a prescriptive right. *Woodruff v. North B. G. M. Co.*, 18 Fed. Rep. 753. The user must be adverse to the true owner. *Anaheim W. Co. v. Semi-tropic W. Co.*, 64 Cal. 185.

If the user must be adverse, then it must be accompanied by the elements required to make out an adverse possession. These elements were well stated in *Unger v. Mooney*, 63 Cal. 595, as follows: "(1) The possession must be by actual occupation, open and notorious, not clandestine. (2) It must be hostile to the plaintiff's title. (3) It must be held under a claim of title, exclusive of any other right, as one's own. (4) It must be continuous and uninterrupted for a period of five years prior to the commencement of the action. (5) Since the passage of the proviso to section 325 of the Code of Civil Procedure, in 1878, payment of taxes."

For the findings it appears that William Thomas, deceased, and the plaintiff herein, were twin brothers, living upon adjoining land, to which they had applied for title from the government of the United States. The brothers sustained towards each other relations of a mutually friendly character. In going to and coming from the nearest highway leading to Hollister, plaintiff was accustomed from September 1, 1874, to February, 1884, to pass over the land of William. This was done by the implied assent of William. Plaintiff graded the road, and William placed gates thereon. Plaintiff claimed the right to use such road, but never informed William of such claim, and he was never aware thereof, nor were his heirs aware of such claim until 1883. William

Thomas died January 4, 1880, leaving as his only surviving heirs his widow, Elizabeth, and a son, A. B. Thomas, then and now a minor under the age of 18 years. A patent issued from the government of the United States to the heirs of William Thomas, dated May 1, 1875, but such patent was not delivered to the heirs until November, 1882. Plaintiff offered to purchase the right of way from the heirs of William Thomas, deceased, but the date of such offer can only be determined inferentially from the findings.

To perfect an easement by occupancy for five years, the enjoyment must be *adverse, continuous, open, peaceable*. It must be *adverse*, and under claim of a legal right, and not by the consent, permission, or indulgence, merely, of the owner of the alleged servient estate. This is quite obvious in cases where the consent, permission, or license is expressly given. But it is no less true where the permission or license is implied, as it may well be from the facts and circumstances under which the use was enjoyed. *Bradley's Fish Co. v. Dudley*, 87 Conn. 136. The question is one for the jury, or for a court sitting as such, to determine as a fact, in the light of the relations between the parties, and all the surrounding circumstances. *Putnam v. Bozoker*, 11 Cush. 542. The finding of the court is that the right of plaintiff to pass over the land was always with the implied permission of William Thomas, his heirs and personal representatives. In the absence of the testimony we are bound to suppose there was evidence sufficient to support this and other findings, and they are sufficient to support the judgment, and defeat plaintiff's right to recover.

We are of opinion the judgment of the court below should be affirmed.

We concur. BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed, and the motion to dismiss the appeal is denied.

(71 Cal. 461)

BLACKWOOD v. CUTTING PACKING CO. (No. 9,581.)

(Supreme Court of California. December 28, 1886.)

JUDGMENT—SETTING ASIDE DEFAULT—STIPULATION EXTENDING TIME TO ANSWER.

A complaint was filed on the fifth day of January, 1884, and on the same day it was stipulated with the defendants that they should have until the eleventh of the month in which to answer. On the ninth of the month this time was extended "to, and to include, February 17, 1884," which was Sunday and a holiday. On the eighteenth of the month a default was entered, and a judgment rendered in favor of the plaintiff for the amount of his demand, and costs. A notice of motion was then served and filed by the defendants, on the same day, to set aside the judgment, and allow an answer to be filed. Held, that although the stipulation was not filed or entered in accordance with subdivision 1, § 283, Code Civil Proc. Cal., and was not, therefore, legally binding upon the trial court, yet, as the defendants seem to have relied upon it in good faith as giving them the right to answer on the said eighteenth day of February, the judgment should be set aside, and defendant allowed to file his answer.

Commissioners' decision.

Department 1. Appeal from superior court, Alameda county.

Action to recover an alleged balance due on a sale of apricots. Judgment against defendants by default. Defendants, on the same day, moved the court to open the default, and its motion was denied. A bill of exceptions on the motion and decision was preserved, and this appeal taken both from the judgment and the order denying defendants' motion.

Chickering & Thomas and *Warren Olney*, for appellant. *A. A. Moore* and *Geo. W. Reed*, for respondent.

Foote, C. The plaintiff brought an action against the defendant for an alleged balance due on a sale of some apricots. The complaint was filed on

the fifth day of January, 1884, and summons served on the eighth day of the same month and year. On the eighteenth day of February of that year a default was entered and a judgment rendered in favor of the plaintiff, for the amount of his demand, and costs. Upon that same day a notice of motion was served and filed to set aside the default and judgment, in these words:

"To the Plaintiff, and A. A. Moore and George W. Reed, his Attorneys: You will please take notice that on Friday, the twenty-ninth day of February, 1884, at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, at the court-room of this court, department No. 2, in the courthouse, at the city of Oakland, Alameda county, California, we shall move said court for an order setting aside the judgment and default heretofore entered against said defendant, and granting said defendant leave to file an answer to the complaint in said action.

"Said motion will be made and based upon the following grounds, to-wit: (1) That said default was taken against said defendant before the time allowed by law for answering, and the extension in writing, by the stipulation of said plaintiff's attorneys, had expired; (2) on the ground of the mistake, inadvertence, and excusable neglect of defendant's attorneys.

"Said motion will be made upon the papers on file herein, and upon the affidavits, copies of which are hereto attached and served herewith.

"Yours, etc.,

Dated February 18, 1884.

CHICKERING & THOMAS,

"Attorneys for Defendant."

The affidavits of merit, made in support of the motion, by one of the attorneys for defendant, and Mr. Cutting, the vice-president of the corporation sued in the action, are as follows:

"State of California, City and County of San Francisco. William Thomas, being duly sworn, deposes and says: I am one of the attorneys for the defendant in the above-entitled action. The vice-president of the said defendant has fully and fairly stated to me the facts of the said case, and I have advised him and believe that said defendant has a good defense thereto on the merits. We were retained in the case on the fifteenth of February, 1884. As there was but little time to prepare the papers, I at once prepared a stipulation, allowing us a few more days within which to answer, and sent it to Oakland by B. Noyes, Esq., a member of the bar, employed in our office, requesting him to see one of the plaintiff's attorneys, and ask for such time. I am informed by said Noyes, and therefore believe, that he called at the office of said plaintiff's attorneys on the afternoon of the sixteenth inst., but could not find said attorneys, both of them being absent; that said Noyes believed and understood that defendant's time to answer did not expire until the close of the eighteenth day of February, 1884. I have always understood the terms of the stipulation set out in the affidavit of Francis Cutting, filed herewith, to give the whole of the succeeding day, when the last day expressed therein falls on a Sunday, and such, I am informed, is the general belief of the members of the bar of this city and county. WILLIAM THOMAS."

(Duly verified.)

"State of California, City and County of San Francisco. Francis Cutting, being duly sworn, deposes and says that he is the vice-president of the defendant corporation in the above-entitled action; that he has fully and fairly stated the facts of the above-entitled case to his counsel, Chickering & Thomas, and that he is advised by said counsel that the defendant corporation has a good defense on the merits of the said action; that A. D. Cutler is an employe of said corporation, and was such employe on February 5, 1884; that on said last date George W. Reed, one of the plaintiff's attorneys, addressed to said Cutler a letter in the words following, to-wit:

"OAKLAND, February 5, 1884.

"Mr. A. D. Cutler—DEAR SIR: Mr. Blackwood called to see us to-day in regard to the last suit brought against Cutting Packing Company. He desired me to say to you that the defendant might have until February 11, 1884, within which time to answer, and the time is hereby extended until that time. In regard to the proposition made by you concerning the amending of the complaint, I will talk with Mr. Moore, and advise you to-morrow.

"Yours truly,

GEO. W. REED.

"That the above-entitled action is the 'last suit' mentioned in said letter; that on February 9, 1884, affiant saw A. A. Moore, one of plaintiff's attorneys, who indorsed on the back of said letter the following, to-wit:

"Time to answer in this case is hereby extended to, and to include, February 17, 1884.
A. A. MOORE, Attorney for Plaintiff."

"February 9, 1884.

(Duly verified.)

FRANCIS CUTTING."

Upon the hearing of the motion, its counsel stated that the defendant had prepared a verified answer to the complaint, which was then and there offered to be filed if the court would allow it, after setting aside the default and vacating the judgment. The court denied the motion, and from the order made therein, and the judgment rendered against it, the defendant appeals.

It appears by the record, from a letter dated February 5, 1884, of one of the plaintiff's attorneys, that the defendant was granted until the eleventh of February, 1884, in which to answer; that on the ninth of the same month, this time was extended "to, and to include, February 17, 1884."

The affidavits of merit were sufficient in form and matter, and the stipulation under consideration, had it been entered or filed, in accordance with subdivision 1, § 283, Code Civil Proc., would have entitled the defendant to have answered at any time on Monday, the eighteenth day of February, 1884, (sections 10, 12, 13, Code Civil Proc.,) since the seventeenth day of February, 1884, fell on Sunday, which was a holiday, and that which was fixed in the stipulation to be performed on that day (viz., the filing of the answer) could have been done on the next day, which was Monday, the eighteenth day of February, 1884.

It was not filed or entered, and was not, therefore, legally binding upon the trial court. Nevertheless, the parties defendant seem to have relied upon it in good faith as a stipulation, which gave them the right to answer the complaint on the said eighteenth day of February. They appeared at once in court on the same day that default was taken, and offered to file an answer then and there if permitted.

Under all the circumstances of this case it would seem that it was one in which a wise discretion might have been exercised in granting the defendant's motion. Therefore we think that the judgment and order should be reversed, and the defendant given a reasonable time in which to answer the complaint.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded, with leave to defendant to answer within a reasonable time.

(14 Or. 340)

TURNER and others v. PARKER.

(Supreme Court of Oregon. December 23, 1886.)

WATERS AND WATER-COURSES—BOUNDARIES—"MEANDER"—DEED.

"Meander" means to follow a winding or flexuous course; and where, in a deed, one of the boundaries of the land conveyed is described as "beginning at a stake

in the bay of Shallows; * * * thence, with the meander of the stream, 1st. N., 60 deg. W., 20 chs., to Shark's point,"—held, that the line described is the boundary line of the river.

C. W. Fulton and *R. Williams*, for appellant, Parker. *R. L. McKee*, for respondents, Turner and others.

LORD, C. J. This was an action of ejectment to recover a small strip of land described in the complaint. The only question is whether or not the tract of land in dispute is within the boundaries of the McClure donation land claim. It is stipulated that, if it was, the plaintiffs are the owners of it; but that, to determine this, it was necessary to ascertain the true northern boundary of that claim, and, if the river is the boundary, then the tract of land in dispute is owned by the plaintiffs. The land claimed and notified is described thus: "Beginning at a stake at low-water mark, in the bay of Shallows at Astoria, 7 chs. N. of Shively's N. W. corner; * * * thence, with the meander of the river, 1st, N., 60 deg. W., 20 chs., to Shark's Point; 2nd, N., 85 deg. W., 30 chs.; 3d, S., 60 deg. W., 18.50 chs.; 4th, W. 2 chs. to a stake," etc. To follow the calls of the survey by metes and bounds,—that is, by straight lines from one point to the other, as indicated above,—the tract in dispute would not be included in the donation claim; but if the intention was to meander, then the river is the boundary, and includes the tract in controversy. "Meander" means to follow a winding or flexuous course; and when it is said, "thence, with the meander of the river," etc., it must mean a meandered line,—a line which follows the sinuosities of the river; or, in other words, that the river is the boundary of the land claim between the points indicated. *Schurmeier v. Railroad Co.*, 10 Minn. 100–102, (Gil. 59.) It seems to us this is the obvious construction of the language, and the plain intention, in the light of all the facts, as suggested at the argument.

In *County of St. Clair v. Lovington*, 23 Wall. 64, Mr. Justice SWAYNE, in delivering the opinion of the court, said: "It may be considered a canon in American jurisprudence that when the calls in a conveyance of land are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of the rule by showing that the intention of the parties was otherwise. Survey 597 is the elder one. Its calls are: 'Beginning on the bank of the Mississippi river,' etc., * * * 'thence S., 5 W., 160 chains, to a point on the river,' etc. It will be observed that the beginning corner is on the bank of the river. The second corner is a point on the river. The line between them is a straight one. Where the corner, as described, would have fixed the line, does not appear. There was an obvious benefit in having the entire front of the land extend to the water's edge. There was no previous survey or ownership by another to prevent this from being done. No sensible reason can be imagined for having the two corners on the river and the intermediate line deflect from it. Under the circumstances, we cannot doubt that the river was intended to be made, and was made, the west line of the survey. In the light of the facts, such is our construction of the calls of the survey, and we give them that effect. The calls of survey No. 786, as respects this subject, are: 'Thence N., 85 deg. W., 174 poles, to a point on the bank of the Mississippi river, from which * * *; thence N., 5 deg. E., up the Mississippi river, and binding therewith, etc. Here the calls as to the river are more explicit than in survey 579. The language, 'up the Mississippi river, and binding therewith,' leaves no room for doubt. Discussion is unnecessary. It could not make the result clearer. The river must be held to have been the west boundary of this survey also."

It seems to us that the question raised was, what was the legal import and significance of the words employed? and this was properly a matter for the decision of the court, in the light of the facts. The judgment must be affirmed.

(71 Cal. 454)

MCGRATH v. HYDE. (No. 11,607.)*(Supreme Court of California. December 27, 1886.)***APPEAL—WHEN TAKEN—FILING NOTICE AND UNDERTAKING—BILL OF EXCEPTIONS—TRANSCRIPT.**

Where final judgment was entered August 20, 1885, *nunc pro tunc* as of January 13, 1885, and notice of appeal from the judgment and decree, and undertaking on appeal, were filed October 10, 1885, by defendant, and the time for preparing and serving a bill of exceptions extended to that day, and the bill was served October 8, 1885, and submitted to the court October 28, 1885, pursuant to notice served on the plaintiff's attorney, October 23d, and finally settled May 7, 1886, a motion to dismiss the appeal made April 30, 1886, will be denied; the appellant, under rule 2 of the supreme court of California, having 40 days from the time of settling the bill of exceptions to file his transcript, and the bill having been served and filed in time.

Commissioners' decision.

In bank. Appeal from superior court, city and county of San Francisco. The grounds of the motion to dismiss were that no statement or bill of exceptions had been prepared, served, or filed, and that no transcript had been filed; that the time for filing said statement or bill of exceptions and transcript had expired.

E. B. Holladay, for appellant. *M. Cooney*, for respondent.

SEARLS, C. This is a motion on behalf of the plaintiff to dismiss an appeal prosecuted by the defendant. Rule 2 of this court requires the appellant to file his transcript within 40 days after the appeal is perfected, and the bill of exceptions and statement (if there be any) are settled.

There are two certificates of the clerk of the superior court on file, from which it appears that final judgment was entered in the cause against defendant August 20, 1885, *nunc pro tunc*, as of January 13, 1885; that on October 10, 1885, defendant filed her notice of appeal from the judgment and decree, and on the same day filed an undertaking on appeal in the sum of \$300. A notice of appeal by defendant from the final judgment had been previously filed on the seventeenth day of September, 1885; but, so far as appears, the appeal was not perfected by filing an undertaking. Defendant had also, on the twenty-ninth day of July, 1885, perfected an appeal from an order denying a motion for a new trial in the cause. A bill of exceptions was prepared by defendant, and submitted to the court for settlement, on the twenty-eighth of October, 1885, pursuant to a notice served on plaintiff's attorney, October 23d, and such amendments were made thereto, and proceedings had therein, that the exceptions were finally settled and signed by the judge of the superior court May 7, 1886. It further appears that the time for preparing and serving the bill of exceptions was extended to October 10, 1885, and that it was served upon the attorney for plaintiff on the eighth day of October, 1885. Notice of this motion was served April 30, 1886.

As a bill of exceptions had been prepared and served, and had not yet been settled by the judge when this motion was made, the motion to dismiss the appeal should be denied. Appellant was entitled to 40 days within which to file her transcript after the bill was settled. If unwarranted delay was had in the settlement of the bill of exceptions after it was proposed, the court below was the proper forum in which to seek redress.

We concur: **BELCHER, C. C.; FOOTE, C.**

BY THE COURT. For the reasons given in the foregoing opinion the motion is denied.

v.12P.no.13—32

(71 Cal. 452)

FISK v. ATKINSON and another. (No. 9,017.)*(Supreme Court of California. December 27, 1886.)***ACTION OR SUIT—ABATEMENT—ACTION PENDING APPEAL.**

An action commenced during the pendency of an appeal from a judgment sustaining a demurrer to plaintiff's complaint, in a suit on the same cause of action brought by the same plaintiff against the same defendant, will be abated.

For commissioners' opinion, see 10 Pac. Rep. 374.

In bank. Appeal from superior court, city and county of San Francisco. *Joseph Mee*, for appellant. *A. Campbell, Sr.*, and *Cambell & Sanderson*, for respondents.

FOOTE, C. We adhere to the opinion formerly expressed by us in this cause, which was approved by Department 2 of this court. 10 Pac. Rep. 374. In the action instituted in San Mateo county, the pendency of which was pleaded in abatement of the present suit, a demurrer was sustained to the complaint, and, the plaintiff declining to amend his pleading, judgment passed for the defendants. From that judgment an appeal was taken by the plaintiff, pending which the present suit for the same cause of action, between the same parties, was brought in the city and county of San Francisco. The plaintiff had an opportunity in his former action to have amended his complaint, but did not choose to do so, preferring rather to prosecute an appeal from the judgment rendered therein, and to commence another suit, with the same subject-matter, against the same parties, in another county, without dismissing that appeal. His last action was therefore unnecessary and vexatious, and should be abated, and the judgment in this cause should be the same as that heretofore rendered by Department 2.

We concur: **BELCHER, C. C.; SEARLS, C.**

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded, with directions to the court below to enter judgment in favor of defendant Byrnes, that the action abate, and for his costs and disbursements.

(71 Cal. 488)

COHN v. CENTRAL PAC. R. CO. (No. 11,519.)*(Supreme Court of California. December 30, 1886.)***1. ACTION OR SUIT—VENUE—CHANGE OF—CORPORATION—PRINCIPAL PLACE OF BUSINESS
—CONST. CAL. ART. 12, § 16.**

Under section 16, art. 12, Const. Cal., providing that "a corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises or the breach occurred, or in the county where the principal place of business of such corporation is situate, subject to the power of the court to change the place of trial, as in other cases," a railroad company, the principal place of business of which is in San Francisco, when sued in Los Angeles county for damages for breach of a contract made in San Francisco, to be performed out of the state, and the breach of which occurred outside of the state, is entitled to a change of venue to San Francisco county.

2. SAME—CORPORATION—"RESIDENCE" OR—CODE CIVIL PROC. CAL. § 395.

When the affidavit on which an application for a change of venue is based, states that the principal place of business of the defendant, a corporation, is San Francisco, *held*, that such place is its "residence," within the meaning of that term as used in section 395, Code Civil Proc. Cal., fixing the place of trial of actions; following *Jenkins v. California Stage Co.*, 22 Cal. 538. *MYRICK, J.*, dissents.

In bank. Appeal from superior court, Los Angeles county. *Howard & Scott*, for appellant. *Glassell, Smith & Patton* and *Howard & Robarts*, for respondent.

MCKEE, J. This is an action against the corporation defendant, in which the superior court of Los Angeles county changed the place of trial of the action to the city and county of San Francisco. The basis of the application upon which the court ordered the change of venue was an affidavit, verified by the attorney of the corporation, showing that the residence of the corporation was, at the commencement of the action, in the city and county of San Francisco, and that that was the proper place for the trial of the case. Upon that showing, in connection with the pleadings in the case, the court made the order from which the plaintiff appeals.

Section 16, art. 12, of the constitution, ordains: "A corporation or association may be sued in the county where the contract is made, or is to be performed, or where the obligation or liability arises, or the breach occurred, or in the county where the principal place of business of such corporation is situate, subject to the power of the court to change the place of trial, as in other cases."

Now, the action in hand was brought to recover damages for breach of a contract, which, as it appears by the complaint in the action, was made in the city and county of San Francisco, to be performed outside the state, and the breach of which occurred outside the state. The action was not brought in the county where the contract was made, nor where it was to be performed, nor in the county where the breach occurred, or where the obligation and liability arose; nor was it brought in the county of the alleged residence of the defendant. It was brought in Los Angeles county. Therefore the county designated in the complaint was not the proper county, unless the residence of the defendant was unknown to the plaintiff. If that were the fact, then the action was properly brought, under section 395, Code Civil Proc., and could be tried in the county designated in the complaint, subject, however, even upon that assumption, to the power of the court to change the place of trial to the place of defendant's residence. According to the uncontested statement in the affidavit, "the principal place of business of said defendant corporation was, at the time of the filing of the complaint in the action, and still is, at the city and county of San Francisco."

In *Jenkins v. California Stage Co.*, 22 Cal. 538, this court held that the principal place of business of a corporation is its "residence," within the meaning of that term as used in section 20 of the practice act, fixing the place of trial. Section 20 of the practice act was re-enacted by section 395, Code Civil Proc. The order appealed from was therefore properly entered upon the authority of that case, unless the case itself had been overruled.

It is contended that it has been overruled by the decision in *California Southern R. Co. v. Southern Pac. R. Co.*, 65 Cal. 394; S. C. 4 Pac. Rep. 344. But that case arose out of a proceeding *in rem* to condemn a tract of land under the law of eminent domain. Upon an application by the defendant in the case the lower court refused to order the place of trial to be changed from San Diego county to the city and county of San Francisco, the alleged residence of defendant; and this court, on appeal, affirmed the order entered by the court below, because the land sought to be condemned was situated in San Diego county, and the condemnatory proceeding was properly brought in San Diego county, and had to be tried there. That was the only question raised and decided in the case. The other question, whether a domestic corporation had any place of residence in the state where it was entitled, as matter of right, to the trial of a suit brought against it in another county, did not necessarily arise in the case, and the expressions of opinion in the case upon that question are not authoritative. Therefore the case does not overrule *Jenkins v. California Stage Co.*; and, under the constitutional provisions of section 16, art. 12, *supra*, and upon the authority of that case, the court below, upon the affidavit made in this case, properly granted a change of venue. Order affirmed.

We concur: MORRISON, C. J.; MCKINSTRY, J.; SHARPSTEIN, J.

MYRICK, J., (*concurring.*) I concur in the judgment, because, under section 16, art. 12, Const., the action should have been brought in the city and county of San Francisco. The contract was there made. It was not to be performed in the county of Los Angeles, nor did the obligation or liability arise, or the breach occur, in the latter county. Besides, the principal place of business of the corporation is situated in the city and county of San Francisco. I do not, however, join in approval of *Jenkins v. California Stage Co.*

(14 Or. 325)

WHEELER and another v. HARRAH.

(*Supreme Court of Oregon.* December 20, 1886.)

SALE—ACTION FOR PRICE—SALE ON CREDIT—CONDITION NOT FULFILLED.

Where credit is given for the price of goods sold on condition that the purchaser's notes, with surety, be given therefor, and this condition is not complied with, except as to the giving of the notes, but the property is taken by the purchaser, he is liable for the price at once, and before the expiration of the proposed time of credit.

L. B. Cox, for appellant, Harrah. *Ramsey & Bingham*, for respondents, Wheeler and another.

LORD, C. J. The plaintiffs, being in business in Pendleton, through their agents doing business at Walla Walla, sold and delivered to the defendant a machine for the sum of \$275, for which the defendant promised and agreed to execute two notes, payable at different dates, and furnish such surety or indorsers thereon as would be satisfactory to the plaintiffs. With this understanding, the defendant executed his individual notes, payable to the plaintiffs, which were received by their agents, and forwarded to them, with an explanation of the arrangement. The plaintiffs received the notes, and on several occasions demanded of the defendant to furnish the security he had promised, and which the evidence shows he admitted to the plaintiffs he had agreed with their agents to furnish. Finally, the defendant paid the plaintiffs the amount of one of the notes; but the plaintiff still demanded that the security for the payment of the other note, as agreed at the time of the sale and delivery of the machine, should be given. The defendant delaying, and at last refusing, to give the required security, and denying his obligation or agreement so to do, the plaintiffs brought this action to recover the price, less the amount paid.

The defense is that, in the form charged, the action is prematurely brought, and cannot be sustained; and, in support of this proposition, counsel for defendant has cited *Hanna v. Mills*, 21 Wend. 92; *Mussen v. Price*, 4 East, 147; *Dutton v. Solomonson*, 3 Bos. & P. 582; *Hoskins v. Duperoy*, 9 East, 498. These authorities are to the effect that, when goods are to be paid for in a note or bill, the vendor cannot recover on the common count for goods sold and delivered until the credit has expired, but he may proceed immediately for a breach of the special agreement.

In *Hanna v. Mills, supra*, BRONSON, J., said: "In such an action, he will be entitled to recover as damages the whole value of the goods, unless, perhaps, there should be a rebate of interest during the stipulated credit. The right of action is as perfect, on neglect or refusal to give the note or the bill, as it can be after the credit has expired. The only difference between suing at one time or the other relates to the *form of the remedy*. In the one case, the plaintiff must declare specially; in the other, he may declare generally. The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single con-

tract, and the contract is no more broken after the credit expires than it was the moment the note or bill was wrongfully withheld."

This proceeds upon the theory that when goods are sold on credit, and it is a part of the contract that payment shall be made at a future day, no action can be maintained for the price until that day; but that when it is also a part of the same contract that a note shall be given which is payable on that future date, and such note is not given, an action can at once be maintained for the breach of the special agreement. *Johnson v. Smith*, Anth. N. P. 82; *Yale v. Coddington*, 21 Wend. 175; *Hunneman v. Inhabitants of Grafton*, 10 Metc. 455.

But these cases do not reach the point involved here. It is not disputed, nor can it be by the record, but that the credit was given for the price of the property sold, on condition that a surety be given on the purchaser's note such as should be acceptable or satisfactory to the plaintiffs. The naked obligation of the defendant was not sufficient to obtain the credit; nor would it have been received, and the property delivered, without the promise of security as agreed. When credit is given for the price of goods sold on the condition that the purchaser's note, with surety, be given therefor, and this condition is not complied with, but the property is taken by the purchaser, he is liable for the price at once, and before the expiration of the proposed term of credit.

In *Rice v. Andrews*, 32 Vt. 694, REDFIELD, C. J., said: "In regard to the term of credit, we think that was not absolute, but only conditional, depending upon the giving of the note with surety; and, when a term of credit is offered to those who give notes with approved indorsers, it is, from its very nature, dependent upon the giving of the security. The security is the consideration for the credit; and, when one fails, the other may be lawfully withdrawn. The rule of construction is different, generally, when the debtor is only required to give his own note; and especially when the debtor has an election as to the term of the credit, and is not asked to make an election. This was so decided in *Scott v. Montague*, 16 Vt. 164." See also, *Rugg v. Weir*, 16 C. B. (N. S.) 471.

A later case in that state is still more nearly akin to the point involved here. In *Hale v. Jones*, 48 Vt. 229, where the agreement was that the defendant should pay by giving the plaintiffs a note, *to be approved by them*, PIERPOINT, C. J., said: "It appears that the contract was that the \$300 was to be paid by a promissory note approved by the said Hale & Fish, to be made payable, etc. The language of the contract becomes material in determining the right to maintain this action, as it is well settled in this state, if the agreement is to give time for payment, upon the debtor's giving a note with surety, if such note is not furnished, the creditor may sue at once on book, or in general *assumpsit*. But a different rule is said to prevail when the debtor is only required to give his own note. In considering the language used in this contract, the inference is almost irresistible that the parties contemplated something more than an ordinary note of hand of the defendant,—something more than the naked obligation of the defendant to pay. That they had without a note. Else why the formal approval? Clearly, the time was not to be given unless they had a note that they approved of,—were satisfied with. They might well say, under this contract, that they were entitled to a note that would give them some security beyond that of the defendant alone; and we may well infer that the county court so regarded the contract from the fact that the judgment was for the plaintiffs; and this we the more readily do from the fact that the defendant honestly owes the money, and the objection to a recovery is purely technical." Language which we think is peculiarly appropriate here, and which, BRONSON, J., in *Hanna v. Mills, supra*, had expressed many years before in the form of "much regret" at the necessity of reversing a judgment on such "narrow grounds."

Notwithstanding the law was settled as to the defendant's own note, it was said at the argument that the acceptance of payment by the plaintiffs of the amount of one of the notes ought to be construed as acquiescence in the contract without security. It is sufficient to say that the intendment of the verdict is that it was only accepted in part payment of the price, and without any abatement of the right to have surety according to the terms of the agreement, and, in our judgment, it was the correct inference from the facts in evidence.

As this view disposes of all the questions raised, it follows that the judgment must be affirmed.

STRAHAN, J., did not sit in this case.

(14 Or. 319)

HAINES v. WELCH and others.

(*Supreme Court of Oregon. December 20, 1886.*)

LOGS AND LOGGING—DAMAGE TO LANDS BY FLOATING LOGS IN STREAM.

One who floats logs down a stream running through the land of another is liable to the owner of the land for damage done thereto by logs washed upon the land, or by damming up the stream, and causing it to overflow the land, whether the stream is navigable or not, or whether or not he had permission from the owner of the land to use the stream for that purpose.

Appeal from circuit court, Union county.

J. W. Shelton and Wm. M. Ramsey, for appellants, Welch and others. *Robert Eakin*, for respondent, Haines.

THAYER, J. This appeal is from a judgment recovered in favor of the respondent against the appellants for the sum of \$50 damages, and costs of action. The case was argued and submitted to this court at the October term, 1885, thereof, and should have been decided at once, and no doubt would have been, if it had not been overlooked, and continued over with a number of undecided cases, and escaped observation in consequence. The amount of the judgment is hardly sufficient to justify an appeal, and there is no important principle involved in the case requiring any such delay in the matter.

It appears that the respondent was in possession of, and claimed to own, a tract of 160 acres of land in said Union county, across which flowed a creek called "Anthony Creek;" and the appellants, in June, 1884, put a quantity of saw-logs in the creek, at a point above respondent's land, and floated them down to the point below it, where they had a mill, for the purpose of manufacturing them into lumber. The respondent claimed that appellants had no right to use the creek in that way; that it was not navigable, and that portions of the logs lodged in the bed of the stream above and on his land; portions of them were carried out of the channel onto his premises; and that, by the floating and lodging of the logs in the creek, the water thereof was dammed up, and caused to overflow its banks, and flood the premises, and deposit sediment thereon, whereby the respondent was injured in a great many ways not necessary here to enumerate. He specified the several items of damage in his complaint, alleged the extent in each particular, and they all aggregated \$500.

The appellants in their answer denied almost everything in the complaint, and set up affirmatively that the creek, during its annual high stage of water, which occurred in June and July of each year, was a navigable stream, for the purpose of floating saw-logs from a point about 10 miles above the land claimed by the respondent to where it united with Powder river, a point below it, and that during such stage of high water was useful and necessary for floating timber to market; that, for the purpose of procuring saw-logs for their mills during the season of 1884, it became convenient and necessary to

use said Anthony creek as a public highway during the high-water season of that year for floating them from the head of navigation on said stream, through and past the lands claimed by the respondent, to a convenient point for hauling them to the mill, a distance of about 15 miles; and to that end the logs in question were put into the creek, and floated down, or attempted to be floated down, through said land referred to. The appellants also claimed a special license from respondent to float said logs through his land.

The issues were framed on both sides with great particularity, but the principal point litigated in the case was whether the creek was a navigable stream or not for the purposes for which the appellants sought to use it. Unless it were so navigable, the appellants had no more right to attempt to use it in the manner they did than to attempt to appropriate any other part of respondent's farm. They could only use it in that case by obtaining the latter's consent to do so. The question, as it comes here, is a mixed one of law and fact. We could not say, as a matter of law, from what appears in the allegations and proofs, that the creek in question is a navigable stream. Whether it is so or not depends upon its capacity, extent, and importance. If it is capable of serving an important public use as a channel for commerce, it should be considered public; but if it is only a brook, although it might carry down saw-logs for a few days, during a freshet, it is not, therefore, a public highway. Cooley, Const. Lim. 539. And, even if it were public in the sense that it is useful to float products to market, it can only be used with due regard to the rights of the owner of its banks through which it flows. The appellants had no right to injure the respondent's premises, or intrude upon them. The right to float logs down the stream gave them no right to run them upon his land, nor to cause the water to overflow its banks to his injury. The bed of the stream, I suppose, belonged to the respondent. At least we may so presume, in view of the verdict of the jury in the case. The right, therefore, to float the logs, conceding that it existed, did not justify the acts alleged in the complaint to have been committed by the appellants. When any of the logs ran out of the channel on the respondent's premises, or lodged in the channel, or caused the water to dam and flow over onto the respondent's land, and thereby do him injury, they were liable therefor. The latter's right to the enjoyment of his premises must, in any view, be held secure, as against any such consequences, whether they are occasioned by negligence of the party, or arise out of circumstances which he was unable at the particular time to control. If the appellants attempted to use the stream to float their logs, they were bound to keep them within the channel, and prevent them from lodging so as to injure the banks of the creek, or turn the water out of the channel. The right to use the stream for such purpose, conceding it to have been navigable for the purpose, must be restricted as indicated; otherwise one person would be enabled to appropriate the property of another against the latter's consent and without compensation. The public cannot do that, and much less a private party. The act of the appellants may have been lawful, so long as it did not injure the respondent. A person may have a lawful right to excavate a canal, as was said by the court in *Hay v. Cohoes Co.*, 2 N.Y. 159, "but he cannot cast the dirt and stone upon the land of his neighbor, either by human agency, or the force of gunpowder."

The theory of the appellant's counsel that, if the creek were navigable, they would only be liable in case of negligence in floating their logs, cannot be maintained. It being navigable would relieve them from a charge of trespass for floating their logs down it, but not for the acts before referred to; and, as I view the question, the judgment appealed from can be upheld under either circumstance. The amount of the verdict shows that the jury only allowed a small portion of the damages claimed; and if they found that the appellants' logs had injured the banks of the creek,—had turned the water on

to respondent's land in consequence of their lodging in the channel, and a portion of them had floated out of the channel on the land, whereby the respondent had been injured in the manner alleged, as we must presume they did find,—it was their duty to return a verdict for the respondent, even though they found that the creek was a navigable stream, as claimed in the answer. Nor would it necessarily have changed the result if they had found that the respondent assented to the appellants floating the logs down the creek, though they had found that the creek was not in fact navigable. A general assent to float the logs down the creek would not have entitled the appellants to a verdict. It would not have been a license to the appellants to injure the respondent's premises. It would only have justified the acts to which it extended, and, if the appellants went beyond the license, they would have been trespassers from the point of departure. If a person enter another's premises under a license, and commit a trespass while in, the license will only be good as to the entry. Conceding that the consent had been given, it would still be a question for the jury to determine whether the appellants had not gone beyond the assent. The assent to float the logs down the creek would have conferred no greater right upon the appellants, if it were not navigable, than they had without it, if the creek were navigable. Under this view, the instructions of the court were substantially correct, and those requested by the appellants' counsel to be given, which were not given, were properly refused. Under any view of the case, it seems to me the main question to be decided was one of fact.

The matter of defense set up in the answer, if true, was not decisive of the case. It would only have barred the action, if the creek had been a public highway, by the appellants proving that they floated the logs down it within the channel, without interfering with the respondent's land; and the assent would only have barred it by the appellants showing that they kept within its terms, which would have required them to prove that they pursued the same course exactly with reference to floating the logs within the channel. I do not think the verdict of the jury settled the question at all as to whether the creek was navigable or not. In order to have accomplished that end, they should have been required to bring in a special verdict. Questions could, I think, have been so framed as to determine whether it was a public highway or mere private stream.

The judgment must be affirmed.

STRAHAN, J., did not sit in this case.

(19 Nev. 376)

HOYE v. SWEETMAN. (No. 1,248.)

(*Supreme Court of Nevada. January 8, 1887.*)

WATERS AND WATER-COURSES—IRRIGATING DITCHES—ACTION FOR DAMAGES—INJUNCTION REFUSED.

Where, in an action for damages and for an injunction to restrain defendant from constructing and maintaining an irrigating ditch through plaintiff's land, it appears that defendant, with plaintiff's knowledge and consent, entered upon the land, and commenced the construction of the ditch; that plaintiff then denied defendant's right, and forbade all further work; that the damage caused by constructing and maintaining the ditch will be merely nominal; and that defendant is not insolvent and unable to respond in damages; and plaintiff's remedy at law is ample and adequate,—the court will refuse to grant the injunction, and will assess nominal damages; following *Thorn v. Sweeney*, 12 Nev. 251.

Appeal from a judgment of the Second judicial district court, Douglas county, entered in favor of the defendant.

Action for damages to land, and for an injunction.

A. C. Ellis, D. W. Virgin, and J. R. Judge, for appellant. *Clarke & King*, for respondent.

HAWLEY, J. This action was brought to recover damages in the sum of \$400, and enjoin defendant from constructing or maintaining a ditch upon plaintiff's land. The cause was tried before the court without a jury, and from the testimony the court found that the defendant, with the knowledge and consent of plaintiff, entered upon plaintiff's land, and commenced the construction of a small irrigating ditch; that, while defendant was so engaged in constructing said ditch, plaintiff denied defendant's right, revoked all further authority or license, and forbade defendant doing any further work thereon; that the land upon and over which this ditch was constructed, was uninclosed, wild, unproductive, and of no value for farming or grazing purposes, and, owing to the surrounding situation and circumstances, it could not be used to any advantage or profit to plaintiff; that defendant had fully completed the ditch over plaintiff's land prior to the commencement of this suit; that, in constructing and maintaining the ditch, the defendant damaged plaintiff to the extent of five dollars; that said damage was nominal merely, and was not a real and substantial injury to plaintiff's land; that the maintenance and use of said ditch by defendant in the future would not cause any real damage to plaintiff; that defendant was not insolvent, or unable to respond in damages; and that plaintiff's remedy at law was adequate and ample. Upon these findings the court rendered judgment in favor of plaintiff for five dollars, required each party to pay his own costs, and held that plaintiff was not entitled to an injunction.

Appellant claims that there is no testimony tending to show any license or permission on his part for respondent to enter upon this land, and construct the ditch. In view of the judgment as rendered by the court, it is immaterial whether such license was given or not. If such license had been given and was not revoked, the judgment should have been in favor of respondent. If not given and afterwards revoked, as found by the court, then it was the duty of the court to assess and fix the damages, which duty it has performed.

Testimony was submitted by appellant tending to show that the land upon which this ditch was constructed was valuable for a mill-site. It is unnecessary to review the evidence upon this point, as there is sufficient evidence in the record to sustain the finding of the court that the land was of but little value; that the injury to the land was not real; and that the damages were merely nominal.

Applying the principles of law announced by this court in *Thorn v. Sweeney*, 12 Nev. 251, to the facts of this case, we are of opinion that the court did not err in refusing to grant an injunction.

The judgment of the district court is affirmed.

(71 Cal. 498)

MYERS v. MOULTON and others. (No. 11,108.)

(Supreme Court of California. December 31, 1886.)

1. PARTNERSHIP—AUTHORITY OF PARTNER—SELLING ALL PARTNERSHIP PROPERTY—STALLION NOT MERCHANDISE—CIVIL CODE CAL. SUBD. 3, § 2430.

Under section 2430, subd. 3, Civil Code Cal., providing that a partner, as such, has no authority "to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise," a stallion kept for breeding purposes is not merchandise.

2. SALE—BILL OF SALE—LIEN.

Plaintiff sold a stallion to A., who, as security for a loan, gave a bill of sale of 70 head of horses to B. The testimony tended to show that the stallion was included in the bill of sale. Plaintiff bought back the stallion from A., and directed that it be delivered into the possession of B., from whom he seeks to recover it. Held that, the court having found for B., it must have found, under the testimony, that the stallion was included in the bill of sale, and on delivery into his possession the lien arising from his bill of sale attached, and he was entitled to possession.

3. SAME—OFFER TO PAY ON CONDITION WHICH LIENEE WAS NOT BOUND TO PERFORM.

A. offered to pay up the debt to B. if certain horses that had been driven away were returned, but he did not in fact pay it, or tender any money to pay it. *Held*, the offer of A., on conditions which it does not appear that B. was bound to perform, did not release the lien.

4. REPLEVIN—JOINT JUDGMENT FOR DEFENDANTS HAVING SEPARATE DEFENSES.

Two defendants in replevin, sued jointly, answered separately; one claiming title to one-half the property, the other claiming a lien to secure a loan. The judgment for defendants was a joint judgment. *Held* that, as they were sued jointly, there was no error in entering a joint judgment in their favor.

5. SAME—JUDGMENT AWARDING VALUE IF NO RETURN, WHERE DEFENDANTS ASK ONLY FOR RETURN—CODE CIVIL PROC. CAL. § 667.

In replevin, defendants alleged, and the court found, the value of the horse, and that it was taken from them at the commencement of the action. Defendants prayed only for its return. *Held* to justify a judgment awarding defendants the value of the horse in case a return thereof could not be made; section 667, Code Civil Proc. Cal., providing therefor in such a case.

Commissioners' decision.

Department 2. Appeal from superior court, Lassen county.

E. V. Spencer, for appellant. *J. D. Goodwin*, for respondents.

BELCHER, C. C. This action was brought to recover from the defendants the possession or value of a wagon, set of double harness, and a horse. At the commencement of the action the plaintiff claimed a delivery of the property to himself, and by proper proceedings took it from the defendants. The defendants answered separately; each admitting that he was in possession of the property when the action was commenced, and denying all the other allegations of the complaint, and then, averring the value of the property, and that it had been taken from him, demanded judgment for its return.

After trial the court below found that the plaintiff was the owner and entitled to the possession of the wagon and set of harness, and that he was not the owner or entitled to the possession of the horse, but the defendants were lawfully in its possession, and, as against plaintiff, entitled to its possession. Judgment was then entered that the defendants have a return of the horse, with damages in the sum of \$1 for its detention and their costs, or, in case a return could not be had, that they recover from the plaintiff its value, fixed at \$600. The plaintiff moved for a new trial, and, his motion being denied, appealed from the judgment and order.

It appears from the evidence that the plaintiff and the wife of defendant Moulton were partners, engaged in the business of stock-raising upon a ranch owned by them in Lassen county. They owned, in equal shares, a large band of horses, and also the horse in question, which was a stallion, known as J. W. Mackay, and was kept upon the ranch for breeding purposes. Defendant Moulton lived upon the ranch, and took charge of the business and property for his wife. About the first of January, 1884, the horse was pledged to one Frank Horn to secure the payment of a sum of money borrowed for ranch purposes. Horn took and held possession of the horse till sometime in June following. On the seventh of June, 1884, plaintiff made a bill of sale, which reads as follows:

"MADELINE PLAINS, LASSEN COUNTY, CAL.,

"MOULTON & MYERS' RANCH, June 7, 1884.

"Know all men by these presents that I, Jacob Myers, party of the first part, do sell all my real and personal property located in Lassen county, Cal., to John T. Alexander and J. C. Frazer, of the same county and state, for the sum of \$3,000. gold coin of the United States, for value received, the receipt of which is hereby acknowledged.

[Signed]

"JACOB MYERS."

On the eleventh of June, 1884, Alexander, the grantee in the Myers bill of sale, executed a bill of sale to the defendant Bonyman, by which he bargained

and sold "to E. Bonyman, seventy head of horses, more or less, wagons, hayrake, mowing-machine, harness, stove, cooking utensils, all the hay on the land, and all appurtenances remaining on hand on the Myers & Moulton ranch, situate on the Madeline Plains, for the sum of \$400 cash in hand paid."

This last bill of sale was given to secure the payment of \$400, which Alexander borrowed of Bonyman, and for which he gave his promissory note. The plaintiff afterwards bought the horse back from Alexander, and then, with his individual money, paid to Horn the sum of \$300, to secure the payment of which the horse was held by him in pledge. On redeeming the horse, plaintiff directed that he be delivered into the possession of defendant Bonyman, who was then with Moulton upon the Moulton & Myers ranch, and he was so delivered on the twenty-sixth day of June. At some time—it does not appear when—Alexander offered to pay the note given by him to Bonyman, if certain horses that had been driven away were returned, but he did not in fact pay it, or tender any money to pay it. Moulton and Bonyman remained on the ranch, and retained possession of the horse until this action was commenced, on the twenty-eighth day of November, 1884.

It is argued for appellant that when Myers made his bill of sale, on the seventh of June, he transferred the entire interest of Moulton & Myers in the horse and other property of the firm, and the partnership was thereby dissolved, and that when he bought the horse back from Alexander he became its sole owner, subject only to the lien of Horn. This claim cannot be maintained. "Every general partner is agent for the partnership in the transaction of its business, and has authority to do whatever is necessary to carry on such business in the ordinary manner, and for this purpose may bind his co-partners by an agreement in writing," (section 2429, Civil Code;) but a partner, as such, has no authority "to dispose of the whole of the partnership property at once, unless it consists entirely of merchandise," (section 2430, subd. 3, Civil Code.)

The words used in the bill of sale are, "do sell all my real and personal property." This language does not purport to transfer the interest of the seller's copartner; and, if it did, it is clear that he had no power to transfer it. The horse was a stallion, kept and used for breeding purposes, and its sale was not necessary to carry on the business of the firm in the ordinary manner; and, besides, it was not "merchandise" within the meaning of that word as used in the subdivision above quoted from the Civil Code.

It must follow that, notwithstanding the bill of sale, Mrs. Moulton remained the owner of an undivided half interest in the horse, and, as such owner, had the same right to its possession as her co-owner. When, therefore, the plaintiff bought the horse back from Alexander, he bought only the half interest which he had sold, and that half interest was subject to any valid liens created upon it while Alexander held the title.

It is also argued that Bonyman acquired no interest in the horse by his bill of sale from Alexander, because the horse was not included in that bill of sale; and, if it was included, that then his lien was released, and his interest divested, when Alexander offered to pay his note if the horses which had been driven away were returned.

The answer to this is—*First*, that the testimony tends to show that the horse was intended to be and was included in the bill of sale, and, in support of the judgment, it must be presumed that the court so found; and, *second*, when the horse was delivered into the possession of Bonyman, and the lien upon a half interest in him, created by the bill of sale, at once attached, and that lien was not released by an offer from Alexander to pay his note, on conditions which, so far as we are advised, Bonyman was not bound to perform. Section 1494, Civil Code. This must be so, for the reason that it does not appear from the record what horses, if any, had been driven away, where they were driven to, who drove them, or under what circumstances or

claim of right it was done. It may be that they were taken by Mrs. Moulton, the owner of the other undivided half interest in them, and, if so, she had a right to their possession. It cannot be said, therefore, that Bonyman was bound to return them.

The case, then, is this: When the action was brought, the horse was upon the Moulton & Myers ranch, in possession of the defendants Moulton and Bonyman. Mrs. Moulton owned one-half of the horse, and her husband held possession for her. Bonyman had the other half in pledge, and as pledgee also held possession. Plaintiff demanded that the horse be given over into his exclusive possession, and the defendants refused to comply with this demand. The question is, were they justified in their refusal? The court below thought they were, and to us its conclusions seem correct. Certainly the plaintiff could not have taken the horse from Mrs. Moulton, his co-owner; and, as her husband held for her, his possession was her possession. So the plaintiff had no right to take the horse from Bonyman so long as he held it under a valid pledge.

But it is said the judgment was a joint one, and erroneous for that reason. The defendants were sued jointly, and, though they answered separately, we see no error in entering a joint judgment in their favor.

It is further said that the judgment is erroneous, because it awards to the defendants the value of the horse in case a return thereof cannot be had. They alleged, and the court found, the value of the horse, and that it was taken from them at the commencement of the action. They prayed only for its return. This was sufficient to justify the judgment entered. The Code provides: "If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same." Section 667, Code Civil Proc.

We find no error in the record, and the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(*Tl Cal. 495*)

STARKIE v. PERRY. (No. 9,766.)

(*Supreme Court of California. December 31, 1886.*)

PARENT AND CHILD — ACCOUNTING MADE IN LOOQ PARENTIS — CLAIM FOR BOARD AND CLOTHING.

Where plaintiff took defendant on the death of her mother, who was his sister, to live in his home "as a member of his family," where she continued during her minority, and, after she came of age, to labor constantly, doing house-work and helping in farm-work, plaintiff cannot recover from her, or set off against a judgment against him for a balance due defendant from him, as administrator of her mother's estate, sumis claimed to have been expended by him in board and clothes for defendant during and after her minority, his position being that of a parent while she was in his house.

Department 2. Appeal from superior court, Marin county.

Action to settle a trust. Judgment for plaintiff. Defendant appeals.

E. S. Lippitt, for appellant. *Wm. B. Haskell*, for respondent.

MCKEE, J. In this case the plaintiff, by the allegations in his complaint, admits having received for the defendant, between the year 1873 and the commencement of the action, the sum of \$575, as her portion of the estate of her deceased mother; but he claims to have paid, laid out, and expended for the defendant, between the same times, for the necessary clothing, board, and

lodging, a sum of money exceeding that which he received for her, for which, it is alleged, defendant has refused to settle with him; therefore he brought the action in hand to have his account settled and allowed, and to obtain judgment that he be discharged and released from his trust as to the moneys which he received for her.

Upon an answer specifically denying the allegations of the complaint, and setting up a counter-claim for work and labor done by the defendant for the plaintiff at his request, the case was tried, and the court, by its decision, finds that the necessary board, clothing, and lodging of the defendant, for the time stated in the complaint, were furnished by the plaintiff under the following circumstances, namely: In the year 1870 the mother of the defendant died in Marin county, seized and possessed of some real and personal property; and the plaintiff, who was the brother of deceased and the uncle of defendant, was appointed and qualified as administrator of the estate; and, while acting in that capacity, he took his niece, the defendant, in the year 1873, to live in his home, "as a member of his family." At that time defendant was a minor about fifteen years old; and she continued to live with the plaintiff for about seven years; during which time, the court finds, "she labored constantly, doing house-work and helping in the farm-work, milking cows and working in the field," and he "boarded and cared for the defendant and expended for her for clothing \$275.50." The value of her board and lodging was less than the value of her work and labor. How much the one exceeded the other the court does not find; but it held that the plaintiff was not entitled to recover for the board and lodging of the defendant, but was entitled to recover the value of the clothes furnished her, and for that sum, with interest, judgment was given in favor of the plaintiff and against the defendant.

The appeal is from the judgment. We think the judgment erroneous, because, when the defendant became "a member of the family" of her uncle, at his request, the uncle stood towards her in *loco parentis*, and, in that relation, he was bound in law to support and maintain her according to his circumstances. Section 196, Civil Code. Her support and maintenance included necessaries of food, clothes, and lodging, for which he could not charge her, as a member of his family, any more than he could charge for such things one of his own children. And the fact that the defendant continued to be a member of the family after she attained her majority did not change the *quasi paternal* relation existing between herself and her uncle. The relation still continued, unless changed by some understanding or contract, express or implied, between herself and her uncle, which brought her under an obligation to pay for her maintenance. But the plaintiff does not claim and there were no proofs of any contract, express or implied, which changed the relation established by the plaintiff himself between him and his niece into one of master and servant, or which bound her to pay him for a service he voluntarily assumed to perform for her.

The service rendered by the plaintiff in maintenance of the defendant as a member of his family was gratuitous. So, also, were the services rendered by the defendant in the home of the plaintiff. No cause of action arises out of gratuitous services; therefore, neither the plaintiff nor defendant had any cause of action against the other to recover for the value of such services.

Admittedly, plaintiff was trustee of the defendant as to the money which he received for her from the estate of her mother; and, as such, he must be held to the same degree of responsibility as if he had been formally appointed her guardian. In accounting for the fund, he will not be allowed to avail himself of his fiduciary character for any object of personal benefit. Hence, he ought not to be allowed for any portion of it which he may have appropriated as compensation to himself for a service voluntarily rendered in maintenance of his *cestui que trust* as a member of his family. For that purpose the trust fund was not legally chargeable. The court therefore erred in allow-

ing the plaintiff, in the settlement of his trust, the benefit of any portion of the fund as compensation to himself, for clothes furnished to the defendant in her maintenance as a member of his family.

Judgment reversed, and cause remanded.

We concur: THORNTON, J.; SHARPSTEIN, J.

(71 Cal. 509)

COCHRAN v. JEWELL. (No. 9,365.)

(*Supreme Court of California. December 31, 1886.*)

DAMAGES—ACTION ON CONTRACT FOR SALE.

In this action, which is for a breach of contract for the sale of hops, held, on the evidence, that plaintiff was entitled to one-half the judgment rendered by the court below. THORNTON and MCKEE, JJ., dissenting.

Commissioners' decision.

In bank. Appeal from superior court, San Francisco.

H. S. Lippitt, for appellant. *York & Whitworth*, for respondent.

BELCHER, C. C. This is an action to recover damages for the breach of a contract alleged to have been made on the twenty-fourth day of November, 1882, for the sale and delivery to plaintiff of 97 bales of hops, weighing 14,596 pounds, at the price of 80 cents per pound. The case was tried before a jury, and a verdict was returned in favor of plaintiff for \$2,189.40, on which judgment was entered. The defendant moved for a new trial, and the plaintiff was required by the court to remit from his judgment \$729.40, and, having done so, the motion was denied. The defendant then appealed from the judgment and order.

When the alleged contract was made, the defendant resided and had his hops in Sonoma county. The contract was made through the agency of his son, and a broker in the city of San Francisco. It is claimed for the appellant that neither the son nor the broker had any authority to sell the hops for less than 90 cents per pound, and the contract was therefore made without any authority, and was void. On the other hand, it is claimed, and we think there was testimony tending to show, that the contract was ratified by the defendant after he had knowledge of it. We cannot, therefore, reverse the judgment on the ground that the verdict was not justified by the evidence.

It is further claimed for the appellant that the court erred in giving and refusing instructions to the jury. After carefully looking at the instructions we are unable to see that any substantial error was committed in this respect. The instructions given by the court of its own motion and at the request of the parties seem to cover all the points involved, and to fully, fairly, and correctly state the law of the case.

But we are unable to see why, when the court below was requiring the plaintiff to remit from his judgment an amount equal to five cents for each pound of the hops, it did not make the amount equal to ten cents. It appears from the evidence that a few hours after the contract of sale was made the son went back to the broker's office, and told the broker that "he had sold too cheap," and that he wished to have the contract canceled. The son and broker then went to the plaintiff's office, and asked him to cancel the contract. The plaintiff declined, and, according to his testimony, the following conversation was had: "I told him I could not cancel, as hops were going up. He said his father was interested in the hops, and that his father had been offered 90 cents at Petaluma, and he had been offered 90 cents here after he had sold them. I told him I had been offered 90 cents per pound for them since I bought them, but that I would cancel the contract for 5 cents per pound. He wanted it left open until he could go and consult with his father to see whether he wanted to pay the difference—5 cents—or deliver. I told him I would leave

it open till 12 o'clock the next day,—a Saturday. He said he would go home and consult his father, and would telegraph me what he wanted to do. The next morning he telegraphed me that he would keep the hops. The telegram marked 'F' is the one I received. It was received on the 25th, the day it was sent, before 12 o'clock M., according to agreement."

The telegram referred to was signed by the son, and in the following words: "Will keep hops and pay difference."

The plaintiff further testified that he afterwards met the defendant, and that, after stating to him in detail the facts of the case, the defendant said: "Well, we went, and we consulted a lawyer, and we telegraphed you that we would pay that." From this it appears that the plaintiff agreed in advance to accept five cents per pound as the measure of his damages in case of the non-delivery of the hops. This being so, why should he now be permitted to exact more?

Upon the question of what was the real damage sustained by the plaintiff, the evidence was very conflicting; some of the witnesses making it even less than the amount thus agreed upon. Under the circumstances, we think the damages still given by the judgment excessive, and that the judgment and order should be reversed, and the cause remanded for a new trial, unless within 30 days the plaintiff shall file with the clerk of this court a release of all the damages recovered over and above the sum of \$729.80, and that upon his filing such release the judgment and order should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial, unless within 30 days plaintiff shall file with the clerk of this court a release of all damages recovered over and above the sum of \$729.80; and upon his filing such release the judgment and order will stand affirmed.

We dissent: THORNTON, J.; MCKEE, J.

(71 Cal. 493)

GRUELL v. SPOONER. (No. 9,682.)

(*Supreme Court of California.* December 31, 1886.)

1. EJECTMENT—OUTER, WHAT IS.

Where, when plaintiff is in possession of land, defendant erects a house on the land, and incloses it all but a few acres, on which plaintiff's house stands, and assumes and exercises control over it, there is a sufficient ouster to enable plaintiff to bring an action of ejectment on the ground of prior possession.

2. APPEAL—DISMISSAL—TIME.

An appeal to the supreme court of California, not taken within a year after the judgment appealed from, will be dismissed.

3. SAME—NOTICE—DESCRIPTION OF ORDER.

A notice of appeal, with caption, showing title of court and cause, which specifies the date of the order, and of the filing thereof, but does not mention the nature of the order made, is sufficient to inform respondent what order is appealed from, where no other order is entered on that day.

Department 2. Appeal from superior court, San Luis Obispo county.

Action of ejectment. Judgment for plaintiff. Defendant appeals.

F. Adams and V. A. Gregg, for appellant. Graves, Turner & Graves, for respondent.

THORNTON, J. The appeal from the judgment was not taken within a year after the entry of the judgment, and must be dismissed.

The notice of appeal described the order appealed from as one made and entered on June 2, 1884. The order denying a new trial was entered on that

day, and it does not appear that any other order was on that day entered. The order was so described in the notice of appeal as to inform the respondent that it was appealed from. The appeal cannot be dismissed for the reason, as contended, that the order appealed from was not sufficiently designated and described in the notice.

The action is ejectment, and plaintiff recovered on the ground of prior possession. The evidence seems to be sufficient to sustain the finding to that effect.

It is said there is no proof of ouster; but the evidence shows that defendant erected a house on the land, and inclosed it, except a few acres on which plaintiff's house stands, and was assuming and exercising control over it. This was evidence of a withholding which is sufficient to sustain the action. *Payne v. Treadwell*, 16 Cal. 223. Where the defendant claims and exercises control over the land, the plaintiff can elect to be disseized, and bring his action to recover possession. He is not obliged to enter on the land, which might result in a breach of the peace, or from which he might be turned out for an unlawful and forcible entry, and have to resort to ejectment at last.

The defendant was called as a witness by plaintiff, and, on his cross-examination by his counsel, certain questions were asked him, objected to by counsel for plaintiff, and the objections sustained. The questions were answered at a subsequent stage of the trial, and the defendant sustained no injury for which a reversal should be had, granting that the court erred in sustaining the objections when first made.

Judgment and order are affirmed.

We concur: MCKEE, J.; SHARPSTEIN, J.

(2 Cal. Unrep. 730)

BROWN and others v. CENTRAL PAC. R. CO. (No. 11,883.)*

(Supreme Court of California. January 3, 1887.)

1. NEGLIGENCE—CONTRIBUTORY—PROXIMATE CAUSE—TRAIN CONDUCTOR.

Where, on the trial of an action for damages against a railroad company brought for the death of a train conductor in defendant's employ, it appears that such conductor was in absolute control of a long freight train; that there were three brakemen who were under him, and whose positions, respectively, were on the front, middle, and rear of the train; that the middle brakeman, when the train was leaving the last station at which it stopped before the accident, was about to go to his position, when he was stopped by the conductor to assist him in checking waybills, and remained in the baggage car after such checking was finished, and until the accident happened, there is evidence of negligence in the conductor; but the verdict for plaintiff may be sustained, where the instructions of the judge are clear, on the theory that the jury considered that the negligence of the conductor did not contribute *proximately* to produce the accident.

2. TRIAL—GENERAL OR SPECIAL VERDICT—OMISSION TO MAKE SPECIAL FINDINGS.

When, on the trial of an action for damages, the jury are instructed that they may return either a general or a special verdict, but, if a general verdict is returned, they must also make written findings on the particular findings of fact submitted to them in writing, and the jury return a general verdict for the plaintiff, without passing on the special facts submitted, which is received and entered by the court without objection by counsel, the defendant cannot object to the verdict, on appeal, as irregular, as the reception and entry of the verdict by the court amounted to a waiver of the request for the special findings.

Commissioners' decision.

In bank. Appeal from superior court, Los Angeles county.

Action for damages against railroad company. Judgment for plaintiffs. Defendant appeals.

Glassell, Smith & Patton, for appellant. *Howard, Brousseau & Howard*, for respondent.

SEARLS, C. This is an action to recover damages by plaintiffs, the widow and children, as heirs, of Gilman George Brown, deceased, for the death of

*Reversed in banc. See 14 Pac. 138, 72 Cal. 523.

the latter, through the alleged negligence of defendant, a railroad corporation. Plaintiffs had a verdict and judgment for \$10,000, and costs, from which judgment, and from an order denying a new trial, defendant appeals.

The decedent of plaintiffs was a conductor on the railroad of defendant, and, as such, left Los Angeles on the evening of April 7, 1877, in charge of a mixed train, consisting of over 20 cars, drawn by a locomotive engine in charge of Frank Wilson as engineer. While proceeding on its way, about midnight of the same day, the train, when at or near the foot of a slightly descending grade, broke in two, or parted; the front part with the engine running a considerable distance before the accident was discovered. When discovered, the engineer, in obedience to the signal of the only brakeman left upon the front part of the train, reversed his engine, and backed up, in doing which he collided with the still advancing rear portion of the train, partially wrecking the latter, and killing the conductor, Brown.

The *gravamen* of the charge against defendant, as contained in the complaint, is that, through its negligence, carelessness, and default, it employed, as engineer upon its train, one Frank Wilson, an unsafe, unskillful, untrustworthy, and incompetent person, of whose unskillfulness, untrustworthiness, and incompetency defendant had notice; and that, by reason of the negligence, carelessness, and lack of skill of said engineer, the accident occurred, whereby Brown was killed. The answer denies all negligence on the part of defendant, and avers that the accident and its consequences were due to the negligence of Brown, the deceased conductor, in not having his brakemen at their posts, etc.

Plaintiffs' intestate, as conductor of the train, and Frank Wilson, the engineer, by whose negligence it is claimed Brown was killed, were co-employees in the same general business. It follows that defendant could only be liable for the negligent act of the engineer whereby deceased lost his life, upon the theory that it neglected to use ordinary care in the employment or retention of such engineer. *Hogan v. Central Pac. R. Co.*, 49 Cal. 130.

"An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employee." Civil Code, § 1970; *Sweeney v. Central Pac. R. Co.*, 57 Cal. 15.

Under the pleadings and evidence in the cause, three propositions were essential to recovery by the plaintiffs: (1) Negligence or the want of ordinary care by defendant in the employment or retention of Frank Wilson as an engineer; (2) negligence of such engineer, whereby Brown was killed; and (3) the absence of concurring negligence on the part of Brown proximately contributing to the injury. There was evidence *pro* and *con* upon each of these propositions.

Upon the first, there was testimony tending to show that Wilson, the engineer, had been for some time addicted to the intemperate use of intoxicating drinks, to such a degree and in so public a manner that defendant's officers whose duty it was to employ, superintend, and discharge engineers, would be likely to know, and should have known, of his habit, and that he had been previously discharged once or twice by defendant on another division on account of intoxication. This was denied by defendant.

As bearing upon the first and second propositions, there was uncontradicted testimony that on the day of the accident Wilson had with him upon his engine a bottle of whisky, from which he and others drank freely; that, when the train had parted, he ran back over the road without sending a flag-man ahead, or sounding his whistle or bell, which was in violation of the rules of the company. There was also testimony to the effect that Wilson was either asleep, or stupid from drink, when the train parted, and had to be aroused by

his fireman, and that in backing up he did so at a dangerous rate of speed. These last facts are contradicted.

Without proceeding to state the testimony, which is quite voluminous, it is sufficient to say there was evidence sufficient to uphold the verdict of the jury, and the cause should not be reversed for want of evidence, or because the verdict was contrary to the evidence.

The only branch of the case which has awakened serious doubts as to the correctness of the verdict is that relating to the contributory negligence of the deceased. He was conductor of the train, and was making his first trip over the road. The night was clear, and the moon shone, but upon the desert tract over which the train was passing the dust obstructed the view to a great extent. The road was composed of not heavy, but of varying and changing, grades. The train was a long and heavy one, and was supplied with three brakemen, one of whom acted also as baggage master. The conductor was master of the train, and, under ordinary circumstances and for all practical purposes, had absolute control over all persons employed thereon.

The position of the brakemen should have been, one in front, one at or near the middle of the train, and the other upon the rear car. The middle brakeman, upon leaving Indio, the last station at which the train stopped before the accident, was about to go to his place, when he was detained by the conductor to assist the latter in calling off and checking way-bills. That office performed, he remained in the baggage car with the conductor, and was lying down upon some mail-sacks when the accident occurred.

Neither the conductor nor brakeman was aware the train had parted. They felt a shock as if from passing over a rough joint, and, although the evidence is not clear upon the point, we suppose the detached portion, consisting of say six cars, slowed down. We infer this from the fact that the conductor asked the brakeman if they were approaching Walters, or "Is this Walters?" —a very natural inquiry for a stranger upon the road on finding the speed of his train checked. He was informed they had not run far enough for Walters. Mr. Brown then rose, looked out the side of the baggage car, and so far as appears saw nothing to indicate trouble. The crash came very soon thereafter.

It would seem to us that the conductor was negligent in not having his crew at their posts, and we can only uphold the verdict upon the theory that the jury, from all the facts presented, and under the very clear instructions of the court upon the point, must have come to the conclusion that the negligence of the conductor did not contribute *proximately* to produce the fatal result. We are not quite satisfied upon the point, but, as before stated, do not feel warranted in setting the verdict aside for this cause.

The giving of the following instruction is assigned as error: "Second. If you find from the evidence that the plaintiffs are the widow and children, respectively, of Gilman George Brown; that said Brown met his death in consequence of the negligence of the defendant, through its employe Frank Wilson, without such negligence on his part as to directly contribute to the accident,—then your verdict should be for the plaintiffs, and you should assess their damages at such sum as under all the circumstances of the case may be just; and, in determining the amount of such damages, you have the right to take into consideration the pecuniary loss, if any, suffered by these plaintiffs in the death of the deceased by being deprived of their support by him; also the relations proved as existing between the plaintiffs and deceased at the time of his death, and the injury, if any, sustained by plaintiffs in the loss of his society."

The instruction simply informs the jury as to their duty in the premises if they shall find that Brown, without contributory negligence on his part, "met his death in consequence of the negligence of the defendant, through its employe Frank Wilson." It does not state, or purport to state, the facts or cir-

cumstances which, under the pleadings and proofs, would constitute negligence on the part of defendant. It speaks of negligence in the abstract, for the apparent purpose of reaching the conclusions flowing therefrom and consequent thereto.

In a criminal case against a defendant charged with murder, there can be no impropriety in charging the jury that, if they find the defendant guilty of murder in the first degree, they may fix the penalty at, etc., although such charge failed to define what constitutes murder. So, in the present case, the instruction under consideration defined the result from a given stand-point. The *data* from which this stand-point was to be determined—its existence or non-existence ascertained—was to be found in the other instructions given, between which and the one indicated there was and is no conflict.

We should be glad to insert at large the instructions given, containing, as we think they do, a clear exposition of the law applicable to the case; but their length precludes us from so doing.

After instructing the jury, the court, at the request of counsel for defendant, submitted to them certain questions of fact in writing, and in reference thereto instructed them as follows: "In this case you, in your discretion, may render a general or a special verdict; but the court instructs you that, if you render a general verdict, you will also find upon the particular questions of fact stated in writing, and herewith submitted to you, and make your written findings thereto." The jury returned a general verdict in favor of plaintiffs, but did not pass upon the special facts submitted.

One of the members of the firm of attorneys who acted in the cause for the defendant was present at the rendition of the verdict, polled the jury, and made no objection to the want of findings upon the special facts, and no notice seems to have been taken of the omission. The attorney so present had not participated in the trial, but consented, on behalf of his law firm, to receive the verdict.

The action being for the recovery of money only, it was discretionary with the jury to find a general or special verdict, subject to the provision that, if they found a general verdict, the court in its discretion might require them to find upon particular questions of fact in addition thereto. Code Civil Proc. § 625. This, as shown above, the court required, but the jury failed to respond. The verdict as rendered was complete, and such as the court was authorized to receive, and the reception and entry of verdict by the court and counsel without objection amounted to a waiver of the request for findings upon the particular questions of fact.

Upon the whole case as presented we are of opinion the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 535)

M'DONALD v. HANLON. (No. 11,832.)

(*Supreme Court of California. January 6, 1887.*)

APPEAL—STAY PENDING APPEAL—CODE CIVIL PROC. CAL. § 1176.

By Code Civil Proc. Cal. § 1176, the power of accepting an undertaking, and directing a stay of proceedings, under a judgment, pending an appeal therefrom, is vested exclusively in the court that tried the case, and no appeal lies from its refusal.

In bank. Appeal from superior court, city and county of San Francisco. Action under Code Civil Proc. Cal. § 1161, for the unlawful detainer of certain premises. Judgment for plaintiff. Defendant appeals, and, pending

the appeal, makes this application to stay proceedings under the judgment. *Joseph Kirk*, for appellant. *Thos. E. Curran* and *S. B. McKee, Jr.*, for respondent.

MORRISON, C. J. This is an application for leave to file an undertaking on appeal to stay proceedings in the cause on appeal, and to stay all further proceedings in the superior court of the city and county of San Francisco, wherein said action was pending. The action was brought under section 1161, Code Civil Proc., and a judgment therein duly entered in favor of the plaintiff, from which an appeal is being prosecuted to this court. An application similar to this was made in the superior court, and was denied. It is now renewed in this court, on the same grounds and for like reasons.

Section 1176 of the Code of Civil Procedure provides that "an appeal taken by the defendant shall not stay proceedings upon the judgment, unless the judge or justice before whom the same was rendered so directs." This was an amendment to the Code of March 9, 1880, and it is claimed that the power of accepting an undertaking, and directing a stay of proceedings, is vested thereby in the court that tried the case exclusively. Such seems to have been the understanding of the statute; for, as has been remarked, application for a stay was first made to the court that tried the case. In this interpretation of the statute we agree, and the motion must therefore be denied. So ordered.

We concur: **THORNTON, J.; MCKINSTRY, J.; SHARPSTEIN, J.**

(9 Colo. 379)

UNION PAC. R. R. v. JONES.

(*Supreme Court of Colorado. December 3, 1885.*)

RAILROAD COMPANIES—DAMAGES FROM FIRE OF LOCOMOTIVE—EVIDENCE AS TO USE OF ROAD.

Where, on the trial of an action for damages against a railroad company resulting from fire coming from an engine alleged to belong to defendant, the defendant denies that it operated the railroad running through plaintiff's farm, the uncontroverted evidence, by a station agent of defendant, that the defendant company ran its trains over the road running through plaintiff's farm, though not going clearly to the date of the fire; also that defendant sent him, soon after the fire, to see plaintiff respecting it, and to report concerning it,—is sufficient to establish the fact that defendant was operating the road at the time of the fire, and regarded itself as liable for damages.¹

Appeal from county court, Boulder county.

This was an action brought before a Justice of the peace by Jones, the appellee, to recover the sum of \$156 damages for grass and pasture burned on his farm by a fire set out by the defendant company. The case was afterwards appealed to the county court, where trial was had to the court. The defendant denied setting out the fire; denied that it operated the railroad running through the appellee's farm; denied that it ran the locomotive which it was alleged set out the fire; denied that it was in any way indebted to the plaintiff. Judgment against the defendant company for \$109, and costs of suit. Appeal to the supreme court.

¹ As to the liability of railroad companies for fires set out by sparks from their locomotives, see *Butcher v. Vaca Val. R. Co.*, (Cal.) 8 Pac. Rep. 174, and note; *Lowney v. New Brunswick Ry. Co.*, (Me.) 7 Atl. Rep. 381; *Balsley v. St. Louis, A. & T. H. R. Co.*, (Ill.) 8 N. E. Rep. 859; *Indiana, B. & W. Ry. Co. v. Foster*, (Ind.) 8 N. E. Rep. 264; *Seeley v. New York Cent. & H. R. R. Co.*, (N. Y.) 7 N. E. Rep. 734; *Adamus v. Young*, (Ohio,) 4 N. E. Rep. 599, and note; *Mahoney v. St. Paul, M. & M. Ry. Co.*, (Minn.) 29 N. W. Rep. 6; *Babcock v. Chicago & N. W. Ry. Co.*, (Iowa) 28 N. W. Rep. 644; *Gibbons v. Wisconsin Val. R. Co.*, (Wis.) 28 N. W. Rep. 170; *Lanning v. Chicago, B. & Q. R. Co.*, (Iowa,) 27 N. W. Rep. 478, and note; *Jones v. Michigan Cent. R. Co.*, (Mich.) 26 N. W. Rep. 662; *Wolff v. Chicago, M. & St. P. R. Co.*, (Minn.) 25 N. W. Rep. 63, and note; *International & G. N. R. Co. v. Ragsdale*, (Tex.) 2 S. W. Rep. —.

Teller & Orahood, for appellant. *Chas. M. Campbell*, for appellee.

ELBERT, J. We think it sufficiently appears from the testimony of Van Riper that the defendant company operated the Boulder Valley road at the time of the fire. The witness was the station agent of the defendant company at Boulder; and while his testimony, to the effect that the Union Pacific Railway Company "ran its trains over the Boulder Valley road," is general, and does not clearly go to the date of the fire, the act of the company, in sending him, soon after the fire, to see the appellee, Jones, respecting it, and to report concerning it, but without power to settle the damages, is inconsistent with any other theory than that the defendant company was operating the road at the time of the fire, and regarded itself as a party concerned in any claim for damages resulting therefrom. From all the evidence, it is also reasonably clear that the appellee's grass was fired by sparks from a locomotive attached to one of defendant's freight trains.

The judgment of the court below is affirmed.

(36 Kan. 146)

MISSOURI VALLEY LIFE INS CO. v MCCRUM.

(*Supreme Court of Kansas*. January 7, 1887.)

1. LIFE INSURANCE—INSURABLE INTEREST.

A person who has no insurable interest in another's life cannot recover upon an insurance policy on such life, which is purchased during the life-time of the insured, as policy so obtained is a mere wager, and void.

2. SAME—SALE OF POLICY—FRAUD.

The sale and transfer of a policy of insurance by the beneficiaries thereof, during the life of the insured, to one who has no insurable interest in the life of the insured, either as a relative or as a creditor, is a fraud upon the insurance company by which it was issued.

3. SAME—RETURN OF POLICY CANCELED—PUBLIC POLICY.

Where the beneficiaries of a policy of insurance, for a valuable consideration, sell, transfer, and assign the policy to a person who has no insurable interest in the life of the insured, and such person retains possession of the policy until after the death of the insured, and, after serving proof of death, ascertains the policy cannot be collected in his hands, returns the same to the beneficiaries, with the word "canceled" written across the face of the assignment, the transaction between the beneficiaries and the assignee is against public policy, and not to be tolerated by law. Therefore the policy is worthless and void, not only in the hands of the person having no insurable interest in the life of the insured, but also in the hands of the beneficiaries and their assignee.

(*Syllabus by the Court*.)

Error from Doniphan county.

T. A. Hurd, for plaintiff in error. *W. D. Webb*, for defendant in error.

HORTON, C. J. The facts in this case are substantially as follows: On July 10, 1872, the Missouri Valley Life Insurance Company issued and delivered to Daniel Snyder its paid-up policy of insurance on his life for the sum of \$502.65, payable to Elizabeth and Desylvia Snyder, his children, in 60 days after due notice and proof of his death. On June 12, 1883, Daniel Snyder and Elizabeth and Desylvia Snyder executed a written instrument of assignment on the back of the policy, as follows:

"TROY, KANSAS, June 12, 1883.

"For value received, without recourse on me, I hereby sell and assign to C. M. Parker the within policy, and authorize her to receive, collect, and receipt for any money that may be paid thereon.

"DANIEL SNYDER.
"ELIZABETH SNYDER.
DESYLVIA SNYDER."

"Witness: A. PERRY.

The policy of insurance, with the written indorsement thereon, was at the time of its execution delivered to Mrs. C. M. Parker, who paid a valuable consideration therefor. On November 14, 1883, Daniel Snyder died. After the death of Daniel Snyder, and prior to August 2, 1884, Mrs. Parker wrote the word "Canceled" across the face of said assignment, on the back of the policy, and signed the same: "Canceled. C. M. PARKER." Mrs. Parker then delivered the policy to Elizabeth Snyder and Desylvia Kinsey *nee* Snyder. On August 2, 1884, Elizabeth Snyder and Desylvia Kinsey executed another written instrument of assignment on the back of the policy, as follows:

"For value received, we hereby sell and assign to Joseph McCrum the within policy, and authorize him to collect the same.

"ELIZABETH SNYDER.

"DESYLVIA KINSEY.

"August 2, 1884."

At said time Elizabeth Snyder and Desylvia Kinsey delivered the policy of insurance, with all the indorsements thereon, to Joseph McCrum, who commenced this action to recover the amount of the insurance policy in the court below. Mrs. Parker was not in any way related to nor a creditor of Daniel Snyder. The proof of death of Daniel Snyder was presented on behalf of Mrs. Parker about December 26, 1883, and this embraced the affidavits of Elizabeth Snyder and Desylvia Kinsey, and also the certificate of the physician who attended Daniel Snyder to the time of his death.

Under the circumstances, we do not think that McCrum can recover upon the policy. It was decided in *Insurance Co. v. Sturges*, 18 Kan. 93, that "a person who has no interest in another's life cannot purchase or take by assignment an insurance policy on such life. Such a thing would be clearly against public policy, and is not authorized by law." To the same effect are *Warnock v. Davis*, 104 U. S. 775; *Gilbert v. Moose*, 104 Pa. St. 74; *Ruth v. Katterman*, 112 Pa. St. 251; S. C. 3 Atl. Rep. 833; May, Ins. (2d Ed.) § 74.

The exact question now at issue was not passed upon in *Insurance Co. v. Sturges*, because in that case the insurance company only claimed the assignment was void. Mrs. Parker, who accepted the assignment and paid for the policy, had no insurable interest in the life of the insured. Therefore the policy was not assignable to her. She took the policy solely for the purpose of speculation. The speculation was upon the life of the insured, and the sooner that was determined the better the speculation. The policy so obtained was a mere wager, and void. The sale and transfer thereof to Mrs. Parker by Elizabeth and Desylvia Snyder, the beneficiaries, was an attempted fraud upon the insurance company by which it was issued. After Mrs. Parker took the policy, if she could collect anything thereon, she was thereby directly interested in the early death of the insured. The insurance company issuing the policy did not intend it should reach or belong to any one directly interested in his death. The law will not permit a person thus interested to enforce a policy of insurance. All such speculation or traffic in human life, independent of any statute, is condemned as being against public policy, and therefore not to be tolerated.

All the time Mrs. Parker had possession of the policy she believed that upon the death of the insured she would be paid the full amount thereof. All this time she was directly interested in the speedy death of the insured. This policy was placed in her possession, not only with the written consent of the beneficiaries, but upon a valuable consideration paid to them for the same. They therefore aided in creating in the mind of Mrs. Parker a desire for the early death of the insured. They held out to her the temptation to bring about the event insured against. Mrs. Parker was not successful in obtaining any money upon the policy, because she ascertained after the service of proof of death by her that it could not be collected in her hands, and

therefore handed the same back to the beneficiaries. The law does not tolerate attempted frauds any more than it does those that are consummated. In making the transfer and assignment, and in receiving the money therefor, the beneficiaries, Elizabeth and Desylvia Snyder, were participants with Mrs. Parker in the attempted fraud upon the insurance company. The whole transaction between the beneficiaries and Mrs. Parker contravenes public policy, and the law leaves the parties as it found them. As Mrs. Parker cannot enforce the policy, and as the transfer and assignment of the policy to Mrs. Parker by the beneficiaries is against public policy, and under the ban of the law, the beneficiaries ought not to be permitted to enforce the policy. Their assignee (McCrum) stands in their shoes, and is entitled to no greater rights or privileges than they are.

If Mrs. Parker, before the death of the insured, had demanded from the beneficiaries the money that she had paid for the assignment, upon the ground that the sale to her was void, she could not have recovered. If the beneficiaries can now recover, they are doubly benefited by the questionable transaction in which they were engaged—*First*, by receiving the value of the policy from Mrs. Parker; and, *second*, by receiving the value of the policy again from McCrum. It was said in the case of *Gilbert v. Moose, supra*, that "so fraught with dishonesty and disaster, and so dangerous to even human life, has this life insurance gambling become, that its toleration in a court of justice ought not for a moment to be thought of." If the party who attempts to speculate in human life cannot enforce the policy which he has purchased on the life of another, in whose life he has no insurable interest, the beneficiaries, who knowingly and purposely sell and assign to such a person the policy on the life of another for a valuable consideration, ought not thereafter to be permitted to enforce the same for their own benefit. If, under all the facts of this case, the beneficiaries, or their assignee, could recover, the law forbidding the assignment of policies of insurance to parties who have no insurable interest might be readily avoided. If Mrs. Parker had been a creditor of the insured for any sum, the assignment would have been a valid contract, as security for the same. And, upon the death of the insured, the assignee could have collected any sum lent to or owed by the insured, and the balance would have belonged to the beneficiaries or their assignee. Such a case is not presented.

Frank v. Mutual Life Ins. Co., 6 N. E. Rep. 667, (New York court of appeals,) is referred to as an authority that the beneficiaries can maintain an action upon the policy notwithstanding the assignment to Mrs. Parker. The courts of New York hold that a valid policy of insurance, effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the insured, to the full sum payable, without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the insured. *St. John v. Insurance Co.*, 13 N. Y. 31; *Valton v. Assurance Co.*, 20 N. Y. 32. This court refused to follow the decisions of New York in *Insurance Co. v. Sturges*. The decision in *Frank v. Insurance Co., supra*, was rendered under a statute making a policy procured on the husband's life, for the benefit of the wife, unassignable. The validity of an assignment of a policy to one having no insurable interest in the life of the insured did not enter into the case. There was a want of power to assign. Therefore that case has no affinity with the one under consideration.

Finally, it is insisted, as there is no claim in the answer of the insurance company that the assignment of the policy to Mrs. Parker was invalid, the insurance company had no right subsequently to urge that the assignment was worthless, or the policy non-enforceable on account of such assignment. The issues of a case are made up from all of the pleadings. The amended reply of the plaintiff below stated that Mrs. Parker "had no insurable interest in

the life of Daniel Snyder, and that the assignment to her was void." The question is whether, upon the whole case as presented, the plaintiff is entitled to recover. It is not for the sake of the insurance company that the transactions between the beneficiaries and Mrs. Parker are held wrongful, but such rule is founded on general principles of public policy forbidding speculative contracts upon human life. In all such cases the courts ought not to lend their aid to assist parties engaged in the perpetration, or attempted perpetration, of such wrongful speculations. *Hinnen v. Newman*, 35 Kan. 709; S. C. 12 Pac. Rep. 144; *Insurance Co. v. Sturges, supra*.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

(*36 Kan. 165*)

WARDEN v. SABINS and others.

(*Supreme Court of Kansas. January 7, 1887.*)

MECHANIC'S LIEN—PRIORITY—OTHER INCUMBRANCES—DEED.

Under the provisions of article 27, c. 80, Comp. Laws 1879, the lien of a mechanic or material-man for work done or material furnished, has preference to "all other liens and incumbrances" which may attach to or upon the lands or buildings subsequent to the commencement of the building or the making of the repairs, or the furnishing of the material; and the words of the statute "of all other liens and incumbrances" also embrace conveyances.

(*Syllabus by the Court.*)

Error from Marshall county.

On November 16, 1884, W. H. Sabins commenced his action in the district court of Marshall county to enforce a mechanic's lien, amounting to \$19.50, with interest, upon the premises described as lots 49 and 50, in block 25, in the town of Irving, in that county. James S. Warden, B. Smith, William Murphy, Jr., and J. Armstrong were named defendants. William Murphy, Jr., made default, and the other defendants filed answers and cross-petitions. On March 25, 1885, the following agreed statement of facts, omitting court and title, was filed in the case, with the clerk of the district court:

"It is hereby stipulated and agreed, by and between the plaintiff, William H. Sabins, and the defendants James S. Warden, B. Smith, and Joe Armstrong, that the matters herein in controversy be submitted to the court upon this agreed statement of facts, which are all the facts in the case:

"First, that all the allegations, statements, and averments made and contained in petition of plaintiff, William H. Sabins, and in the answers and cross-petitions of the defendants B. Smith and Joe Armstrong, are true, and that the said plaintiff and the said defendants, B. Smith and Joe Armstrong, are entitled to judgment as prayed for in the petition of plaintiff, and in the answers and cross-petitions of B. Smith and Joe Armstrong, unless defeated by the facts contained in statement No. 2 herein.

"No. 2. That on the twenty-fifth day of April, A. D. 1884, the defendant, James S. Warden, purchased from William Murphy, Jr., for the consideration of \$300, lots 49, 50, in block 25, Irving, Kansas, described in the petition of plaintiff, and in the answers and cross-petitions of B. Smith and Joe Armstrong, and on said day received from said Murphy a deed duly executed, with full covenants of warranty, and which said deed was duly filed for record in the office of register of deeds of this county, on the twenty-ninth day of April, 1884, and was duly recorded in the office of the register of deeds of said county.

"WILLIAM H. SABINS,
"B. SMITH, and
"JOE ARMSTRONG,
"By J. N. BROUGHTON, their Attorney.
"JAMES S. WARDEN,
"By GEORGE C. BROWNWELL, his Attorney."

Trial had at the March term for 1885, a jury being waived, and the issues being submitted, by the parties appearing, to the court, upon the agreed statement of facts.

After argument, and consideration thereof, the court found generally in favor of the plaintiff, W. H. Sabins, and also in favor of B. Smith and Joe Armstrong, and against William Murphy, Jr., and James S. Warden. Judgment was rendered thereon for W. H. Sabins against William Murphy, Jr., for \$20.50, and in favor of B. Smith, against William Murphy, Jr., for \$31.75, and in favor of J. Armstrong against William Murphy, Jr., for \$95. The court decreed that said judgments were concurrent liens upon the premises described in the petition, and that the parties recovering the judgments were entitled to have their respective liens enforced against said real estate. The court further decreed that the rights and interests of James S. Warden were subject to and inferior to the said liens of W. H. Sabins, B. Smith, and J. Armstrong. James S. Warden filed and presented his motion for a new trial, which was overruled. He excepted, and brings the case to this court.

A. E. Park and Brownell & Gregg, for plaintiff in error. *John A. Broughton*, for defendants in error.

HORTON, C. J. The mechanics' liens allowed by the trial court were as follows: W. H. Sabins, \$20.50, for work and labor performed April 15, 16, and 17, 1884; B. Smith, \$31.75, for material furnished from March 22, 1884, to April 16, 1884; and J. Armstrong, \$95, for material delivered between February 1, 1884, and April 17, 1884. The first lien was filed May 10, 1884; the second lien, May 13, 1884; and the third lien, May 17, 1884. Warden purchased the premises from William Murphy, Jr., the owner thereof, April 12, 1884, for the consideration of \$800, and received a warranty deed, which was duly filed for record April 29 of that year. Hence the question for our determination is whether the sale of the premises, in good faith, by Murphy to Warden, before the mechanics' liens were filed, prevented the acquisition of any lien, where Warden had no actual notice of the amount thereof.

Section 630, art. 27, c. 80, Comp. Laws 1879, reads as follows: "Any mechanic or other person who shall, under contract with the owner of any tract or piece of land, his agent or trustee, or under contract with the husband or wife of such owner, perform labor, or furnish material for erecting, altering, or repairing any building, or the appurtenances of any building, or any erection or improvement, or shall furnish or perform labor in putting up any fixtures or machinery in or attachment to any such building or improvement, or plant or grow any trees, vines, and plants, or hedge or hedge fence, or shall build a stone fence, or shall perform labor or furnish material for erecting, altering, or repairing any fence on any tract or piece of land, shall have a lien upon the whole tract or piece of land, the buildings and appurtenances, in the manner herein provided, for the amount due to him for such labor or material, fixtures or machinery. Such liens shall be preferred to all other liens and incumbrances which may attach to or upon such lands, buildings, or improvements, or either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, or planting or growing of such trees, vines, or plants, or hedge or hedge fence or stone fence, or the making of any such repairs or improvement; and if any promissory note, bearing not exceeding 12 per cent. interest per annum, shall have been taken for any such labor or material, it shall be sufficient to file a copy of such note, with a sworn statement that said note, or any part thereof, was given for such labor or material used in the construction of any such building or improvement, in the office of the district clerk; and it shall be necessary to file a list of items used, and the lien shall be for the principal and interest aforesaid, as specified in said note."

The section quoted expressly provides that "such liens shall be preferred to

all other liens and incumbrances which may attach to or upon such lands, buildings, or improvements, or either of them, subsequent to the commencement of such building, the furnishing or putting up of such fixtures or machinery, * * * or the making of any such repairs or improvement." Therefore it is clear, from the language adopted, that the lien of the contractor or material-men must be preferred to all other liens and incumbrances upon the premises subsequent to the commencement of the building, the making of the repairs, or the furnishing of the material. The time when the lien is to be considered as acquired depends upon the provisions of the statute, as, independent of the statute, no such lien exists. The claims of mechanics and material-men are better protected if the commencement of the work, and the furnishing of the material, is the period from which the liens should date. The question arises, upon the statute, whether a conveyance is included in the words "all other liens and incumbrances."

The word "incumbrance" is a broader term than "lien," and yet, when the statute of Indiana only provided that "the liens created shall relate to the time when the persons furnishing materials began to furnish the same, and shall have priority over all liens suffered or created thereafter," etc., the supreme court of that state decided the lien of the mechanic related to the time when the work commenced, or the materials began to be furnished, as to "subsequent conveyances" as well as to other liens. *Fleming v. Bumgarner*, 29 Ind. 424. The same question was before the Indiana court in *Kellenberger v. Boyer*, 37 Ind. 188. The court followed the decision in *Fleming v. Bumgarner*, and said the construction given to the statute in that case did not extend the operation of the act beyond its evident spirit and the legislative intention. An incumbrancer is one who has a legal claim upon an estate, and the purchaser of premises under a conveyance is the holder of the legal estate. An absolute conveyance is an incumbrance in the fullest sense of that term. We do not think, therefore, that the preference given to the lien of the contractor or material-man, which operates "over all other liens and incumbrances," is confined solely to subsequent liens or mortgages, but also embraces "conveyances." In adopting this rule, no injustice is done to the purchaser, as the work itself, or the material furnished, is notice to all of the mechanics' or material-men's claims. Phil. Mech. Liens, (2d Ed.) 380, § 227; *Austin v. Wohler*, 5 Bradw. 330; *Gault v. Deming*, 3 Phila. 337; *Hahn's Appeal*, 39 Pa. St. 409.

The cases cited from New York by counsel for defendant below are not applicable, as the statute in that case makes the filing of the notice of the mechanic's lien the time when the lien is to commence. In this state the statute is different. *Noyes v. Burton*, 17 How. Pr. 449; S. C. 29 Barb. 631.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(36 Kan. 106)

SNAVELY v. ABBOTT BUGGY CO.

(Supreme Court of Kansas. January 7, 1887.)

1. REPORT AND CASE MADE—AMENDMENT.

A case made for the supreme court cannot be amended or supplemented in the supreme court by inserting anything therein, or attaching anything thereto, which did not belong to the "case made," and constitute a part thereof, when it was originally settled and signed by the judge, and attested by the clerk of the court below.

2. ERROR—ATTACHMENT—FINAL JUDGMENT.

An order of the district court overruling a motion to discharge an attachment is not reviewable in the supreme court until a final judgment has been rendered in the case.

(Syllabus by the Court.)

Error from Anderson county.

W. A. Johnson and *C. B. Mason*, for plaintiff in error. *Kirk & Hall* and *John W. Deford*, for defendant in error.

VALENTINE, J. This was an action brought on September 18, 1884, in the district court of Anderson county, Kansas, by the Abbott Buggy Company, a private corporation under the laws of the state of Illinois, against Moses B. Snavely, to recover \$540 on a promissory note. An order of attachment was also issued in the case, and levied upon certain property belonging to the defendant. On January 15, 1885, the court below overruled a motion of the defendant to discharge the attachment, and the defendant, without waiting for a trial upon the merits of the action, or for a final judgment to be rendered in the action, at once made a case for the supreme court. This case was served upon the opposite counsel on January 26, 1885, and was settled by the court below on February 9, 1885, and was brought to the supreme court on June 8, 1885. The only ground alleged for error is the *overruling* of the defendant's motion to dissolve the attachment. In this court, the defendant in error (plaintiff below) made a motion to dismiss the petition in error, for the reason that an order of the district court overruling a motion to discharge an attachment is not reviewable in the supreme court until after a final judgment has been rendered in the case. After this motion was made, the plaintiff in error (defendant below) moved the court for leave to file a transcript showing that a final judgment was rendered in the case in the court below on March 10, 1886. This transcript was a transcript of the judgment only, and of nothing else. On December 8, 1886, these motions, and the case upon its merits, were all submitted to the supreme court.

The first question to be considered in this court is whether the above-mentioned transcript may be filed as a part of the case in this court or not. We think not. The case has been brought to this court upon a case made for the supreme court, and such case made cannot be amended or supplemented in this court by inserting anything therein, or attaching anything thereto, which did not belong to the case made, and constitute a part thereof, when it was originally settled and signed by the judge, and attested by the clerk of the court below. *Transportation Co. v. Palmer*, 19 Kan. 471; *Parker v. Sewing-machine Co.*, 24 Kan. 31. Besides, the transcript which the plaintiff in error now desires to file is a transcript of a judgment only which was rendered nine months after the case was brought to this court. A case can be determined in this court only upon a transcript of the proceedings of the court below, or upon a case made for the supreme court, (Civil Code, § 546;) and it cannot be determined partly upon one and partly upon the other. The motion of the plaintiff in error will therefore be overruled.

The next question to be considered in this case is the one arising upon the motion of the defendant in error (plaintiff below) to dismiss the action from this court, upon the ground that this court has no jurisdiction to hear and determine a case where no final judgment has been rendered in the case, and where the only alleged ground for error is the overruling of a motion to discharge an attachment. The principal statutes necessary to be considered upon this question are sections 542 and 543 of the Civil Code, which read as follows:

"Sec. 542. The supreme court may reverse, vacate, or modify a judgment of the district court for errors appearing on the record; and, in the reversal of such judgment or order, may reverse, vacate, or modify any intermediate order involving the merits of the action, or any portion thereof. The supreme court may also reverse, vacate, or modify any of the following orders of the district court, or a judge thereof: *First.* A final order. *Second.* An order that grants or refuses a continuance; discharges, vacates, or modifies a provisional remedy; or grants, refuses, vacates, or modifies an injunction; that grants or refuses a new trial, or that confirms or refuses to confirm the re-

port of a referee, or that sustains or overrules a demurrer. *Third.* An order that involves the merits of an action, or some part thereof.

"Sec. 543. An order affecting a substantial right in an action, when such order in effect, determines the action, and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed as provided in this article."

It will be seen from the foregoing statutes that the legislature has provided specifically and with great minuteness just what judgments and orders of the district court may be reversed, vacated, or modified by the supreme court. These judgments and orders, which may be so reversed, vacated, or modified, are—*First*, all judgments for errors appearing of record, together with all intermediate orders involving the merits of the action, or some portion thereof; *second*, all final orders; *third*, various orders respecting continuances, provisional remedies, injunctions, new trials, reports of referees, demurrers, and such other orders as involve the merits of the action, or some part thereof.

Under the foregoing statutes, an order may be reversed, vacated, or modified which grants or refuses a continuance, grants or refuses an injunction, grants or refuses a new trial, confirms or refuses to confirm the report of a referee, sustains or overrules a demurrer, or involves the merits of an action, or some part thereof; and the above-quoted statutes use all the foregoing italicised words, but they do not use any one of them with reference to provisional remedies, except with reference to injunctions, which provisional remedies include arrest and bail, replevin *pendente lite*, attachment, temporary or interlocutory injunctions, receivers, and the depositing of money, etc., under sections 559 and 560 of the Civil Code. With reference to all provisional remedies, except injunctions, the statutes use only the words "discharges," "vacates," and "modifies." Hence, as the statutes show, it was clearly not the intention of the legislature that an order of the district court granting, refusing, confirming, or sustaining a provisional remedy, except as to injunctions, should be reviewed in the supreme court prior to the final judgment in the case; nor was it the intention of the legislature that an order "involving the merits" of a provisional remedy, except as to injunctions, should be reviewed by the supreme court prior to such final judgment, unless such order discharged, vacated, or modified the provisional remedy. The legislature had the whole subject of the reviewing of judgments and orders under consideration, and evidently, from the language used, it did not intend that an order granting, refusing, confirming, or sustaining any provisional remedy, except an injunction, should be re-examined by the supreme court prior to the final judgment. If the legislature had intended that such orders might be reviewed in the supreme court prior to the final judgment, it could easily have said so in plain language; for it did say so in plain language with respect to matters other than provisional remedies, and it said so even with respect to injunctions.

In this present case, the order sought to be reversed is one sustaining and confirming an attachment,—a provisional remedy,—or, in other words, the overruling a motion to discharge an attachment; and it is an interlocutory order in a provisional remedy, and is not in any sense a final order. It has been suggested that, under section 543 of the Civil Code, such an order may be considered a final order in a special proceeding; but how can an interlocutory order in a provisional remedy be a final order in a special proceeding? In the first place, is a provisional remedy a special proceeding? Mr. Clemens, in his work on Appellate Jurisdiction, says it is not. On page 13 of that work, he uses the following language: "The Code devides remedies into actions and special proceedings; and a special proceeding is defined to be any other mode of asserting a right, or seeking the redress or prevention of an injury, than by a regular, formal action. It must, however, be distinguished

from a provisional remedy, which is not a *special*, but a merely *collateral*, proceeding, permitted only in connection with a regular action, and as one of its incidents. The test, therefore, to be applied under this provision is, was this order made in an action? If it was, no matter whether concerning the cause of action itself, or with reference to a provisional remedy, then it was not made in a special proceeding. Orders made in proceedings for condemnation of lands under the power of eminent domain; in road cases appealed from county boards, final orders made on proceedings for contempt, even when the contempt itself consisted in the disobedience of an injunction; an order disbarring an attorney; an order setting aside levies upon property, and directing distribution by a receiver; an order discharging or charging a garnishee; an order made in an action brought to vacate a judgment, and for a new trial, for fraud and irregularity,—have been held to be orders of this class; and these instances sufficiently indicate the meaning given to the term "special proceeding." *Final* orders made in such cases are really in the nature of judgments.

But, whether a provisional remedy is a special proceeding or not, certainly an *interlocutory* order in a provisional remedy is not and cannot be a *final* order in a special proceeding. If it be claimed that the legislature intended that the *final* order mentioned in section 542 of the Civil Code, and the *final* order in a special proceeding mentioned in section 543 of the Civil Code, should include orders generally, whether they are in their natures final or only interlocutory, and whether they are involved in the main action or proceeding, or only in some provisional remedy, then it must also be claimed that the legislature was guilty of the inexcusable folly of enacting specifically and expressly that any order of the district court which discharges, vacates, or modifies a provisional remedy, (including arrest and bail, replevin *pendente lite*, attachment, temporary or interlocutory injunctions, receivers, and the depositing of money, etc., under sections 559 and 560 of the Civil Code,) or which grants or refuses an injunction, shall be reviewable in the supreme court, and then, at the same time and in the same section, enacting impliedly the very same thing over again. Why should the legislature enact the same thing twice in the same section? If the words "a final order" will include all orders, interlocutory as well as final, and orders in all kinds of proceedings, provisional as well as the main or principal proceeding, why again, in the same section, enact specifically and minutely what these general words will cover? Also, as the legislature mentioned certain specific orders relating to many specific things which might be reviewed in the supreme court, why should it be supposed that the legislature also intended, by the use of general language in the same section, to include still other orders *not mentioned anywhere* in the statutes? As the legislature used the words "discharges," "vacates," and "modifies" with respect to provisional remedies, why should it be thought that the legislature also intended to use the words "grants," "sustains," and "confirms" with respect to such remedies, when in fact the legislature did not use them at all with respect to such remedies, except injunctions, but expressly used them with respect to other proceedings? *Expressio unius est exclusio alterius*. And, as it seems that the legislature intended to cover certain grounds with express and specific provisions, why attempt to make certain general provisions cover the same ground by implication? And why attempt unnaturally, and by a forced construction and against the clear intention of the legislature, to make the word "final" mean "interlocutory?"

The cases of *Watson v. Sullivan*, 5 Ohio St. 42, and *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1, have been referred to; but, as the statutes of Ohio prescribing what matters may be reviewed by the supreme court of Ohio are very different from the statutes of Kansas upon the same subject, those cases can have but little or no application to the present case. The following cases, however, do have application to this case, and, under them, it must be

held that an order of the district court overruling a motion to discharge an attachment is not reviewable in the supreme court prior to the final judgment in the action. *Hottenstein v. Conrad*, 5 Kan. 249; *Kansas R. M. Co. v. Atchison, T. & S. F. R. Co.*, 31 Kan. 90; S. C. 1 Pac. Rep. 274. See, also, in this connection, and as having some application to this case, the following cases: *Savage v. Challiss*, 4 Kan. 319; *Brown v. Kimble*, 5 Kan. 80; *Edenfield v. Barnhart*, Id. 226; *Burton v. Boyd*, 7 Kan. 17; *Dolbee v. Hoover*, 8 Kan. 124; *McCulloch v. Dodge*, Id. 476; *Stebbins v. Laird*, 10 Kan. 229; *Kennedy v. Beck*, 15 Kan. 555; *Hockett v. Turner*, 19 Kan. 527; *Atchison, T. & S. F. R. Co. v. Brown*, 26 Kan. 443.

Again, referring to the statutes, and considering the fact that the legislature, in passing the statutes, used the words "grants," "refuses," "confirms," "sustains," "overrules," and "involves the merits," with reference to other orders than those relating to attachments, but omitted them with reference to the only class of orders which could possibly have any reference to attachments, we might ask, why should we apply them to attachments? Will it be claimed that, when the legislature used these words with reference to certain orders, and omitted them with reference to certain other orders, that the statutes should nevertheless be construed in the same manner as though these words had been used with reference to all the orders? Such would be against all proper canons of construction.

We think the order of the district court overruling the defendant's motion to discharge the attachment is not reviewable in this court. Entertaining these views, it follows that the case must be dismissed from this court.

(All the justices concurring.)

(36 Kan. 112)

SNAVELY v. GEORGE K. OYLER MANUF'G CO.

SAME v. KINGMAN and others.

(*Supreme Court of Kansas*. January 7, 1887.)

VALENTINE, J. It is understood that precisely the same questions are involved in the cases of *Snavely v. George K. Oyler Manuf'g Co.* and *Same v. Kingman*, that are involved in the preceding case; and therefore, upon the authority of that case, and for the reasons therein given, these two cases will likewise be dismissed.

(All the justices concurring.)

(36 Kan. 138)

Souders v. Voorhees.

(*Supreme Court of Kansas*. January 7, 1887.)

CHATTTEL MORTGAGE—DESCRIPTION OF PROPERTY—UNCERTAINTY.

The description of property in chattel mortgage was: "Six hundred bushels of corn growing, located and being on the west half of section thirty-six, town three south, of range eight east. If said corn matures before the maturity of the note secured by this mortgage, the said Burnside to shuck the same, and put in cribs on the premises above described." The mortgagor remained in possession of the corn; and, although there were more than 1,000 bushels on the tract described, there was no separation or identification of the part intended to be conveyed. Some of the corn was of good quality, while other portions were very inferior in quality. While it was yet standing and unharvested, it was attached at the instance of a creditor of the mortgagor, and replevied by the mortgagee. Held, that the chattel mortgage is void for uncertainty in the description of the property intended to be conveyed.

(*Syllabus by the Court.*)

Error from Marshall county.

This was an action of replevin, brought by W. L. Souders before a justice of the peace to recover the possession of a quantity of corn which he claimed by virtue of a chattel mortgage lien, and which had been levied on and taken possession of by Jacob R. Voorhees, as sheriff, under an execution and at-

tachment. The trial there resulted in favor of the plaintiff, and the defendant appealed the case to the district court, where it was tried by the court upon an agreed statement of facts, which were as follows:

"(1) This action was commenced November 7, 1883, before J. M. SHUMATE, justice of the peace, and is regularly in this court, on appeal from the judgment of said justice.

"(2) The defendant was, at the time of the commencement of this action, and for a long time previous, the sheriff of Marshall county, Kansas; and as such sheriff he had, before the commencement of this action, levied an execution and an attachment on all the corn growing and standing on the west $\frac{1}{2}$ of section thirty-six, township 3 south, range 8 east, in said county, except fifteen acres thereof off the west end of the piece on the south-west quarter of said section, south of the house, and was holding the same under and by virtue of said writ when this action was commenced.

"(3) All the corn standing and growing on said half section of land at the time of the levy of said writs was the property of one Thomas Burnside, and in his possession, and the corn so levied on was levied as the property of the said Thos. Burnside.

"(4) At the time the defendant so levied on said corn, and at the time of the commencement of this action, the said Thomas Burnside was owing the plaintiff the full amount of principal and accrued interest on his note, of which the following is a copy: [Said note heretofore set up in this made case, and marked 'A.'].

"(5) At the date of said note, said Thomas Burnside gave plaintiff a chattel mortgage to secure the same, which was regularly filed in the office of the register of deeds of said county, September 19, 1883, and before said corn was levied on by defendant, all parties having notice thereof. The following is a copy of said chattel mortgage: [Which has been heretofore described in this made case, marked 'B,' and made a part thereof.]

"(6) That at the time said chattel mortgage was given all of the corn on said land was green and growing, and not in a condition to be harvested, and was ripe, and in condition to be harvested before maturity of said note; and there was then over one thousand bushels of the corn which had been levied on by the defendant, some of which was of good quality, and some of very inferior quality, and of less value, and in addition thereto there was a large amount of stalks and fodder.

"(7) No particular parts of the corn growing or grown on the premises was ever designated by any person as being the corn mortgaged, or intended to be mortgaged, by Burnside to plaintiff.

"(8) Said corn was subject to levy as the property of said Burnside, and the levy made by defendant was regular and valid, except as the levy, and the right to levy, was affected by the existence of said chattel mortgage.

"(9) This is an action of replevin brought by plaintiff while defendant was in possession as sheriff of the corn levied on as aforesaid, a demand having been made before suit.

"(10) In plaintiff's affidavit in replevin in this action the property sought to be taken is described as six hundred bushels of corn growing and being on the west half of section thirty-six, town three, range eight east, of the value of ninety-nine dollars, and said defendant states that plaintiff has a special interest therein under a chattel mortgage given to plaintiff by Thomas Burnside, September 18, 1883.

"(11) No property was actually taken or attempted to be taken by virtue of the writ of replevin, but, when said writ was served on defendant, a redelivery bond was given, and defendant retained possession of the property until he sold the same at sheriff's sale.

"(12) At the commencement of this action Frankfort was the nearest and best market for the premises where said corn was raised, and at that time

new corn in Frankfort was worth 20 to 22 cents per bushel at the elevator, and it was worth 8 to 10 cents per bushel to husk the corn, and haul the same to Frankfort."

Upon these facts the court gave judgment in favor of the defendant, finding that he was entitled to the possession of the property, and of this judgment the plaintiff complains.

A. E. Park and Brownell & Gregg, for plaintiff in error. *Mann & Patterson*, for defendant.

JOHNSTON, J. The plaintiff brought replevin to recover the possession of 600 bushels of corn which the defendant, as sheriff, had levied on, and was holding under an attachment and an execution. In 1883, Thomas Burnside was the owner of a growing crop of corn, and on September 18, 1883, he executed a chattel mortgage upon a portion of the growing corn to secure the payment of \$119.75 which he owed to the plaintiff. In the following month the corn was seized by the defendant, and the validity and regularity of the process under which it was taken is conceded. The plaintiff claims the property under the chattel mortgage, and the sole question presented for decision is whether the mortgage is void for uncertainty in the description of the property intended to be conveyed. The description given in the mortgage is: "Six hundred bushels of corn growing, located and being upon the west half of section thirty-six, town three south, of range eight east. If said corn matures before the maturity of the note secured in this mortgage, the said Burnside to shuck the same, and put in cribs on the premises above described." We regard the description to be insufficient. The corn was green and growing when it was mortgaged, and remained in the possession of the mortgagor until it was levied on. There was no identification of the corn when the mortgage was made, and no portion was ever designated or set apart as that which was mortgaged, or intended to be mortgaged. There was considerable more corn on the tract described than the quantity mentioned in the mortgage. It was not uniform in quality or in value, as it is stated as a fact that some portions of the crop were good in quality, others very inferior, and on still other parts of the tract there were only stalks and fodder. How, then, was the corn to be designated? What portion of the tract was the mortgaged corn to be taken from? What quality of corn was conveyed,—the good, the inferior, or the very inferior? By whom was the separation or selection to be made? In what way could the description be made definite and certain? Counsel for plaintiff have not satisfactorily answered these questions. The general rule of law is that the mortgage of a number of articles out of a larger number is void for uncertainty when the particular articles intended to be conveyed are not separated or designated in any way so that they can be distinguished from others of the same kind. Jones, Chat. Mortg. § 56.

In *Savings Bank v. Sargent*, 20 Kan. 576, it was said that "the description of property in a chattel mortgage to be good should contain either some hint which would have directed the attention of those reading it to some source of information beyond the words of the parties to it, or something which will enable third persons to identify the property, aided by inquiries which the mortgage indicates and directs, or a description which distinguishes the property from other similar articles."

There was nothing in the description here given which would enable any one to identify the property covered by the mortgage, nor was there anything on the face of the instrument that would afford a clue by which the part intended to be conveyed could be distinguished from that reserved. It is unlike the cases where the whole or some aliquot part of a crop growing on a definite tract is conveyed; and as the corn included in this mortgage is a part of a greater quantity, made up of different grades and values, it is unlike a case where the articles mortgaged are a definite part of an ascertained quan-

tity of uniform quality and value; and therefore the cases relied on by the plaintiff are plainly distinguishable from the present case.

In *Brown v. Holmes*, 13 Kan. 482, there was a description of the age and kind of the cattle intended to be conveyed, and where and by whom they were held. This, with inquiries suggested by the mortgage, was sufficient to enable third persons to identify the property; and the same may be said of the description that was given in the case of *Mills v. Kansas Lumber Co.*, 26 Kan. 574.

In *Shaffer v. Bicker*, 22 Kan. 619, the property designated was "two hundred and fifty stock hogs, owned by said D. B. Mott, in Franklin county, Kansas." It was urged there that as the mortgage and the record in the case did not show but what the mortgagor had other hogs of the same description, that the mortgage was void for uncertainty. The court held that the doubts, if any on that score, should be resolved in favor of the validity of the instrument instead of against it, and decided the case upon the theory that the hogs designated were all the mortgagor had of that description, and hence they were capable of identification.

Neither does *Sims v. Mead*, 29 Kan. 124, give any support to the plaintiff's theory; for there the description was an undivided two-thirds of a crop of wheat growing on a tract that was definitely described, so that there could be no doubt regarding the interest conveyed. None of the cases cited by plaintiff furnish any light or any rule by which the identity of property described, as was that in this case, may be ascertained; and, unless it is described so as to be capable of identification, the mortgage must be held void for uncertainty. *Tootle v. Lyster*, 26 Kan. 589; *Savings Bank v. Sargent*, 20 Kan. 576; *Golden v. Cockril*, 1 Kan. 259; *Richardson v. Alpena Lumber Co.*, 40 Mich. 203; *Hires v. Hurff*, 39 N. J. Law, 4; *Fowler v. Hunt*, 48 Wis. 345; S. C. 4 N. W. Rep. 481; *Muir v. Blake*, 57 Iowa, 662; S. C. 11 N. W. Rep. 621; *Williamson v. Steele*, 3 Len., 527; Herm. Chat. Mortg. § 42; Jones, Chat. Mortg. § 56. Judgment affirmed.

(All the justices concurring.)

(36 Kan. 144)

CLARK v. VOORHEES.

(Supreme Court of Kansas. January 7, 1887.)

CHATTEL MORTGAGE—DESCRIPTION OF GRAIN—UNCERTAINTY.

Where a chattel mortgage is given upon a certain number of bushels of grain out of a larger quantity, which is not uniform in quality and value, the whole of which remains in the possession of the mortgagor until it is attached by his creditors, and where the description in the mortgage, as well as the mortgage itself, gives no clue by which the part intended to be mortgaged can be distinguished by third parties from the remainder, the mortgage will be held void for uncertainty.

(Syllabus by the Court.)

Error from Marshall county.

A. E. Park, and *Brownell & Gregg*, for plaintiff in error. *Mann & Patterson*, for defendant in error.

JOHNSTON, J. This was an action of replevin, brought by Resin Clark to recover possession of 400 bushels of corn from J. R. Voorhees, the sheriff of Marshall county, who seized and was holding the same as such officer. The case is substantially the same in its facts as *Souders v. Voorhees*, ante, 526, (just decided.) The plaintiff claimed the corn by virtue of a chattel mortgage which was given by Thomas Burnside upon a horse and a quantity of corn, the corn being described as follows: "Four hundred bushels of corn now growing and being on the west half of section thirty-six, town three south, of range eight east, of the sixth P. M." There were over 1,000 bushels of corn upon the premises described, and it differed greatly in both quality and value. The corn was green and growing when the mortgage was executed, and no

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part of the same was designated or set apart as being the corn mortgaged, or intended to be mortgaged, by Burnside to Clark. It was levied on while it was yet standing in the field, and in the possession of the mortgagor, and before there was any separation of the 400 bushels from the balance of the corn in the field. Under these circumstances, we must hold the description in the mortgage to be insufficient. It is impossible for third persons to ascertain from the description, or by the aid of inquiries suggested by the mortgage itself, what particular part of the corn was intended to be mortgaged. The fact that the corn was not uniform in quality and value makes it all the more important and necessary that the mortgage should definitely designate the particular part intended to be covered by it. If a mortgage given on a small part of a growing crop, without any separation or change of possession, and with a description like this, that gives no clue by which third parties may know what part is mortgaged and what reserved, is to be upheld, then gross frauds can be easily committed. To hide away his entire crop from his creditors, a party need only give a chattel mortgage upon a few bushels of the whole product, describing it so imperfectly that neither creditors nor officers could distinguish the mortgaged portion from the remainder. The theory advanced by plaintiff cannot be sanctioned; and, following the case of *Souders v. Voorhees, supra*, we must concur in the ruling of the district court holding the mortgage to be void, and will therefore affirm its judgment.

(All the justices concurring.)

(70 Cal. 534)

ALAMEDA MACADAMIZING CO. v. WILLIAMS and others. (No. 8,194.)

(*Supreme Court of California. August 30, 1886.*)

1. **MUNICIPAL CORPORATIONS—IMPROVEMENT OF STREETS—AUTHORITY TO ORDER.**
Under an act authorizing a city council to order the whole or any portion of the street macadamized, the ordering of the macadamizing and improving of specifically described portions of a single street, which portion included the whole of the street between certain points, except certain portions which had already been improved and macadamized, so as to make the whole improvement uniform, is not in excess of the authority of the board.

2. **SAME—DEMAND OF ASSESSMENT—UNKNOWN OWNERS—PERSONAL DEMAND A NULLITY.**
Where, in cases of local improvements, the statute provides but one mode of making a demand, when the property is assessed to "unknown owners," and that is by demand on the premises, the courts cannot substitute another therefor, and a personal demand is a nullity.

3. **SAME—DEMAND IN HEARING OF PREMISES NOT A DEMAND ON THEM.**
A demand near to or in the hearing of the premises does not satisfy the requirements of a statute providing for a public demand on the premises.

4. **APPEAL—FINDING SUPPORTING JUDGMENT PRESUMED.**
When evidence is introduced on a certain point, in the absence of a showing to the contrary, and of written findings, it will be presumed that the court's finding supported the judgment.

5. **DEED—BOUNDARIES—SIDE LINE OF STREET.**
Land expressly described as being bounded by a side line of a street is so bounded, and not by the center line of the street.¹

Commissioners' decision.

In bank. Appeal from superior court. Alameda county.

George W. Gordon, for appellant. *James C. Martin*, for respondents.

SEARLS, C. This action was brought to foreclose a lien on block 52, East Fourteenth street, Oakland, based upon a street assessment made by the municipal authorities of the city of Oakland. Plaintiff had judgment, from which, and from an order denying a new trial, defendant Williams appeals.

The first point made by appellant is that the council exceeded its jurisdic-

¹See note at end of case.

tion in attempting to let the work of macadamizing several separate and distinct portions of Fourteenth street in one contract. The jurisdiction of the municipal corporation to improve the street is contained in the Statutes of 1863-64, p. 383, and in 1869-70, p. 443. Section 2 of the latter act is in these words: "The city council are hereby authorized and empowered to order the whole or any portion of the streets, lanes, alleys, * * * macadamized," etc.; including the power to grade, construct culverts, curbing, cross-walks, etc.

The resolution of intention to do the work as adopted by the city council, September 17, 1877, described the portion of East Fourteenth street to be macadamized as follows: "From the easterly line of First avenue to the westerly line of Fifteenth avenue," except certain portions which are specified, "all of which has already been macadamized to the official grade." The two acts above referred to confer upon the municipal authorities of the city of Oakland ample authority to open and improve the public streets of that city, in all the various modes by which those objects are usually attained, and they might improve "*the whole or any portion of the streets.*" The improvements to be made in this instance were confined to a single street, and included the whole surface thereof between certain terminal points, except certain portions which had already been improved and macadamized, and which portions were specifically described. There is no question but the city council clearly designated the portions of the street to be improved, and the character of the improvements to be made. Under such circumstances, we are of opinion the authority of the board was not exceeded by ordering the portions of the same street not yet improved to be macadamized so as to render it uniform with the portions already improved in that respect.

2. The court did not err in excluding the written protest offered in evidence. The *proposed work* was the macadamizing *certain portions* of East Fourteenth street, designating them; the construction of certain culverts and cross-walks, describing them, and their location, etc. The protest was "against the macadamizing of said East Fourteenth street, between the points named" as terminals, and did not relate to the cross-walks and culverts to be constructed, was not restricted to the portions to be macadamized, and professed to be made, not by the owners of property upon the portions of the street to be improved, but by property-owners on the line of East Fourteenth street, between First and Fifteenth avenues, *non constat* but that the protestants may have all been the owners of property upon the portions of the street already improved, and excepted from the work to be done. We may, however, waive these objections to the protest as technical; for it appears from the record that the issue was made by the pleadings as to whether a majority of the property-owners on the line of the street did in fact protest. At the trial the names of protestants and the number of front feet owned by each on the line of the work, were admitted, and we must presume, in the absence of written findings, that the finding on this issue was in favor of the plaintiff, who had judgment; and, as the admission of the plaintiff afforded defendant the benefit of the testimony which the protest would have furnished, he cannot complain.

3. Plaintiff introduced in evidence a book labeled "Book F, Street Assessment, Oakland," which defendant admitted was the proper street assessment book of the city of Oakland, in which the assessment mentioned in the complaint should have been recorded. Plaintiff's counsel then read therefrom the contract between the city marshal, as street superintendent, and the plaintiff herein, for the performance of the street improvements upon which the action is based; and, secondly, the record of the assessment, dated, "OAKLAND, June 4, 1878," signed by "J. R. CUTTING, Marshal City of Oakland," the diagram signed and dated in like manner, and the warrant attached thereto, authorizing and empowering the plaintiff to demand and receive the several

assessments upon the assessment and diagram thereto attached, which warrant was of like date, and signed by the marshal as in case of the assessment and diagram, and duly countersigned by the mayor. The record is verified as follows: "Recorded June 4, 1878. J. R. CUTTING, City Marshal of the City of Oakland." Then follows the contractor's return, showing a demand, and recorded and certified, as in case of the other record, on the sixth of July, 1878.

The defendant on his part introduced evidence tending to show that on the sixth day of July, 1878, the name of J. R. Cutting was not at the end or bottom of the assessment; that the recollection of the witness (D. H. Whittemore) was that it was not at the end of the diagram, but of that fact the witness was not certain; that his impression was the warrant was signed and countersigned.

We do not find in the record of this cause any objection on the part of defendant to the introduction of this testimony. The statement of the defendant in his specification of errors upon which he would rely on his motion for a new trial, (transcript, folio 205,) to the effect that he objected to the testimony and excepted to the decision admitting it in evidence, cannot be received as a properly authenticated exception. This is but his specification of an alleged error, and which, upon turning to the statement, proves to be without foundation. We do not understand that the judge who settles and certifies to the correctness of a statement on motion for a new trial thereby gives validity to the statement of fact in the specifications of error. The specification of errors is essential to a statement, but its office under section 659 of the Code of Civil Procedure is to call attention to the precise ground relied upon, and not to fortify the alleged error by a statement of facts in its support. The specifications may be amended after the time has expired for preparing and settling the statement on motion for a new trial. *Low v. McCallan*, 64 Cal. 2.

But waiving this question entirely, and we fail to find any error in the action of the court admitting the record of the assessment diagram, warrant, and return. Section 18 of the act of April 4, 1864, (St. 1863-64,) provides that "the records kept by the marshal of said city, [Oakland] in conformity with the provisions of this act, and signed by him, shall have the same force and effect as other public records, and copies therefrom, duly certified, may be used in evidence with the same effect as the originals." As a public record, the evidence offered being fair on its face and signed by the marshal, was proper to be admitted in evidence. So, too, the certificate of record signed by the marshal was sufficient to authenticate it as a record. The finding of the court below being in favor of plaintiff, and the court having the record before it, with all the evidence on the subject, we do not feel at liberty to disturb the result for this cause.

4. The several lots of land of the defendant were assessed to unknown owners, and the plaintiff herein, after receiving the assessment diagram and warrant, caused payment to be demanded of defendant as follows: *First*, by a demand upon the defendant personally; *second*, by a demand made upon each and every of the assessed lots, by standing on the sidewalk in front of and close to the fence bounding such lots, but not actually upon them, (unless such lots extended to the middle of the street,) and there make a demand in an audible voice.

The statute of April 4, 1864, (St. 1863-64, p. 338,) provides that the contractor or his agents or assigns shall call upon the persons assessed, if they can be found, and demand payment; but whenever they cannot be found, "or whenever the name of the owner of the property is stated as 'unknown' in the assessment, then the said contractor, or his agent or assigns, shall publicly demand payment on the premises assessed." The street seems, from the record, to have been filled in front of the lots of the defendant, so that

they, or a part of them at least, were in a hollow, and, so far as appears, such lots were unoccupied.

The questions presented are: *First*, did the lots in question extend to the middle of the street, so that the demand was in fact made by a person standing upon them? and, if not, then, *second*, was the demand so made, contiguous to the premises, and capable of being heard thereon, but by a person not actually standing upon the land, a sufficient compliance with the requirements of the statute?

Section 881 of the Civil Code is as follows: *First*, "an owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown;" and by section 1112 of the same Code it is provided that "a transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." The conveyance under which defendant holds the property is not before us. The contention of appellant is that the assessment and diagram show that the line of the lots runs along the margin of the street, *and not into it*. The assessment describes the property as "fronting upon East Fourteenth street, in said city," etc., and the diagram attached thereto, and to which reference is made, simply shows the lots on each side of the street and the several cross-streets. Were these the only sources from which to arrive at a conclusion, we should doubt their sufficiency to overcome the presumption of the Code; but, turning to the complaint, we find a specific description of defendant's several parcels of land, from which it appears that the margin or line of the street is the boundary of the land.

In *Severy v. Central Pac. R. Co.*, 51 Cal. 194, it was held that where a deed described the conveyed premises as running "thence along the easterly line of Sacramento street, one hundred and fifty feet," and no other language was employed to modify or affect this description, the eastern line and not the middle of Sacramento street was the boundary. *Maynard v. Weeks*, 41 Vt. 617; *Tyler v. Hammond*, 11 Pick. 193; *O'Linda v. Lothrop*, 21 Pick. 295. Land described in a deed as bounded by a street will be considered as bounded by the center of the street, unless it clearly appears that it was intended to make the side line of the street as a boundary instead of the center. *Moody v. Palmer*, 50 Cal. 31.

In the present case it does clearly appear from the complaint that the side line of the street is the boundary. To illustrate: In assessment No. 272 the land assessed is described as follows: "Commencing at the point of intersection of the westerly line of Second avenue with the northerly line of East Fourteenth street; running thence, westerly, along said line of East Fourteenth street, 145 feet; thence, at right angles, 140 feet; thence, at right angles, easterly, 145 feet, to the said line of Second avenue; thence southerly, along said line of Second avenue, 140 feet, to the point of commencement." With such a description, we hold the presumption that the lot runs to the center of East Fourteenth street and Second avenue is rebutted. There are four parcels of land described, all in like terms, and hence the conclusion is the same as to all the parcels.

As to the sufficiency of the demand made by a person not actually upon the premises. It is proper to say, before discussing this last question, that the demand made upon defendant personally was without authority of law. The statute provides but one mode of making a demand in cases where, as in the present, the property is assessed to "unknown owners," and that is by a demand upon the premises. It matters not that other methods may be as efficacious as the one provided. The law-makers have prescribed a method, and the courts are not at liberty to adopt a substitute therefor. This preliminary question disposed of, it only remains to determine the legality of the demand upon the premises made as hereinbefore stated.

The language of the statute is as follows: "Whenever the name of the owner of the lot is stated as 'unknown' in the assessment, then the said contractor, or his agent or assigns, shall publicly demand payment on the premises assessed." The contention of the respondent is that, if the person making the demand is in such close proximity to the premises that his voice can be heard thereon, all the objects of a demand are attained, and that a physical, corporeal contact with the premises by the person making the demand can add nothing to its efficiency, and such seems to have been the view of the court below. So far as the present case is concerned, at least, this view seems plausible. We must, however, give to this provision of the statute an interpretation alike applicable to all cases arising under it. If the demand may be legally made by one not actually upon the premises, then how far from such premises may he remain, and the demand still be held good? If it be answered that it may be made at any distance, provided the voice can be distinctly heard upon the premises, the response must be that the effect of this rule will tend to substitute the opinion of the person making the demand, as to whether he could be heard, for an essential fact in the case, and will tend to open a door for fraud. Premises of this character in a city will usually have an occupant, or some person in charge, to whom the presence of a person upon them in the attitude of an apparent trespasser will, in itself, many times attract attention, and cause the demand to be heard. Many reasons more or less cogent might be urged why the law-makers required a demand to be made upon the premises to be charged, but it is sufficient to say that the statute so requires, and that, in our opinion, by the term "on the premises" the law-makers meant, "by a person on the premises."

This provision seems to have been taken from the rule of the common law in relation to the demand of rent before entry or ejection, where, in order to claim a forfeiture, it was held that, in the absence of an agreement to the contrary, a demand must be made "upon the land, and at the most notorious place of it;" and such demand, it is said, must be made, although there be no person present to answer; and, as the tenant had the whole day upon which the rent fell due to make payment, the landlord or his agent, to complete the forfeiture, must not "only make the demand at the proper time and place, but must remain upon the land and continue the demand, actually or constructively, until after sunset." Wood, Landl. & Ten. § 452. And it was even held that a personal demand made off the land was not sufficient to work a forfeiture of a lease. The land was regarded as the debtor, and to create a forfeiture for non-payment of rent, the demand must be made upon it. So, in the present case, the land is charged with the payment of the assessment; and, where the owner is designated as "unknown," the statute is imperative in requiring the demand to be made *publicly on the premises*, and a demand made near to, in the neighborhood of, or within hearing of, the premises does not satisfy the requirements of the statute.

It follows that the demand, as made, was insufficient, and the judgment of the court below, and the order denying a new trial, should be reversed, and a new trial had.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

NOTE.

A deed bounding land by the side of a road conveys no title to land within the center of the highway. *Holmes v. Turner's Falls Co.*, (Mass.) 8 N. E. Rep. 646.

As to the construction of deeds in which land is described as bounded by a highway, see *Watkins v. Lynch*, (Cal.) 11 Pac. Rep. 808; *O'Brien v. King*, (N. J.) 7 Atl. Rep. 94;

Kohler v. Kleppinger, (Pa.) 5 Atl. Rep. 746, and note; Cleveland v. Obenchain, (Ind.) 8 N. E. Rep. 623; Chadwick v. Davis, (Mass.) 8 N. E. Rep. 601; Gaylord v. King, Id. 596.

(36 Kan. 113)

CHICAGO & ATCHISON BRIDGE CO. v. PACIFIC MUT. TEL. CO. and others.

(*Supreme Court of Kansas. January 7, 1887.*)

TELEGRAPH COMPANIES—BRIDGE OVER NAVIGABLE RIVER.

A telegraph company, in the exercise of eminent domain, instituted a proceeding to condemn and appropriate so much of a bridge as was necessary to support a line of magnetic telegraph proposed to be built, and for the construction, maintenance, and operation of the same. The bridge was built in pursuance of state and national legislation, and spans the Missouri river at Atchison, Kansas, where the river is navigable, and where it divides the states of Kansas and Missouri. The company owning the bridge, claiming that the condemnation proceeding was without authority of law, brought an action to enjoin the same, and to prevent any interference with the bridge. Held that, before the telegraph company can construct its line at the point named, it must file with the postmaster general a written acceptance of the restrictions and obligations imposed by congress in "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," approved July 24, 1866, and that the failure to file such acceptance is fatal to the condemnation proceeding.

(*Syllabus by the Court.*)

Error from Atchison county.

Everest & Waggener, for plaintiff in error. *Jackson & Royse*, for defendants in error.

JOHNSTON, J. This proceeding is brought by the Chicago & Atchison Bridge Company to reverse the ruling of the district court of Atchison county dissolving a temporary injunction which had been allowed against the Pacific Mutual Telegraph Company, and also Churchill J. White, E. G. Armsby, and Ed. W. Howe, who had been appointed commissioners in a condemnation proceeding. On the twenty-first day of May, 1886, the Pacific Mutual Telegraph Company presented a petition to the judge of the district court of Atchison county asking the appointment of three commissioners to appraise the value of the property proposed to be taken, and to assess the damage that the bridge company might sustain by the appropriation of "so much of the railroad and highway bridge which spans the Missouri at the city of Atchison, and which extends from the west bank of said river, in the state of Kansas, to the east bank thereof, in the state of Missouri, as may, from time to time, be deemed necessary for the construction, maintenance, and operation of a line of magnetic telegraph, and to erect poles, piers, abutments, arms, brackets, wires, and such other necessary fixtures for a magnetic telegraph as may, from time to time, be deemed necessary; and after the same is erected, and when necessary, to go upon said property to repair the said line of magnetic telegraph." The petition gave the details of the plan and materials to be used in the construction of the line, and the manner by which the wires would be attached to and supported upon the bridge. The application of the telegraph company was granted, and commissioners were appointed, who gave notice that, at a stated time, they would, in accordance with the prayer of the petition, proceed to make appraisalment of the property to be taken, and to assess the damages of the bridge company by reason of the construction of the line on the structure of the bridge company, when the present action was begun, and the temporary injunction allowed. On the motion of the defendants, the temporary injunction was vacated and discharged, and this ruling is the subject of complaint.

The bridge to which the telegraph company proposes to attach its wires is owned by the Chicago & Atchison Bridge Company, a consolidated company existing under the laws of Kansas and Missouri. It was built across the Missouri river at the city of Atchison, where the river is navigable, and

where it divides the states of Kansas and Missouri. It appears that, under an act of congress authorizing the construction of the Pacific Railroad system, there was granted to certain railroads the right and franchise to construct a bridge over the Missouri river at Atchison, Kansas, and the manner of its construction was therein provided. 13 St. at Large, c. 216, § 9. Afterwards the privileges, rights, and franchises granted by that act to the railroad companies for the building of the bridge were transferred to the bridge company, upon the conditions that the bridge should be constructed in the manner provided by congress, and the bridge company accepted the transfer, and assumed the obligations of the railroad companies, and thereafter constructed and completed the bridge in accordance with the terms and conditions of the act of congress, and of the assignment. The act of congress required the bridge to be built with suitable and proper draws for the passage of steam-boats, and in such manner as not to impair the usefulness of the river for navigation to any greater extent than such structures of the most approved character necessarily do. The bridge was built with a draw span, and the telegraph company claimed that the manner in which it proposed to construct and attach its line to the bridge would not interfere with the turning of the draw span, nor with the performance of the duties owing by the bridge company to the general government. The bridge company denies the validity of the condemnation proceeding, and insists that, for several reasons, the injunction should have stood, and been made perpetual.

It is claimed that the bridge is already devoted to a public purpose, and cannot be taken for another and different purpose than that contemplated by the charter and the act of congress under which it was built. It is urged that, if the bridge is burdened with the lines of the telegraph company, the use and purpose for which the bridge was built will be impaired and destroyed, and the plaintiff will be obstructed in discharging the obligation which it owes to the federal government. It is also said that no necessity exists for the building of its line upon this bridge; and, among other objections and complications, the plaintiff suggests that if the defendant acquires the right in the bridge which it seeks, and it should become necessary to remodel the entire structure, the defendant might interfere, and prevent it from being done. Counsel for the bridge company say that "such condemnation would, in any event, make a joint proprietorship between the bridge company and the telegraph company, with paramount right in neither. In case of necessary repairs of the bridge, how shall the necessary expense of such repairs be paid? Who shall determine the necessity of such repairs? If the telegraph company gets the right to appropriate so much of said bridge, from time to time, as it may deem necessary, this is a perpetual right, and in fact, if not in law, constitutes ownership,—at least, proprietorship. In that event, which company shall pay the taxes? If both, in what proportion? Who shall insure the bridge? If the telegraph company has an insurable interest, what is its proportion?"

We need not decide in this case whether this and other telegraph and telephone companies can place their wires and fixtures upon a structure which may not have been built with reference to supporting such burdens, and which is already devoted to a specific public use. We also pass over the question of necessity, and shall not undertake to determine whether the characteristics of the country in and about Atchison require the use of the plaintiff's bridge in order to afford the telegraph company an entrance to the state and city, or whether the telegraph company can, by the building of posts or piers in the river or upon the banks, or upon some of the islands of the river, gain an entrance into the state without interference with property in public use. These and other questions that have been presented are purposely passed over, for the reason that a preliminary and essential step which, in any event, is necessary to the validity of the condemnation proceeding has been omitted.

It is admitted that the Missouri river is a navigable one; and, under the commercial clause of the federal constitution, the power of congress over such rivers, and in regard to the bridging of the same, is supreme. It will also be conceded that the telegraph is an instrumentality of commerce; and, under the same constitutional provision, it, like other commercial agencies engaged in interstate traffic, comes within the protection and regulating power of congress. *Telegraph Co. v. Texas*, 105 U. S. 460. Upon the subject of telegraphs, congress has taken affirmative action, and has given authority and provided how and upon what conditions telegraph lines may be constructed over and across the navigable streams and waters of the United States. 14 U. S. St. at Large, c. 230. Section 4 of that act provides that, "before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster general of the restrictions and obligations required by this act." The defendant is seeking to avail itself of the privileges of this act by constructing a telegraph line from the state of Missouri into the state of Kansas, over a navigable stream, without complying with its requirements. The obligations and restrictions to be accepted are important in their character, one of which is that the telegraph line should be so constructed and operated as not to obstruct the navigable streams and waters, or interfere with the travel on the military and post roads. Congress has intervened, and has seen fit to make the filing of a written acceptance an essential prerequisite to the building of a telegraph line over a navigable stream, and to the enjoyment of the privileges conferred by that act, and its authority is paramount. The petition of the telegraph company in the condemnation proceeding does not show that the written acceptance was filed, and in argument counsel for the telegraph company practically concedes that it was not done; and hence we must hold that the proceedings were invalid, and that the injunction should have been continued.

The ruling of the court in vacating the temporary injunction theretofore allowed will be reversed, and the cause remanded for such further proceedings as may properly be taken.

(All the justices concurring.)

(14 Or. 125)

WALKER v. GOLDSMITH and others.

(*Supreme Court of Oregon. November 11, 1886.*)

1. GUARDIAN AND WARD—SALE—APPOINTMENT—COLLATERAL ATTACK—GEN. LAWS OR. 882, § 20.

Under section 20, Gen. Laws Or. 882, providing that where, in an action relating to land sold by a guardian, a ward contests the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear that the guardian was licensed to make the sale by a court of competent jurisdiction, *held*, that the appointment of the guardian cannot be attacked collaterally.

2. SAME—PLEADING—RECORD OF SALE.

When the question of the validity of a sale of real estate of a minor, made under order of a county court, arises collaterally, the sale will be sustained where the pleadings do not attack the proceedings, and where the record on its face discloses jurisdiction of the subject-matter and of the parties.

3. SAME—PETITION.

A petition for the sale, by a guardian, of a ward's estate, is sufficient to give the court jurisdiction, if it states any cause that will authorize the sale, and is not impaired by the statement of causes for which the sale cannot be authorized. (On rehearing.)

4. SAME—NOTICE—PUBLICATION—CIVIL CODE OR. § 288, SUBD. 2.

Civil Code Or. § 288, subd. 2, requiring publication of the notice of sale of real property under execution for four weeks successively, does not require the notice to be given for four weeks *next preceding the sale*. (On rehearing.)

5. SAME—IRREGULARITIES—JURISDICTION.

Where there is a matter of substance on which jurisdiction can hinge, mere errors and defects, although material in some respects, but which might have been avoided on appeal, cannot avail to condemn a judicial proceeding, (a guardian's sale,) when, by lapse of time, an appeal is barred which has become the foundation of title to property. (On rehearing.)

6. LIS PENDENS—CONVEYANCE AFTER SUIT PURSUANT TO PURCHASE BEFORE.

Defendant's ancestor purchased lands in 1878, but did not obtain a conveyance till May 6, 1880. May 5, 1880, his grantor brought suit to quiet title to said land against plaintiff's grantors, in which action plaintiff's grantors prevailed. Held, defendant had a good title, as against plaintiff, since defendant's ancestor was not a purchaser subsequent to the action begun by his grantor, and was therefore not bound by the suit; and, further, since defendants' and plaintiff's equities were equal, defendants' legal title would prevail.

7. SAME—WHEN NOTICE, AND OF WHAT.

A *lis pendens* operates as notice only from the time the complaint is filed, and the summons is served, and of such facts as are alleged in the pleadings. (On rehearing.)

8. APPEAL—REHEARING—CLAIMING DECREE APPEALED FROM NOT FINAL.

On rehearing, held, after parties appear before the supreme court, and argue a cause on its merits, and a final judgment of said court is entered, it is too late for respondents to claim that the decree appealed from was not final.

9. PARTITION—PLEADING—FRAUDULENT GUARDIAN'S SALE.

Where, in an action for partition of real property, the validity of a guardian's sale is disputed, the question of fraud therein cannot be raised if there are no pleadings or issues on that subject. (On rehearing.)

Appeal from circuit court, Multnomah county.

Partition.

P. L. Willis, for *W. B. Walker*. *J. K. Kelly* and *Geo. H. Williams*, for the Goldsmiths. *Seneca Smith*, for *W. Gilliland* and others.

STRAHAN, J. The plaintiff brings this suit to obtain partition of the east half of the Danforth Balch donation land claim, situate in Multnomah county, Oregon. He alleges that he is the owner of 11335-100000 of said claim; that Louis Goldsmith is the owner of one-quarter; that Max Goldsmith is the owner of one-quarter; that L. W. Gilliland is the owner of 17067-100000; that Seneca Smith is the owner of 9533-100000; and that Anna Hamilton and Emma Dickinson each own one-twentieth.

The defendants Louis Goldsmith and Max Goldsmith answered together, denying the material allegations of the complaint, except that Max Goldsmith is the owner of one-fourth of the real property described, and Louis Goldsmith is the owner of five-eighths thereof. Their answer then alleges that the defendant Max Goldsmith is the owner in fee of an undivided one-quarter of said real property, and that the defendant Louis Goldsmith is the owner in fee of the undivided five-eighths of said real property described in the complaint, and that the defendants L. W. Gilliland, Seneca Smith, Emma Dickinson, Anna Hamilton, and P. L. Willis are the owners in fee of the undivided one-eighth of said premises; and that they have not together, nor has either of them, any other right, title to, or interest in said real estate; but these defendants have no knowledge or information sufficient to form a belief as to the rights of the said Gilliland, Smith, Dickinson, Hamilton, and Willis, as between themselves.

The plaintiff's reply denies that Willis owns any part of said real property, or that he has any interest therein. It also puts in issue the residue of the new matter contained in the answer. The defendants Dickinson, Smith, and Hamilton answered, admitting their interest as alleged. Upon these issues the case was tried in the court below, where a decree for the partition of said real property was entered substantially in accordance with the prayer of the plaintiff's complaint. By said decree the court find that the land to be partitioned contained 172.96 acres, and that the several parties plaintiff and defendant

owned the same as tenants in common in the proportions alleged in the complaint.

From this statement of the pleading it will readily be perceived that the only real contention is between the defendant Louis Goldsmith and his co-defendants, Gilliland, Smith, Dickinson, and Hamilton, and the plaintiff, as to the ownership of the undivided three-eighths in issue between them. The pleadings admit that he owns two-eighths or one-quarter, but they deny that he owns the other three-eighths which he claims; and that is the only controverted question we are called upon to determine.

It is conceded by all that on the fourth day of October, 1870, one-half of the land, including the three-eighths in controversy, belonged either to J. H. Mitchell or to John Danforth, Louis and Emma Balch, children of Danforth Balch, then deceased, and of Mary Jane Balch, who died in 1875, and that, unless it then belonged to Mr. Mitchell, it does not now belong to Louis Goldsmith, and that Mr. Mitchell then owned a life-estate in said land for the life of said Mary Jane Balch, with a right to the possession of the whole during the continuance of said life-estate; that on the fourth day of October, 1870, Mitchell conveyed to B. Goldsmith, for the consideration of \$15,000, all his right, title, and interest of, in, and to the said premises, and that on the twenty-sixth day of October, 1870, said B. Goldsmith sold to P. Wasserman all his right and title and interest in said real property for \$10,000, except the said life-estate, which last estate terminated with the death of Mary Jane Balch in 1875. On the twelfth day of July, 1871, for the consideration of \$1,000, Wasserman sold and conveyed all his right, title, and interest in said real property to Joseph Teal. The interest that is claimed which passed by these mesne conveyances to Teal was the same interest that was sold by C. S. Silvers, as guardian of Danforth Balch, Emma Balch, John Balch, and Louis Balch on the twenty-fourth day of September, 1870, to John H. Mitchell. If the county court of Multnomah county had jurisdiction to order the sale of the interest of said heirs, then, for all the purposes of this case, Mitchell acquired their interest. The interest which the defendants Gilliland, Smith, Dickinson, Hamilton, and the plaintiff, Walker, represent in this case, is whatever interest they have acquired through mesne conveyances from the four children of Danforth Balch, above named, or such as the defendant Emma Dickinson has in her own right, and their present interest depends on the validity of the guardian's sale above referred to, and the effect to be given to the decree of this court in the case of *Teal v. Dickinson*, and in the case of *Same v. Same*, which cases appear to have been consolidated, and one decree rendered disposing of both causes in the same manner. If the guardian's sale above referred to is a nullity, or if the decree in the causes last named was binding upon Solomon Goldsmith, or affected his interest, then the plaintiff, and these defendants, whose title depends on the same questions, are entitled to have partition of said premises as prayed; otherwise the defendant Louis Goldsmith is entitled to five-eighths of said real property, and must have partition thereof as prayed by him and Max Goldsmith in their separate answer.

And, first, as to the guardian's sale. The entire record of the county court of Multnomah county in that matter has been offered in evidence in this cause, and we have carefully examined it. No substantial defect or irregularity was pointed out to us upon the argument, and we have discovered none. The county court, at the time it made the order of sale in question, appears from the record to have acquired jurisdiction of the subject-matter, and of the persons to be affected by its orders and decrees. The sale was regularly made, reported to the court, and on the third day of October, 1870, duly confirmed by said court; and the guardian was directed to execute and deliver a deed to J. H. Mitchell, the purchaser, for the property purchased by him.

Upon the argument two points of objection were suggested against the

validity of the sale. The first was that, at the time C. S. Silvers was appointed guardian of said minors, they were not residents or inhabitants of Multnomah county; and the other objection is that J. H. Mitchell was not authorized to purchase, because he was one of the attorneys for the guardian, and that there was some kind of fraud practiced between the attorney and the guardian. But, if it were competent to raise these questions between the parties now before the court, it has not been done. The pleadings in this suit are silent on both points. They contain no allegations of fraud, or other allegations tending to impeach the jurisdiction of the county court of Multnomah county in decreeing said sale.

But, if this sale can be attacked, it must be on some one or all of the grounds specified in the statute. The section on the subject is as follows: "Sec. 20. In the case of an action relating to any estate sold by a guardian under the provisions of this chapter, in which the ward, or any person claiming under him, shall contest the validity of the sale, the same shall not be avoided on account of any irregularity in the proceedings, provided it shall appear (1) that the guardian was licensed to make the sale by a court of competent jurisdiction; (2) that he gave a bond that was approved by the county judge; (3) that he took the oath prescribed by this chapter; (4) that he gave notice of the time and place of sale, as prescribed by law; and (5) that the premises were sold, accordingly, at public auction, and are held by one who purchased them in good faith." Gen. Laws, 882, § 20.

In a case arising under a similar statute in the state of Minnesota, the appointment of a guardian was not allowed to be attacked collaterally. *Davis v. Hudson*, 29 Minn. 27; S. C. 11 N. W. Rep. 136. We therefore hold that this record is sufficient, and that, by virtue of said guardian's sale, and the mesne conveyances offered in evidence on the part of the defendant Louis Goldsmith, Joseph Teal acquired four-eighths of the east half of the Danforth Balch donation land claim mentioned in the pleadings.

The effect of the decree of this court against Teal, above referred to, upon the interest of the defendant Louis Goldsmith remains to be considered.

On the fifth day of May, 1880, Joseph Teal filed his complaint in the circuit court of Multnomah county, Oregon, against Frank Dickinson and Emma Dickinson, his wife, formerly Emma Balch, James G. Chapman, Danforth Balch, and Louis Balch, to quiet his title to a half interest in said east half of said donation land claim, which half interest included the three-eighths now in controversy. On the sixth day of May, 1880, the summons in said suit was regularly served on the defendant Chapman. On the fifteenth day of May, 1880, a stipulation was signed by the attorneys, whereby it was agreed that John Balch, Louis Balch, and James G. Chapman should have until the second Monday of the next term of court thereafter in which to plead, and the said James G. Chapman then entered his appearance for himself, and as attorney for the defendants John and Louis Balch. On the fifteenth day of July, 1880, said defendants filed their answer. On the second day of January, 1877 or 1878, Joseph Teal and Solomon Goldsmith, of San Francisco, entered into an agreement in writing, whereby, in consideration of one dollar, the receipt of which was thereby acknowledged, and for divers other valuable considerations, whereby the said Joseph Teal agreed, for himself, his heirs, executors, and administrators, to make, execute, and deliver to said Solomon Goldsmith, his heirs, executors, administrators, and assigns, quitclaim deeds to and for all the real property described in said writing, including the four-eighths of the Balch claim heretofore mentioned. By the said writing, the said Teal also obligated himself to convey to said Solomon Goldsmith a large amount of personal property, situate in this state; said conveyances to be executed by said Teal as soon as money enough was realized out of said real and personal property to pay off the full amounts of certain claims specified in said writing, due by Teal. It also appears that on the sixth day of April, 1880,

Solomon Goldsmith commenced a suit in the circuit court of the United States for the district of Oregon, founded on the said agreement, and that on the same day a restraining order was allowed against the defendant Teal, and he was also required, within 10 days after the service of the said order, to show cause why a receiver should not be appointed as prayed in said bill of complaint. It also appears that said suit was for an accounting and for conveyance. It also appears that on the sixteenth day of April, 1880, the plaintiff in said suit applied to said court for leave to withdraw the same, without prejudice, for the purpose of amicably settling the controversy, and said motion was allowed, and the bill of complaint was, by leave of the court, withdrawn from the files. It also appears that on the sixth day of May, 1880, Joseph Teal and wife conveyed by deed all their right, title, and interest to Solomon Goldsmith of, in, and to the undivided three-fourths of said east half of said donation claim.

The deposition of Solomon Goldsmith was taken in this suit, in which he testifies, in answer to interrogatories, substantially as follows: "Purchased an interest in the Danforth Balch donation land claim in 1877 or 1878. I bought an undivided one-half of an undivided three-fourths of the east half of the donation land claim of Danforth Balch from Joseph Teal and Bernard Goldsmith in 1877 or 1878. I paid \$40,000. I had indorsed notes to the amount of \$40,000 for Joseph Teal and Bernard Goldsmith. I paid these notes at maturity. Then Joseph Teal gave me a written contract that, upon the surrender of these notes, he would give a deed of said property. I tendered him the notes through my agent Bernard Goldsmith, but he refused to execute a deed. I then commenced a suit in the United States district court of Oregon, in 1880, when he executed the deed." Also, further: "I had a written contract with Joseph Teal, which was surrendered to him at the time of making the deed. I have no copy, and don't know whether my agent, Bernard Goldsmith, has or not." It also appears from his evidence that the \$40,000 was paid for said interest two or three years before the deed was executed, and that, at the time of said payment, he had no knowledge or notice of any kind that the Balches claimed any interest in said real property, and that he never heard of said claim until after Joseph Teal commenced his suit. It also appears that Louis Goldsmith purchased this interest of Solomon Goldsmith for \$40,000; and on all of these points Solomon Goldsmith is corroborated by Louis Goldsmith, whose deposition was also taken.

We are now prepared to consider the effect of the decree of this court upon Goldsmith's interest rendered in the case of *Teal v. Dickinson*. It is claimed by the respondents that Goldsmith was a *lis pendens* purchaser, and was therefore bound by the decree rendered against Teal, from whom he received his deed. There is no statute in this state declaring the effect of a decree upon the title or interest of a *lis pendens* purchaser, and therefore the common-law rule will prevail.

Chancellor KENT, in *Murray v. Ballou*, 1 Johns. Ch. 576, states the rule thus: "The established rule is that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpoena after the bill is filed." And a late writer states the doctrine thus: "During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute so as to affect the rights of his opponent. This brief proposition in reality contains the entire doctrine." 2 Pom. Eq. Jur. § 633.

If the title derived from Teal by Solomon Goldsmith is within this rule, then he, and all who have succeeded to his interest, would be bound by the decree rendered in that suit; otherwise he was a stranger to the proceeding, and his interest remained unaffected by the decree.

The rule and the exception are thus stated in *Hopkins v. McLaren*, 4 Cow. 678, 679: "The doctrine of *lis pendens* applies only when a third per-

son attempts to intrude into a controversy by acquiring an interest in the matter in litigation pending the suit. The rule as given by Chancellor KENT in the case of *Murray v. Lyburn*, 2 Johns. Ch. 445, is that any interest acquired in the subject-matter of a suit pending the suit is so far considered as a nullity that it cannot avail against the plaintiff's title. The reason of the rule is that, if a transfer of interest pending a suit were to be allowed to affect the proceedings, there would be no end to litigation; for as soon as a new party was brought in he might transfer to another, and render it necessary to bring that other before the court, so that a suit might be interminable. So that neither the rule, nor the reason of the rule, applies to the case under consideration. The interest of the appellant in the mortgage was not a voluntary acquisition by him pending the suit. *His interest subsisted long before the suit was commenced*, and ought not, in my opinion, to have been considered as a nullity."

And so, in *Parks v. Jackson*, 11 Wend. 442, Senator SEWARD, who delivered the prevailing opinion in the court for the correction of errors, said: "This objection needs no other answer than that, in order to take this case out of the rule of *lis pendens*, it is only necessary that the persons sought to be affected by the decree should have a *subsisting interest in the premises*, and might have been made parties to the suit."

So, also, in *Trimble v. Boothby*, 14 Ohio, 109, it is said: "If the interest in these lands acquired by purchase from Kerr was to be affected by the suit of Moore's devisees, *such interest existing prior to the commencement of the suit*, the persons so interested should have been made parties. Not having been made parties, it was their right to clothe their equity with the legal title as though such suit had not existed."

The like rule is stated in *Clarkson v. Morgans Devisees*, 6 B. Mon. 441. Said the court: "But, if the contract was executory, it could not be overreached or concluded by a subsequent suit against Parker, without giving to those who claimed under it a right to be heard. Nor could the rights of Fowler, or those claiming under him, be concluded, though the contract had been in parol, the same being consummated by a subsequent deed, as was determined by this court in the case of *Clary's Heirs v. Marshall*, 5 B. Mon. 266. If a right or interest passed from Parker to Fowler by contract which was obligatory upon the parties, that right or interest cannot be overreached or concluded by a subsequent suit against Parker."

In *Haughwoot v. Murphy*, 22 N. J. Eq. 531, it is said: "A person whose interest existed at the commencement of the suit is a necessary party, and will not be bound by the proceedings, unless he be made a party to the suit." *Enswoorth v. Lambert*, 4 Johns. Ch. 605. And the same doctrine is stated in *Rodgers v. Dibrell*, 6 Lea, 69.

This doctrine may be regarded as elementary. Speaking of the doctrine of *lis pendens*, it is stated by an eminent American author that "this reason, however, has no application to a *third person*, whose *interest existed before the suit was commenced*, and who might have been an original party." Bigelow, Fraud, 301. And so, in Adams, Eq. 366, note 1, it is said: "* * * And it applies only to rights or interests acquired from a party after the institution of the suit, and not to the case of a right previously contingent or conditional becoming perfect."

This view of the application of the doctrine under consideration is further strengthened by considering the relations that existed between the vendor and vendee of real property. "* * * Where a contract is made for the sale of land, the vendor is, in equity, immediately deemed a trustee for the vendee of the real estate, and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances, the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate. On the other hand, the money is treated as the personal estate of the vendor, and

is subject to the like mode of disposition by him." 2 Story, Eq. Jur. § 1212. "The view which equity takes of the juridical relations resulting from the transaction is widely different. Applying one of its fruitful principles, that that which ought to be done is regarded as done, equity says that, from the contract, even while yet executory, the vendee acquires a real right,—a right of property in the land,—which, though lacking a legal title, and therefore equitable only, is none the less the real beneficial ownership, subject, however, to a lien of the vendor as security for the purchase price as long as that remains unpaid. This property in the land, upon the death of the vendee, descends to his heirs, or passes to his devisees, and is liable to the dower of his widow." 1 Pom. Eq. Jur. § 105.

The facts in this case show that at the time Teal commenced the suit in question, he had no beneficial interest whatever in the property in controversy, and that he was nothing but the naked trustee of the legal title, and that he held said title for the benefit of Solomon Goldsmith. To allow the equitable doctrine of *lis pendens* to prevail so as to defeat such a right would, to our minds, be subversive of some of the most important principles of equity. It was insisted at the trial of this cause that the decree against Teal must be allowed to have the effect of a recorded deed, for the purpose of cutting off and defeating the rights of Goldsmith under his contract with Teal. But to have this effect it must be imparted to it by some statute, and it is not claimed that there is any statute in force in this state giving to a decree any such force or effect.

In *Smith v. Williams*, 44 Mich. 240, S. C. 6 N. W. Rep. 662, the court apparently had this question under consideration. Its language is: "The only reason given for the position is that the plaintiff, by not recording her deed, and suffering Byron F. Squires to appear of record as apparent owner, has allowed him to appear to the world as the owner of the land now sought to be recovered by her; so that Squire's day in court was her day, and she must accept the consequences of her own acts. It is, then, upon her failure to place the evidence of her title upon the record, that this effect of the decree upon her rights is to depend. The general rule that a judgment or decree binds those only who are parties to it is not disputed. There are a few well-understood exceptions, of persons who, subsequent to the institution of the suit, have acquired interests or claims under the parties; but the plaintiff's is not one of these, for her title had accrued before. If she loses her title, then it must be by force of the recording laws; for, independent of these, there is no principle of law that could bind her by the judgment against one whose interest she had acquired long before the suit was instituted." And further on in the same case the court remarks: "The mere institution of a suit cannot make one a *bona fide* purchaser."

It was claimed upon the argument by counsel for the respondent that a suit is commenced by the filing of the complaint, and that the *lis pendens* attaches from that time; while counsel for appellants insist that the suit is to be deemed commenced, for the purposes of a *lis pendens*, from the time of the service of the summons. We do not find it necessary to decide which view is correct. The *lis pendens*, whether it is to be regarded as attaching from the filing of the complaint or from the service of the summons, did not, in any way, affect the estate of Solomon Goldsmith. And, for like reasons, we do not now decide the effect of the pendency of a suit upon a conveyance made by a plaintiff after the commencement of the suit, when the final decree is in favor of a defendant, upon new matter in his answer, and which answer was not filed till after such conveyance.

Upon the latter subject, Mr. Pomeroy says: "I would remark, in passing, that while the general doctrine of notice by *lis pendens*, and the foregoing special rules, have ordinarily been applied to real property described by the plaintiff in his bill of complaint, they should, upon principle, apply with equal

force to the counter-claim and cross-complaints authorized by the reformed procedure, by which the defendant alleges some equitable interest or right, and demands some affirmative relief. In such pleadings the defendant becomes the actor, and is, to all intents and purposes, a plaintiff." 2 Pom. Eq. Jur. § 634.

Under this state of pleadings, it is difficult for us to see, on principle, why a *lis pendens* attaches or becomes operative as notice until the answer is filed setting up such equitable claim.

Counsel for the respondent have on file in this cause certified copies of numerous depositions heretofore taken in the case of *Teal v. Dickinson*, and have offered the same as evidence upon this trial. We have already held that there are no issues in this cause upon the trial of which any of said evidence would be material; but they are incompetent as between the parties to this suit. Section 819 of the Civil Code, it is claimed, authorizes the introduction of these depositions. That section is as follows: "When a deposition has been once taken, when either of the causes mentioned in section 804 exists, or if the witness be dead, or his attendance cannot be procured, it may be read in any stage of the same action, suit, or proceeding, or in any other action, suit, or proceeding between the same parties, or their representatives, upon the same subject, and is then to be deemed the evidence of the party reading it." It is clear from an inspection of these depositions that they are not offered in an action, suit, or proceeding between the same parties, or their representatives, upon the same subject. The parties are different, and the two causes of suit are entirely dissimilar.

The decree of the court below will therefore be reversed, and a decree entered in this court in accordance with this opinion, and the cause remanded to the court below for further proceedings; the appellants to recover their costs.

THAYER, J., (*concurring*.) The vital question in this case is the effect to be given to the decree in *Teal v. Dickinson*, referred to in Judge STRAHAN's opinion herein, upon the alleged interest of Louis Goldsmith in the property in controversy. Conceding that he contracted for the purchase of it, and paid the purchase price, prior to the commencement of the suit in which the decree was entered, the statutes of Oregon declare that the effect of a judgment, decree, or final order in an action, suit, or proceeding before a court, or judge thereof, of this state, or of the United States, having jurisdiction to pronounce the same, in all cases *in personam*, is, in respect to the matter directly determined, conclusive between the parties, and their representatives and successors in interest by title subsequent to the commencement of the action, suit, or proceeding, litigating for the same thing, under the same title, and in the same capacity. Civil Code, § 723, subd. 2. This statute, I believe, is the only law on the subject to be invoked upon the question. I do not believe that the *lis pendens* doctrine has anything at all to do with it. The statute declares the law respecting it in unmistakable terms, and the court has only to apply it to the case. The decree referred to was rendered against Teal, in a suit brought by him to quiet his title to the certain real property, including the premises in controversy, and which he claimed to own in fee. The decree is made conclusive by the statute as against Teal, and his representatives and successors in interest by title subsequent to the commencement of that suit; so that neither he nor they can, in any other litigation concerning the property, claim to be the owner of it. If Louis Goldsmith, therefore, is a successor in interest by title subsequent to the commencement of that suit, he is concluded by the decree. I do not understand that a decree in a suit to quiet title transfers the title from the person against whom it is obtained to the one obtaining it; but precludes him from asserting any ownership of it thereafter, and also his representatives and

successors in interest by title subsequent to the bringing of the suit. It determines that neither he nor they are owners of it. The statute is declaratory of the law in the premises, and it is unnecessary to look beyond its provisions. The question before the court is whether Louis Goldsmith owns, by title subsequent to the commencement of that suit, his alleged interest in the property,—if he purchased indirectly from Teal the three-eighths interest, as claimed in his testimony. This presents a pure, simple question of law which this court must declare without regard to the effect it may have upon the parties litigant. The public welfare is much more important than their interests in the case, and it should be determined according to the best judgment of the court, and leave the consequences to fall upon whom they may.

I am of the opinion that if Solomon Goldsmith made the contract with Teal for the purchase of the property, and paid the consideration price as he alleges in his testimony, and conveyed to Louis Goldsmith, the latter is not a successor in interest to Teal by title subsequent to the commencement of the suit, but that he was a purchaser anterior to that time, and unaffected by the decree. It was claimed upon the part of the respondents at the hearing that, if Solomon Goldsmith did contract with Teal to purchase for him the property prior to the commencement of the suit, and paid the purchase price therefor, and conveyed to Louis Goldsmith, yet the latter is concluded by the decree; that the respondents, by force of the decree, occupy the same position of purchaser in good faith and for a valuable consideration. This view cannot be maintained upon principle or authority. A purchaser in good faith acquires an equity by reason of his having paid the purchase money without notice, actual or implied, or knowledge of any fact sufficient to put him upon inquiry, and under a well-grounded belief that he is acquiring a complete and valid title to the property; and then his equity is only equal to the outstanding equity, but the law adjudges him as having the better right, upon the ground that he has acquired the legal title, which, under the equitable maxim, prevails when the equities are equal. A judgment or decree, upon the other hand, obtains its force from the statute; and to give the statute in question the construction contended for would make it speak an untruth, as it contains a negative affirmation, excluding every inference that the judgment or decree affects a successor in interest by title anterior to the commencement of the action or suit in which it is recovered. A decree may have been obtained in consequence of an inability upon the part of the party against whom it is recovered to obtain his proof, or through false testimony, or on account of the ignorance of his counsel, or by the error of the court rendering it; still the law surrounds it with a presumption of its own rectitude. But the law does not, certainly, extend its effect so as to determine the rights of strangers to the suit. It operates, in cases like the present, only upon the parties and their privies. As to all others it is *res inter alios acta*. Again, a person claiming to have been a *bona fide* purchaser must plead specially the facts from which he claims to be such, and must deny all notice of the outstanding equity up to the very time he paid the purchase money. He must show facts that address themselves to the conscience of the chancellor, while the effect of a decree is an inflexible rule of law established by public policy, and maintains a fixed *status*. No facts or circumstances can restrict or extend its force. Positive law has established its limits, which are the *ne plus ultra* extent of its effect.

Whether Solomon Goldsmith testified to the truth when he swore that he made the purchase of the three-eighths interest is a question of fact. His evidence is corroborated by the testimony of his brother Louis Goldsmith, and by the records and files of the circuit court of the United States for the district of Oregon; and no reason is assigned, or motive shown, for getting up such a contract at the time the proof shows strongly that it was in existence as a mere sham, or for any purpose other than to carry out a business trans-

action; and I do not believe that we have a right to discard the evidence upon that subject, in consequence of any inconsistencies shown or incredible statements made by the persons in their cross-examination as witnesses in the case.

I agree with the opinion of Judge STRAHAN upon the other points of the case, and concur in the result arrived at.

LORD, C. J., (*dissenting.*) As I am unable to concur in the result reached by my associates, the importance of the principle involved must be my excuse for a statement of the grounds of my dissent. I hold that the decree rendered in the suit of *Teal v. Dickinson, supra*, is a conclusive bar against Goldsmith's title in the present suit, for the reason that he is the grantee or successor in interest of Teal by title subsequent to the commencement of that suit. The decree in that suit was to the effect that the fee-simple was not in Teal, but in the defendants, in the proportions named therein, and that neither Teal, nor any person claiming by, through, or under him, has any right, title, or interest in or to said premises, or any part thereof.

It is provided by the Code that "the effect of a judgment, decree, or final order in an action, suit, or proceeding before a court or judge thereof of this state, or of the United States, having jurisdiction to pronounce the same, is as follows: * * * The judgment, decree, or order is, in respect to the matter directly determined, conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the action, suit, or proceeding." Code, § 723, subd. 2.

It is not disputed but that the "matter directly determined" by the decree in that suit is the identical title asserted by Goldsmith in the present suit; nor that he derived his title from Teal after the complaint was filed, summons issued, and delivered to the proper officer, and service had on one of the defendants. If these acts—the filing of a complaint, and the causing of a summons to be issued and delivered to the sheriff—constitute, within the meaning of the Code, the commencement of a suit, Goldsmith is in privity with Teal, and bound by the decree. In his complaint Teal alleged that "he was the owner in fee-simple and in possession of the premises" described; and, by force of the provision referred to, it is the title at the time of the commencement of his suit of which the decree rendered therein is conclusive, not only as against him, but against all who claim title under him subsequent to the commencement of that suit.

It becomes important, then, to ascertain the definition of the "commencement of an action" or suit, within the meaning of the Code. At common law, an action is commenced by issuing a writ, and in some of the states that rule is practically adhered to, or declared by the statute. In New York it is provided that an action shall be commenced by the service of a summons. Code 1873, § 127. The same is declared in St. Minn. 1878, § 52, p. 714. In California, Kansas, and Indiana a civil action is commenced by filing a complaint, and the issuing of summons thereon. Code Cal. 1872, § 22. Comp. Laws Kan. 1879, § 57, p. 608; Rev. St. Ind. 1881, § 314. By reference to the decisions under these different provisions it will be noted that the language is resorted to, and controls in determining what constitutes the commencement of an action.

To illustrate: In *Depuy v. Shear*, 29 Cal. 238, SAWYER, J., said: "The complaint in this case was filed, and summons issued thereon, on the twenty-sixth day of July, 1855. A suit was therefore commenced on that day, within the provisions of section 22 of the practice act." Again: "The practice act prescribes the mode of commencing suits, and acquiring jurisdiction of the parties. The proceeding is controlled by its provisions, and not by the rules of practice which prevailed at common law. * * * The act of filing a complaint and issuing summons were both performed, and a suit was therefore commenced."

Our Code, in reference to the commencement of an action, is equally plain and precise. It provides that "actions at law shall be *commenced* by filing a complaint with the clerk of the court. * * * At any time after the action is *commenced*, the plaintiff may cause a summons to be served on the defendant," etc. Section 50, Code. This provision is made applicable to suits in equity, (section 385, Code;) so that the same meaning applies to the commencement of a suit in equity as an action at law. The action or suit is commenced by filing the complaint, and after it is commenced, that is, by filing a complaint, the plaintiff may cause a summons to be served on the defendant.

On the fifth day of May, 1880, Teal filed his complaint with the clerk of the court, and delivered a summons to the sheriff to be served on the defendants. A suit was therefore commenced on that day, within the meaning of the section cited. It is not claimed that the court acquired jurisdiction of the defendants until there was service upon them. But, in this particular, the case stands different as to Teal. When he commenced his suit by filing a complaint, and at the same time caused a summons to be delivered to the officer to be served on the defendants, he necessarily invoked and submitted himself to the jurisdiction of the court. As to Teal, the suit was not only commenced, but jurisdiction was acquired, on the fifth day of May, 1880; and when service was obtained upon the defendants, and the cause proceeded regularly to judgment or decree on issue joined as to the title alleged in his complaint, whoever, after that date,—the commencement of the suit,—acquired an interest or title in the subject-matter of that suit of Teal, as Goldsmith did, took such title subject to, and is bound by, the decree rendered therein. Taking, then, these provisions of the Code together, viz., that "by filing a complaint with the clerk" a suit is "commenced," and the conclusive effect to be given to a decree against "a successor in interest by title subsequent to the commencement of the suit," and Goldsmith holding a derivative title from Teal after the filing of the complaint,—the commencement of the suit,—the decree is as effectual as to him as to his grantor, Teal. Privies, within the meaning of this rule, are those who are successors in interest of the matter or title directly determined, by title subsequent to the commencement of the suit, and, under the familiar and elementary rule, are bound by the decree, although not made parties. By taking his title in that manner, Goldsmith placed himself in legal privity with Teal, a part of whose interest or title he purchased, and which was affected by the decree. It may be hard, as remarked in Buller's *Nisi Prius*, "that a man should be injured by a determination that he, or those under whom he claims, was not at liberty to controvert." But the party under whom Goldsmith claims did have that liberty and opportunity. He instituted the suit, and brought the defendants into court in *invitum* by force of the summons he caused to be served, and compelled him to adjudicate the title alleged in his complaint. The whole matter, as thus alleged, was controverted by pleadings, by evidence, and by argument. The truth is, however, there never was any "hardship in holding that a man should be bound by that which would have bound those under whom he claimed *quoad* the subject-matter of the claim; for *qui sentit commodum, sentire debet et onus*; and no man can, except in certain cases excepted by the statute law and the law-merchant, transfer to another a better right than he himself possessed." 2 Smith, Lead. Cas. 624. Yet such is the consequence of the decision in the present suit. It holds, in effect, that the decree in the Teal-Dickinson suit does not operate as an estoppel against Goldsmith. Teal has been able to transfer a better right—a better title—than he possessed. The stream has risen above its source, a thing which cannot be true in law or philosophy.

In nearly all the states there is a statutory provision to the effect that, in any action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, may file with the clerk of

each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, and the general nature of the action, etc. From the time of its filing it operates as constructive notice of the pendency of such action, and whoever purchases thereafter the property affected thereby is bound to the same extent as if he were made a party. Under these statutes it will be noticed that the notice to purchasers or incumbrancers dates from the filing with the officer, while at common law the *lis pendens* and consequent notice only began from the service of the subpoena, or other process, after the filing of the bill, so that the court may have acquired jurisdiction of the defendant. 2 Pom. Eq. Jur. § 634. At common law, also, the averments of the bill "must be so definite that any one, on reading the case, can learn what property was intended to be made the subject of litigation" in order to operate as notice. We have no statutory provisions upon this subject. But it *seems* to me that the sections cited, when taken together, and of which all persons are bound to take notice, are calculated, if not designed, to include this object. By filing the complaint with the clerk—it necessarily containing proper and specific averments of the subject-matter to be litigated, and the names of the parties to be affected thereby—a suit is commenced, and operates, under section 723, as constructive notice of the pendency of the suit, and the subject-matter involved for judicial determination, against all persons who purchase or acquire an interest of the parties by title subsequent to the commencement of the suit, making the decree rendered therein conclusively binding on them, to the same extent as if they had been made parties. To hold otherwise would allow the plaintiff, by such alienation of title after suit commenced, to defeat any judgment or decree adverse to him, and subject the defendants to the annoyance and expense of another defense, again to be defeated by a similar course of proceeding. Usually, and in fact in all the cases which have come under my observation, the question is raised as to the purchasers from the defendant, but the reason of the rule applies with much greater force to him deriving title from the plaintiff, who instituted the suit, and brought the defendants into court.

But, to obviate this effect, it is said that, prior to the commencement of the suit of *Teal v. Dickinson*, Goldsmith had made a contract with Teal for the conveyance of this identical land, which Teal deeded to him after the commencement of that suit, and consequently he had an equitable estate in the lands antecedent to that suit, which was unaffected by the decree, unless he was made a party to the proceeding. But in this case his equitable estate depends upon Teal's having title to the lands. By taking title from Teal subsequent to the commencement of the suit, he is bound by the decree as to that title. The decree adjudged the title to be in the defendants,—that Teal had no title,—and consequently there is no title upon which the equitable estate can rest. In a word, if Teal had no title, as the result proved, his contract could create none, legal or equitable. If I am right in this point, it is decisive of the case.

It only remains now to consider wherein I differ with my associates in the application of the law to the facts in avoiding the doctrine of *lis pendens*. As I understand it, the reasoning of the decision is that, equity treating that as done which was agreed to be done, Goldsmith, under the contract referred to, acquired an equitable estate or interest in the lands prior to the commencement of the suit of *Teal v. Dickinson*; and that, in order to bind him by the decree rendered therein, he must have been impleaded, notwithstanding he acquired his title to such property by deed from Teal after the suit was instituted. His equity is thus made antecedent to that suit, and put beyond the reach of the doctrine of *lis pendens*.

Now, there are some facts which are undisputed, that need to be stated, and kept in view, to properly understand how the law has been applied to the facts of this case. With the exception of one-eighth, the land which was

the subject-matter of the suit in *Teal v. Dickinson* is the subject-matter of the present suit. After that suit was commenced, Teal made and delivered his deed to Goldsmith, which, on its face, purported to convey, then and of that date, the land in question, but the deed was not recorded till more than two months thereafter, and after the defendants had been served and answered in the suit. There is no pretense that the defendants in the former suit had any knowledge or notice, actual or constructive, of the equitable estate or interest acquired by Goldsmith under the contract of 1878. Whatever of advantage might have accrued to Teal in the prosecution of the former suit would have inured to the benefit of Goldsmith as against the defendants. The result, as we have seen, proved otherwise. The court held that the defendants had the superior or paramount title, or in fact that Teal had no title whatever. Now, Goldsmith claims that he is not bound by that decree, because he was not made a party to the suit, although his deed purports to be a conveyance of the lands after the suit was commenced, and the doctrine of *lis pendens*, invoked by the plaintiff to the present suit, is not applicable to him, because, under his contract with Teal, he acquired an equitable estate anterior to that suit. But how is that equity made antecedent as to the defendants in the suit of *Teal v. Dickinson*? It is said that in equity an agreement for the sale of land, although executory, is treated as executed, and operates to transfer the estate from the vendor, and to vest it in the vendee; so that Goldsmith, by force of his contract, acquired an estate or interest in the land which was prior to the suit. The maxim of equity is that "equity regards that as done which ought to be done." It is the presence of the "ought"—the equitable duty—which imposes its obligations upon the consciences of the parties to the contract, and induces equity to treat as done that which ought to be done. It has no reference to third parties unaffected by notice. Nor will equity thrust aside the law, where the contract is still executory, and no estate is vested in or acquired by the vendee, to push forward a concealed equity as against third parties without notice. It creates no right destructive of the interests of third parties, without notice, actual or constructive, of that contract. "What ought to be done is considered in equity as done;" and its meaning, Mr. Adams says, "is that, whenever the holder of property is subject to an equity in respect to it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character which it would then have borne." Adams, Eq. 135. "But," says Judge STORY, "equity will not thus consider things in favor of all persons, but only in favor of such as have a right to pray that the acts might be done." Story, Eq. Jur. § 249. See, also, Pom. Eq. Jur. §§ 363, 368; Pom. Cont. 290. It is plain that this equitable construction of contracts is only applied to the parties or grantees with notice, upon whom an equitable duty is devolved, and will not be extended so as to affect injuriously the rights of third persons. As to these, equity will not regard the contract as executed, and as operating to transfer an estate, but will rather leave it as at law, which imparts no property right whatever.

In this view, Goldsmith acquired no antecedent equity or property in the land, or other title, until the contract was executed by performance, and he became invested by his deed with whatever title, legal or equitable, Teal had. He then became a purchaser of the land, and acquired a property in it; but this was not until after the suit was commenced, and by the doctrine of *lis pendens* he was bound by the decree rendered against his grantor, Teal. I am aware that it is laid down by the text writers that the rule applies only to rights or interests acquired from a party after the institution of the suit, and not to the case of a right or equity antecedently acquired. 2 Pom. Eq. Jur. 637; Wade, Notice, § 160. But the question is, when, upon the facts, will such rights or equities be treated as antecedent when the property was

conveyed after the suit was commenced? Mr. Pomeroy says: "If a person has acquired a prior right to the specific land, the commencement of a suit affecting the same land will not invalidate any act which he may subsequently do in pursuance of such antecedent right, or for the purpose of carrying it into effect." Section 637. Now, note the illustration given in the notes: "For example," he says, "the bringing of a suit against A., as the owner of land, is not notice to B., a prior vendee from A., who is in *actual possession*, and will not prevent him from subsequently taking the necessary steps to complete the purchase, and obtain a deed of conveyance." But his "*actual possession*" does charge the party bringing the suit with notice that he has an interest or some right or property in the land, and that he must make him a party, or he will not be bound by the decree. And so here, if Goldsmith, under his contract, had gone into possession of the land, or done any act or thing which would have been the equivalent of notice, the defendants in the suit of *Teal v. Dickinson* would have been charged by the law that it was necessary to make him a party, otherwise the decree would not bind him. It is unnecessary to say there was no pretense of any facts from which such notice may be inferred. Goldsmith had actually done nothing under his contract that charged third parties, or the defendants in that suit, with notice of any equity or interest he had acquired in the land; and what was still worse the deed which was executed to him after the suit was commenced was pocketed, and not recorded for more than two months afterwards; the suit all the while being prosecuted by Teal for the whole of the parties in interest, with whom, to say the least, he had an identity of interest, and the court jurisdiction of all the parties.

Under this state of facts, I propose now to make a brief examination of the authorities cited, for the purpose of ascertaining whether the facts to which the law is applied in them differ in any essential degree from the facts here.

In *Parks v. Jackson*, 11 Wend. 442, the court held that the institution of a suit was notice to a prior purchaser who had gone into possession, and made expenditures on the faith of the purchase, although his deed was not in fact executed until the institution of the suit.

In *Trimble v. Boothby*, 14 Ohio, 115, the defendants had taken possession, and paid the consideration money under the contract to sell the land, prior to the commencement of the suit. The court say: "If the interest in these lands, acquired by purchase from Kerr, was to be affected by the suit of Morris' devisees, such interest existing prior to the commencement of the suit, the persons so interested should have been made parties. Not having been made parties, it was their right to clothe their equity with the legal title." The opinion must be read in the light of the facts. The parties were in actual possession under their contract, and nothing is better settled than that this constituted notice.

In *Clarkson v. Morgan's Devisees*, 6 B. Mon. 445, the court say: "There is evidence tending strongly to the conclusion that Fowler had *acquired the possession*, claiming the same in his *own right*, before the bill was filed. He, certainly, before the bill was filed, claimed and exercised a right to the possession, and sold land to James Marshall, one of the complainants, in April, before suit was brought, who must have entered upon the same immediately." The italics are the court's.

In *Haughwout v. Murphy*, 22 N. J. Eq. 545, the court say: "But the defendant was not a purchaser *pendente lite*. He acquired title by deed which bears date on the seventh day of August, 1865, and was acknowledged on the next day. * * * The proof, however, is full and clear that it was executed and delivered to Murphy *before* the bill was filed in the case of *Haughwout v. Boisaboin*. The commencement of a suit in chancery is constructive notice of the pendency of such suit only as against persons who have acquired some title to or interest in the property involved in the litigation after

the suit was commenced. A person whose interest existed in the land at the commencement of the suit is a necessary party, and will not be bound by the proceeding, unless he be made a party to the suit." By reference to the statement of facts in this case the reader is referred to *Haughwout v. Murphy*, 21 N. J. Eq. 122, in which the court say: "Murphy might have been made a party to the bill against Boisaubin. He was a proper, if not a necessary, party; and, if his deed was not known to Haughwout at the filing of the bill, he had notice, on the filing of the answer in October, 1865, and might have amended his bill so as to make Murphy a party, or he might then have commenced suit against him."

Essentially as the facts differ in all these cases from the state of facts here, it cannot escape the attention that the prevailing parties in all these suits had full notice,—either possession or some equivalent fact,—at the time of bringing the suit, and thus opportunity to make them parties to the suit, and bind them by the decree. Have we not a right to infer,—more especially where title is derived from the plaintiff after the commencement of his suit,—in the absence of any fact to charge notice, actual or constructive, that a different rule would prevail as to the defendants? These cases do not reach the facts, or the law to be applied to them, as disclosed by this record. There is no claim that the defendants in the suit of *Teal v. Dicktison* had any notice whatever of the interests of Goldsmith under the contract. And without notice of such interest, how was it possible for them to have made him a party? The law does not require the performance of impossible things. Teal knew of his interest, and brought the suit, and the law devolved upon him the duty of bringing in all parties to be affected by the adjudication. But he may have thought, as I think, that it was unnecessary, because Goldsmith was identified with him in interest, and the rule is that, "whenever this identity is found to exist, all alike are included." Moreover, it seems to me, in such case, that a party's interests or rights ought not to be treated as vested,—the contract executed,—and thereby made antecedent, until, by going into possession, or doing some other act, the defendants in that suit become chargeable with notice of its existence. The rule is that such equitable estate of the vendee, arising out of an executory contract, is only treated as executed, and only avails against the vendor's heirs, devisees, and grantees with notice. Pom. Eq. Jur. § 368.

Nor can I avoid the impression that to deprive the defendants now of the rights acquired by the decree in the former suit, on the ground of Goldsmith's antecedent equity, and that to bind him he must have been made a party, when no act of either Teal or Goldsmith was calculated or designed to impart notice, and when the defendants, by the most active scrutiny, could have acquired no knowledge of the existence of such equity, is the announcement of a principle which is liable to result in the future in serious obstructions to the administration of justice. The general rule that a person whose interest existed at the commencement of the suit is a necessary party, and will not be bound by the proceedings unless he be made a party, is conceded. But, under the facts of this case, when the former suit was necessarily prosecuted as much in the behalf of Goldsmith as Teal, the title conveyed after his grantor had commenced suit, and the record disclosed Teal clothed with the full legal title, Goldsmith should be taken to have acquired his interest when the deed was recorded, as to the defendants, which, being after the suit was commenced, and service had on all the defendants, comes within the operation of the doctrine of *lis pendens*.

In *Utley v. Fee*, 33 Kan. 689, S. C. 7 Pac. Rep. 555, the court say: "The title and estate of a person holding an unrecorded deed is, as to third persons without notice, wholly in the grantor, and the grantee is in privity with his grantor, and any decree rendered against the grantor, affecting the grantor's title, is also, in effect, a decree rendered against the grantee, and it equally affects his title; and the decree is *res adjudicata* as to the interests of all."

In *Norton v. Birge*, 35 Conn. 263, it was held that when a party to a suit had conveyed his interest in the land before the commencement of the suit, the deed not being recorded, the purchaser would be bound by the judgment. "Otherwise," said the court, "the purposes of the suit, and the ends of justice in all such cases, would be defeated." The party was deemed to have taken his deed *pendente lite*. But here the deed was not executed or recorded until after suit and service. With stronger reason, upon the facts, why ought not the same rule apply to this case?

I am aware it is claimed the doctrine of *lis pendens* does not stand upon the ground of notice, but that it is a rule of public policy, the effect of which is to impose a disability to convey the subject-matter of litigation *pendente lite*, (*Bellamy v. Sabine*, 1 De Gex & J. 580,) and that the rule only applies to purchasers, and not to holders of previously acquired equitable interests in the property, (Wade, on Notice.) But it is a rule of public policy that there should be an end of litigation; and I have endeavored to show that, unless the decree in *Teal v. Dickinson* operates as an estoppel, and binds Goldsmith, there is no disability to convey the subject-matter *pendente lite*, and there can be no end to the litigation. But the cases already referred to sufficiently illustrate the doctrine, and none of them are parallel with this, and in all of them there were facts which imparted notice at the commencement of the suit, which enabled the party bringing the suit to make the holders of such interests a party, or to take the consequences of his failure to do it, which cannot be charged against the defendants in *Teal v. Dickinson*. My conclusion is that the decree operates as an estoppel, and bind Goldsmith, and, of course, all who claim under him.

ON PETITION FOR REHEARING.

(December 23, 1886.)

STRAHAN, J. The plaintiff has filed a petition for rehearing in which some questions not previously discussed are suggested.

It is now claimed, for the first time, that the decree appealed from is not final, but we think it is *final*, in the sense that it ascertains and determines the rights of the parties to the suit in the land in controversy, and leaves nothing more for the court to do but to carry the decree into effect by the appointment of referees, etc. But if it were otherwise, when the parties appeal from such a decree to this court, and appear here, and argue the cause upon its merits, and a final decree is entered in this court, it is then too late to complain that the decree appealed from was not final.

It must be remembered that in this case the plaintiff is seeking to make a collateral attack upon a judicial record of a court created by the constitution, which is a "court of record having general jurisdiction, to be defined, limited, and regulated by law in accordance with this constitution." Const. Or. art. 7, § 1. Without entering into any general discussion of the law of this state relative to the power of county courts to order the sale of real estate of minors, it is sufficient to say, where the question arises collaterally, and where the pleadings do not attack the proceedings for want of jurisdiction, and where the record on its face discloses jurisdiction both of the parties and the subject-matter, the sale must be sustained. All other questions are mere matters of irregularity, and in such case do not affect the legality of the sale. In addition to these considerations, the property appears to have passed through several purchasers, who it is shown, in each instance, paid large sums of money for it, presumably upon the faith of this judicial record. To overthrow the sale now in the way it is sought to be accomplished in this case would look very much like a species of judicial robbery. No court of equity could do an act fraught with such flagrant injustice.

Hatcher v. Briggs, 6 Or. 31, is a case where this court applied equitable principles to a void judicial sale. There the county court of Linn county had ordered the sale of certain real property for the purpose of partition after

all jurisdiction had been taken from the county courts in such matters, and vested in the circuit courts. It was a case plainly without jurisdiction, and the sale was admitted to be void. But Hatcher had invested his money on the faith of that judicial record, and had made permanent improvements on the land. This court, therefore, refused to permit the legal owner of the land to recover the same until an account had been taken of Hatcher's purchase money, and the value of the improvements made, and also of the rents and profits, and enjoined the legal owner until Hatcher was reimbursed. This case arose between the parties to the original transaction, and not between parties who came in subsequently, and invested their money on the faith of what had been done. Hatcher made himself a party to the proceeding by buying under a void order of sale, and, of course, he was chargeable with notice of the law, and that the court had no jurisdiction to make such order. Still this court found that in fact he had acted in good faith, and was entitled to protection. It seems to me that purchasers of property, who receive it for value after it has passed through many hands, have a much stronger claim. But I merely mention this case to show the position of such a purchaser in equity, as defined by this court, and not for the purpose of conceding that the defendants Goldsmiths are in that position.

That the attack in this case is collateral, and not direct, seems to be conceded by counsel for plaintiff. He thus states the rule on page 148 of his brief: "When the validity of the record attacked is directly put in issue by the pleadings of the party attacking it by proper averments, then the attack is *direct* and not *collateral*." The converse of what is here said must be also true; and that is, when there are no proper averments attacking the record, the attack is then *collateral*, and not *direct*. In case of a collateral attack, this court decided, in *Heatherly v. Hadley*, 4 Or. 1: "If the record contains a recital of the facts requisite to confer jurisdiction, it is conclusive when attacked *collaterally*." In this record, so far as I have been able to discover, the *recitals* appear to be full and complete.

It also appears that the sale in question was reported to the county court of Multnomah county, and duly confirmed by that court, and a deed ordered to be executed. Now, I think persons who are strangers to this record, and who have acquired rights upon the faith of it, for which they paid value, have a right to ask the court to invoke the ordinary presumptions as to jurisdiction and regularity for their protection. It is to be presumed that what was done was rightly done until the contrary is made to expressly appear; and that, too, in proper legal form.

But counsel insists that all of the various provisions of the statute relative to the sale of the property of a ward are, in effect, mandatory, or in their nature jurisdictional, and compliance with the statute must be shown affirmatively, or jurisdiction is not made out. For instance, it is claimed that section 8, p. 739, Gen. Laws, which requires that "a copy of the order shall be personally served on the next of kin of such ward, and on all persons interested in the estate, at least ten days before hearing of the petition," etc., is of that nature, and that, unless this section is shown to have been complied with, the whole proceeding is a nullity. Among other authorities much reliance appears to be placed on *Mohr v. Tulip*, 40 Wis. 66. But this case was expressly overruled in *Mohr v. Porter*, 51 Wis. 487, S. C. 8 N. W. Rep. 364, on this point, and it was there held: "In a statutory proceeding by the guardian of an insane person for the sale of the real estate of his ward, he represents the ward; and, when a proper petition has been presented by the guardian to the proper county court, that court has jurisdiction to order such sale, and its determination would be binding on the guardian and ward, even though it were not binding upon other parties having adverse interests, without due notice to them." And this latter view is also announced in *Mohr v. Manierre*, 101 U. S. 417, and is certainly supported both by the better reason and the better authority.

Counsel for the plaintiff has also argued with much ingenuity that the *petition* of the guardian for the sale of the property was insufficient to give the court jurisdiction to act in the particular case, for the reason that the petition is for the sale of the property to pay alleged debts. It is true, the petition mentions claims already accrued for the support of the children; but it then goes further, and alleges that they have no money, or other estate whatever, out of which to cancel such indebtedness for maintenance, or with which to provide for their future maintenance, etc.; and the future maintenance of said minors is elsewhere referred to in said petition as one of the reasons for making the sale. It is true that payment of the alleged debt is also referred to as reason for making the sale; but, in the present condition of this case before us, the only possible question that could arise on this part of the record is, did the petition for the sale state *any cause* which under the law would have authorized the court to make a sale? And we must say that it did. The petition showed there was no income from the estate, and that its sale was necessary to maintain said wards; thus bringing the case directly within the provisions of section 1, p. 738, Gen. Laws, under which said proceedings were instituted. The case became *coram judice* when a petition was presented containing facts which would authorize the court to act. *Wright v. Edwards*, 10 Or. 298; *Gager v. Henry*, 5 Sawy. 237.

It is argued further, on the part of the plaintiff, that there was no sufficient notice of sale given. The proof, so far as the same is disclosed by this record, is that the notice was printed in the Weekly Oregonian newspaper, of general circulation, published in the city of Portland, in said county and state; the first publication being in issue of August 13, 1870, and the last in the issue of September 3, 1870. By the terms of said notice the sale was to and did take place on Saturday, the twenty-fourth day of September, 1870. There is an affidavit in the record, made by A. J. Moses, to the effect that on the seventeenth day of August, 1870, he posted up notices of said sale in three public places (particularly describing them) in the city of Portland, etc. The jurat to this affidavit appears to have been made August 5, 1870. In addition to this evidence of notice, there is also the report of sale made by the guardian to the court, in which it is recited that said guardian gave public notice of such sale by causing notice thereof (Exhibit B) to be published once each week, for four weeks successively, in the Weekly Oregonian newspaper, published in Multnomah county, in the issues of August 13, 20, 27, and September 3, A. D. 1870, and by posting up printed copies of said notice (Exhibit B) for over four weeks successively in four of the most public places in Multnomah county, state of Oregon, prior to such sale. In each case, reference is made to the affidavits attached to such notice. The order of the court confirming the sale contains the following findings as to the notice: "And, it appearing to the court, by affidavits filed with said report of sales, that said C. S. Silver, guardian aforesaid, had given public notice of the time and place of sale, as required by law, by publication of a notice thereof, particularly describing the interest of each ward, for four successive weeks prior to the day of sale, in the Weekly Oregonian, a weekly newspaper published in Multnomah county, state of Oregon, and by posting up four similar notices in four of the most public places in Multnomah county, Oregon, four weeks prior to such sale." The statute in such case prescribes the same notice as in case of the sale of real property on execution, (Gen. Laws, 739, § 12;) and notice of sale of real property on execution must be given by posting a notice, particularly describing the property, "for four weeks successively in three public places of the county where the property is to be sold, and publishing a copy thereof once a week, for the same period, in a newspaper of the county. * * *" Civil Code, § 288, subd. 2.

On the face of these records counsel for the plaintiff insists that we ought to find that there was no evidence of the fact that notice of sale had been given by the guardian. To this we cannot accede. It is true, there appears

to be some discrepancy in the date of the verification made by Moses; but undoubtedly it was a clerical mistake. Such mistakes are not unusual, and it would be a harsh rule to say that they are fatal. The court would rather intend that the affidavit was made on some day after the notices had been posted. A like intendment was allowed to prevail in *Russell v. Lewis*, 3 Or. 380. It is true that case, as reported, only appears to have been decided by THAYER, J., on the circuit, who was then also a member of this court; but the cause was brought here on appeal, where his judgment was affirmed, though no opinion appears to have been written.

Nor can we adopt the construction that the proof must show that the notice was given for four weeks *next preceding the sale*. Those words are not in the statute, and it is not the province of the court to insert them by construction. "For four weeks *successively*," is the language of our Code. The word "successively," as here used, is to have its ordinary meaning,—in a successive manner; in a series or order; following in order or uninterrupted course.

The other objections as to the validity of the record do not require particular notice. We have carefully examined them, and are entirely satisfied the same are not well taken.

In stating these conclusions we are only reiterating what may be regarded as the settled law of this court. Said LORD, J., in *Wright v. Edwards*, *supra*: "Where there is a matter of substance upon which jurisdiction can hinge, mere errors or defects, although material in some respects, but which might have been avoided on appeal, cannot avail to condemn a judicial proceeding, when by lapse of time an appeal is barred, which has become the foundation of title to property." See, also, *Arrowsmith v. Harmoning*, 42 Ohio St. 254.

The following authorities tend to support our construction of this law: *Hannmann v. Mink*, 99 Ind. 279; *Robertson v. Johnson*, 57 Tex. 62; *Bunce v. Bunce*, 59 Iowa, 533; S. C. 13 N. W. Rep. 705; *McKinney v. Jones*, 55 Wis. 89; S. C. 11 N. W. Rep. 606, and 12 N. W. Rep. 381; *Watts v. Cook*, 24 Kan. 278; *Cocks v. Simmons*, 57 Miss. 183; *Spring v. Kane*, 86 Ill. 580; *Lynch v. Kirby*, 36 Mich. 288; *Wade v. Carpenter*, 4 Iowa, 361; *In re Harvey*, 16 Ill. 127.

We have already said in the former opinion that we cannot try the question of fraud in this case, for the reason there are no pleadings and no issues on that subject. If fraud entered into the original proceedings of the guardian in procuring or conducting the sale, it might be a reason for setting aside his proceedings in equity on the application of any one injured by such fraud. In such case his proceedings were not absolutely void, but voidable at the election of the party injured; and such party ought to make his election by bringing a suit to avoid the sale within a reasonable time after attaining his majority, or after knowledge of the fraud. Acquiescence for an unreasonable time after notice of the fraud, and after such minor had reached his majority, would be a waiver of the right to complain of it.

It was expressly admitted on the argument, by counsel on both sides, that a clerical error appeared in this record, in using the word "circuit" before the word "court," and that the original record read "county court." But, in the absence of such omission, it is too plain for argument that it is a mere clerical error, and that it is not entitled to a moment's consideration. The error is manifest from the connection in which it occurs, and by reference to the other parts of the record.

We have no doubt that in partition suits, when questions of fact are to be tried, it can only be done on regular issues joined between the parties as in other cases. Any other practice would tend to very great uncertainty, and introduce interminable confusion. The allegations and proofs must agree in this class of suits, as well as all others under the Code. The rule is element-

ary, and has not been changed or altered, or, at least, counsel for the plaintiff has cited no authority to support his contention, and we have been unable to find any.

Counsel for the plaintiff seems to claim with much confidence that the decree in the *Teal-Dickinson Case* cut off or destroyed Goldsmith's title, because his deed, or the evidence of his title, was not of record when that suit was begun, or when the defendant's answer was filed; and he cites *Utley v. Fee*, 33 Kan. 683, S. C. 7 Pac. Rep. 555, to support this position. It seems from the report that one Flint quieted his title as against the persons who appeared from the record to have title, and then conveyed to the plaintiff. The plaintiff claimed that, under section 21 of the act relating to conveyances, all unrecorded deeds executed by Fisher and Hammond and others were void in law and in equity as to Flint and Flint's assignees. It is also said in the opinion: "Indeed, at the time when the decree quieting Flint's title was rendered, the unrecorded deeds held by the grantees of Fisher and Hammond were void, as against Flint, *without any decree of any kind*. Comp. Laws 1879, c. 22, 'Relating to Conveyances,' § 21." It thus appears from the case so much relied upon by the plaintiff that it was the recording act of Kansas that destroyed the title of the grantees of Fisher and Hammond, and not the decree quieting Flint's title.

Clark v. Conner, 28 Iowa, 311, is also relied upon on this point. Language is there used broad enough to give color to plaintiff's claim, but it is immediately added: "And, further, the sections of the Code of 1851, being sections 506 *et seq.*, under which the tax foreclosure was had, * * * provided that the tax purchaser should file his petition in the district court, * * * in which action notice to the party and the service are to be the same as in case of a mortgage. And, turning to section 2073 of the Code of 1851, we find that a notice in a mortgage foreclosure must be served on the mortgagor, and upon all persons having *recorded* liens upon the same property, etc. Hence we conclude that the tax foreclosure judgment was not void, for the reason that Spencer Moore, the defendant therein, had aliened the property to another whose deed was not recorded," etc. Here the court properly gave much weight to the statutory requirement as to the person on whom notice was to be served, and might have decided the case on that point alone. Besides, it appears to have been a tax foreclosure suit, and such suits are frequently in the nature of proceedings *in rem*.

Norton v. Birge, 35 Conn. 250, is also cited to the same point; but, after a careful examination of the case, I do not think it tends to support the plaintiff's contention.

Leonard v. New York Bay Co., 28 N. J. Eq. 192, is a case not cited by counsel, where the rights of a party under an unrecorded deed were cut off by a decree in a suit to which she was not a party; but the court placed its decision expressly on the statute in force in that state, and not on any common-law rule.

So, also, in *Aldrich v. Stephens*, 49 Cal. 676, the same principle is announced, but the court is only applying the statute of California (Code Civil Proc. § 726) to the facts before it. The contrary is announced as the rule in *Davenport v. Turpin*, 41 Cal. 100, where no statute is referred to by the court, and presumably there was none in force on that subject in California at that time.

So, in *Lessee of Irvin v. Smith*, 17 Ohio, 226, a person not a party, and whose deed was not recorded, was not bound or concluded by a decree in a suit against his grantee, and it is expressly shown by this case that the doctrine of *litis pendens* has no application to such a state of facts. In addition to this, the court gives prominence to the fact that the deed in question was placed on record during the pendency of the suit, and before a decree, just as Goldsmith's was here, so that the party prevailing in the suit had full notice of the deed before his decree was entered.

The statute of this state (Gen. Laws, p. 518, § 26) declaring the effect of omitting to record a deed, and in whose favor it operates, is as follows: "Every conveyance of real property within this state, hereafter made, which shall not be recorded, as provided in this title, within five days thereafter, shall be void, against any *subsequent* purchaser in good faith, and for a valuable consideration, of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." Now, if it be conceded that the plaintiff, and those under whom he claims, were purchasers in good faith and for value, still the decree under which they claim has never been recorded; and Goldsmith's deed, being first duly recorded, would be prior to their decree. Sections 37 and 88, Gen. Laws, 520, provide for the recording of certain decrees, but they do not appear to be comprehensive enough to include decrees like the one in question.

On the question of fact suggested by the plaintiff's counsel for a rehearing, it suffices to say that the evidence offered satisfies me that the contract in evidence is real, and not fabricated, and that Goldsmith paid the amount of money to which he testified for the land. Slight discrepancies, after so long a time, are to be expected, and do not weaken the force of the evidence offered. Besides, the plaintiff omitted to offer this record until about the close of the evidence, and the time for the taking of evidence had about expired. It was claimed upon the argument that the defendant Goldsmith would have taken more evidence but for this reason. However this may be, if the plaintiff relied upon the Teal-Dickinson decree as one of the muniments of title, he ought to have offered it in chief, and the defendant would then have had no reason to complain that he had not been given a fair opportunity to meet it.

The doctrine of *lis pendens* has also been carefully re-examined, and, without again entering at large into the discussion of the subject, I am satisfied it operates as notice only from the time the complaint is filed, and the summons is served, and of such facts as are alleged in the pleadings which are pertinent to the issue, and of the contents of exhibits. *Center v. Planters' & M. Bank*, 22 Ala. 743; *Hayden v. Bucklin*, 9 Paige, 511-515, note 1; *King v. Bill*, 28 Conn. 592; *Murray v. Ballou*, 1 Johns. Ch. 566; *Low v. Pratt*, 53 Ill. 438; *Miller v. Sherry*, 2 Wall. 237; *Jones v. Lusk*, 2 Metc. (Ky.) 356; *Lewis v. Meow*, 1 Strob. Eq. 180; *Griffith v. Griffith*, Hoff. Ch. 153; *Stone v. Connelly*, 1 Metc. (Ky.) 652; *Freem. Judgm.* § 199; 2 Pom. Eq. Jur. § 634; *Leitch v. Wells*, 48 N.Y. 585.

"The rule has existed for centuries, and we cannot dispense with it where it is fairly applicable. As it is, however, a hard rule, and not a favorite with the courts, a party claiming the benefit of it must clearly bring his case within it; and it is said, if he makes a slip in his proceedings, the court will not assist him to rectify the mistake. 3 Sugd. Vend. 460; *Sorrell v. Carpenter*, 2 P. Wms. 482."

This case has been argued with great research and ability by counsel on both sides, and exhaustive and elaborate briefs have been filed, in which all of the questions at issue, both of law and fact, have been fully discussed. After a careful review of the entire case, we have no doubt whatever of the correctness of the previous opinion, and there is therefore no cause for a rehearing, and the same is denied.

THAYER, J., concurs.

(See Kan. 101)

PELHAM and others v. SMITH and others, Board Co. Com'rs, Finney Co.,
Kan.

(Supreme Court of Kansas. January 7, 1887.)

COURTS—JUDICIAL DISTRICTS—COUNTIES.

Under the provisions of chapter 81, Sess. Laws Kan. 1886, approved February 20, 1886, and which took effect February 26, 1886, Wichita county is within the Six-

teenth judicial district of the state, as said chapter 81, attaching that county to Finney county for judicial purposes, is the latest expression of the legislature, and therefore controlling.

(*Syllabus by the Court.*)

Original proceedings in *mandamus*.

On October 11, 1886, there was filed in this court the following petition, omitting court and title:

"Now come the plaintiffs, T. W. Pelham, James N. Mount, Oren Clark, A. R. Johnson, Frank A. Clark, S. W. McCall, Chas. H. Shark, W. A. Rains, Charles Vinson, H. Betton, J. F. Parsons, Geo. I. Watkins, John C. B. Short, P. G. Massey, George Blackburn, W. A. Dewitt, S. E. Gandy, G. W. Oliver, C. N. Lewis, A. N. Boorey, C. S. Triplett, A. E. Mead, W. J. Latimer, and show to the court and aver that on the fourth day of October, 1886, said defendants, B. F. Smith, G. W. Wight, J. H. Waterman, were the duly elected, commissioned, qualified, and acting members of and constituting the board of county commissioners of Finney county, Kansas, and that said board was then and there in Garden City, in said county and state, in session, at its regular October meeting; that then and there, on said day, there was presented to said board of county commissioners a petition signed by a majority of the electors of the unincorporated town or village of Leoti City, in Wichita county, state of Kansas, setting forth the metes and bounds of their town, village, and commons, and stating that the number of the inhabitants of said town and village was three hundred and fifty, (350,) and praying that said town or village be incorporated as a city of the third class, with said petition filing and presenting to said board the duly verified affidavit of J. F. Ward, one of the publishers of the Leoti Lance, a weekly newspaper published and printed at Leoti City aforesaid, that said petition had been published in said newspaper at least once in each week for three consecutive weeks, to-wit, on September 16, 1886, September 23, 1886, and September 30, 1886; that said board of county commissioners were satisfied on all points and requirements as set forth in sections 1 and 2, c. LXVI, (66,) Laws of Kansas 1886, but that said board of county commissioners wrongfully, and without right, refused to receive and act upon said petition, and to grant the prayer of said petition, on the sole grounds that Wichita county, an unorganized county of the state of Kansas, was not attached to Finney county, Kansas, for judicial purposes.

"Plaintiffs further aver that at a previous session of said board, viz., the regular July session 1885 thereof, said county of Wichita, Kansas, was organized as a municipal township of Finney county, Kansas. Plaintiffs further aver that Finney county, Kansas, for the two years last past, (said Finney county, Kansas, being situated within the Sixteenth judicial district of the state of Kansas,) was the only organized county adjoining said Wichita county, Kansas, and was such at and during the last session of the legislature of the state of Kansas, and that said Sixteenth judicial district was the most convenient judicial district to said Wichita county, Kansas. Plaintiffs further aver that Wichita county, Kansas, has been and is attached to Finney county, Kansas, for judicial purposes, since February 26, 1886, and prior thereto, and that it was the duty of said defendants, as such board, to receive and act upon said petition, and to grant said petition, and the performance of which the law specially enjoined on them as a duty, by virtue of their office, trust, and station.

"Wherefore said plaintiffs ask the court to grant, issue, and award a peremptory writ of *mandamus* to said board of county commissioners, compelling and commanding said board to receive and act upon said petition, and to grant the prayer of said petition, and make the proper order, declaring said town or village of Leoti City incorporated as a city of the third class by the name and style of the 'City of Leoti City,' and designating in said order the metes and bounds thereof; and also to incorporate in said order an order or-

dering the first election in said city for city officers, designating the place where said election shall be held, and appointing three qualified electors of said city to act as judges of said election, and two other electors of said city to act as clerks, and three other electors of said city to act as a board of canvassers of said election returns, and to forthwith enter said order at length on the journal of the proceedings of said board of county commissioners, and cause the same to be published once in some newspaper printed in said city at least one week before said city election; and for all other and proper relief."

Subsequently the following facts were agreed upon:

"It is hereby agreed that on the fourth day of October, 1886, said defendants, B. F. Smith, C. W. Wight, J. H. Waterman, were the duly elected, commissioned, qualified, and acting members of and constituting the board of county commissioners of Finney county, Kansas, and that said board was then and there in Garden City, in said county and state, in session at its regular October meeting; that then and there, on said day and date, there was presented to said board of county commissioners, a petition signed by a majority of the electors of the unincorporated town or village of Leoti City, situated in Wichita county, state of Kansas, setting forth the metes and bounds of their town, village, and commons, and stating that the number of the inhabitants of said town or village was three hundred and fifty, (350,) and praying that said town or village be incorporated as a city of the third class, with said petition filing and presenting to said board the duly-verified affidavit of J. F. Ward, one of the publishers of the Leoti Lance, a weekly newspaper printed and published at Leoti City aforesaid; that said petition had been published in said newspaper at least once in each week for three consecutive weeks, to-wit, on September 16, 1886, September 23, 1886, and September 30, 1886; that said board of county commissioners were satisfied on all points and requirements as set forth in sections 1 and 2, c. LXVI., (66,) Laws of Kansas 1886, but refused to receive and act upon said petition, and to grant the prayer of said petition, on the sole ground that Wichita county, Kansas, (which it is admitted by all parties,) is an unorganized county, and is not attached to Finney county, Kansas, for judicial purposes.

"It is further admitted that at a previous session of said board, namely, the July term, 1885, thereof, and being a regular session, said county of Wichita, Kansas, was organized as a municipal township of Finney county, Kansas. No objection is made by the defendants to anything in said proceedings as to fact or form, except that, in view of the legislation of the past winter, or session of 1886, of the legislature of the state of Kansas, to-wit, chapter 87, chapter 120, and chapter 81, Wichita county is no longer attached to Finney county, Kansas; for judicial purposes, and that said board of county commissioners had no jurisdiction to grant the prayer of the petition. It is further agreed that, at the time said laws were enacted, Finney county, in the Sixteenth judicial district, was the only organized county adjoining Wichita county, Kansas.

WEBB & SPENCER,

"TOM H. BAIN,

"MILTON BROWN,

"Attorneys for Plaintiffs.

"W. R. HOPKINS,

"County Atty., Finney Co., Kansas."

B. F. Simpson, Milton Brown, and Webb & Spencer, for plaintiffs. W. R. Hopkins and Abbott & Lawrence, for defendants.

HORTON, C. J. The sole question in this case is whether the county of Wichita, which is unorganized, is within the Sixteenth or the Twenty-third judicial district of the state. At the regular July session of the board of

county commissioners of Finney county, held in 1885, the county of Wichita was organized as a municipal township of that county. Finney county is situated within the Sixteenth judicial district, and is the only organized county adjoining Wichita county. By the provisions of chapter 87, Sess. Laws 1886, approved February 18, 1886, and which took effect February 19, 1886, Wichita county was attached to Finney county for judicial purposes. Chapter 120, of the Session Laws 1886, approved February 19, 1886, and which took effect February 20, 1886, created the Twenty-third judicial district, comprising the organized counties of Rush, Ness, Ellis, and Trego, and the unorganized counties of Gove, St. John, Wallace, Lane, Scott, Greeley, and Wichita. It was therein provided that the terms of the district court of that judicial district should commence in the counties of Gove, St. John, Wallace, Lane, Scott, Greeley, and Wichita, after the same had been organized, at such time as the judge of the district should order. By the provisions of chapter 81, Sess. Laws 1886, approved February 20, 1886, and which took effect February 26, 1886, the county of Wichita was again attached to Finney county for judicial purposes.

The constitution of the state ordains that provision may be made by law for the increase of the number of judicial districts whenever two-thirds of the members of each house shall concur. Such districts shall be formed of compact territory, and bounded by county lines, and such increase shall not vacate the office of any judge. Section 14, art. 3. New or unorganized counties shall by law be attached for judicial purposes to the most convenient judicial district. Section 19, art. 3.

As Wichita county adjoins Finney on the north, and is an unorganized county, the legislature had ample power, under the constitution, to attach that county to the judicial district embracing Finney county. It will be conceded that the legislature had the authority to organize the Sixteenth judicial district so as to comprise Wichita county. On the nineteenth of February, the Twenty-third judicial district was created, comprising certain organized counties, and also certain unorganized counties, including Wichita, with the provision, however, that courts should not be held in the unorganized counties until after the same had been organized, and at such time as the district judge should order. The act of February 20th, attaching the county of Wichita to Finney county for judicial purposes is the latest expression of the legislature; and, as Finney county is a part of the Sixteenth judicial district, the act attaching Wichita county to Finney county for judicial purposes attaches it to the Sixteenth judicial district, and thereby puts Wichita county, for judicial purposes, within the Sixteenth judicial district. Such construction does not violate any provision of the constitution of the state, and certainly gives full effect to the intent and purpose of the legislature. *In re Holcomb*, 21 Kan. 628; *State v. Ruth*, 21 Kan. 583; *Ex parte Crawford*, 12 Neb. 379; S. C. 11 N. W. Rep. 494.

Such construction does not repeal chapter 120, Sess. Laws 1886, nor destroy the Twenty-third judicial district created thereby, but it determines that the county of Wichita is not a part of that district under the terms of said chapter 81, approved later than said chapter 120.

Let the peremptory writ of *mandamus* be issued as prayed for.
(All the justices concurring.)

(*See Kan. 118*)

PACIFIC MUT. TEL. CO. AND OTHERS V. CHICAGO & ATCHISON BRIDGE CO.

(*Supreme Court of Kansas. January 7, 1887.*)

TELEGRAPH COMPANIES — BRIDGE OVER NAVIGABLE RIVER — INJUNCTION — CONDEMNATION PROCEEDINGS.

Where a telegraph company presents an application to the judge of the district court, and secures the appointment of commissioners to condemn a right of way for a telegraph line over and along a bridge which spans a navigable river, and therein

specifically states the property proposed to be taken, and the particular manner by which it is proposed to attach the wires and other fixtures to the bridge, and it is found that the method outlined in the application will interfere with the opening of the draw span of the bridge, and obstruct the navigation of the river, the owner of the bridge is entitled to an injunction to restrain the company, and the commissioners that were appointed, from proceeding further under the application; and a proposal by the telegraph company, in its answer in the injunction proceeding, to so change its plan as to obviate the objections, and which is a substantial departure from the plan stated in the application, will not defeat the action for injunction.

(*Syllabus by the Court.*)

Error from Atchison county.

Jackson & Royse, for plaintiffs in error. *Everest & Waggener*, for defendant in error.

JOHNSTON, J. The Pacific Mutual Telegraph Company presented an application to the judge of the district court of Atchison county for the appointment of commissioners to condemn the right to construct and maintain a telegraph line along and over the north side of the bridge of the Chicago & Atchison Bridge Company which spans the Missouri river at Atchison, Kansas, and to appraise the value and assess the damages to the bridge property taken for such purpose. On this application commissioners were appointed. Afterwards the bridge company began an action, and obtained a temporary injunction enjoining the telegraph company and the commissioners from proceeding with the condemnation. Issues were joined, and a trial had before the court, which resulted in a decree enjoining the telegraph company from proceeding further under the condemnation proceeding that had been instituted, to reverse which this proceeding is brought. The district court found and placed its decision upon the fact that the plans of the telegraph company, for the construction and operation of its line across the bridge, as stated in its petition to the judge of the district court, and upon which the commissioners were appointed, was impracticable, and would interfere with the opening of the draw span of the bridge, and with the navigation of the river. This fact cannot well be questioned by the plaintiff in error, as the testimony upon which it was found has not been brought here; and that the company cannot in any way interfere with the turning of the draw span, or obstruct the navigation of the river, is conceded. In its answer filed in the injunction proceeding the telegraph company outlined and proposed another plan for the construction of its line which it claimed would not interfere with the operation of the draw span, or with the navigation of the river; but this plan was a substantial departure from the one upon which the commissioners were appointed to condemn the right of way across the bridge.

It is now contended that it was unnecessary to state in the petition what property was intended to be appropriated, or how the wires of the telegraph company were to be attached to the bridge, and therefore the company was at liberty to disregard the plans stated in the petition, and to have the commissioners that were appointed proceed upon another and a different one. The petition or application is the initiatory step or basis of the condemnation proceeding. It is required to be in writing, and from it the judge determines whether a case is presented for the exercise of the right of eminent domain. In this case the condemning party stated particularly what use it proposed to make of the bridge, and detailed the manner in which it proposed to attach its wires and other fixtures to the same. The commissioners were appointed to appraise the damages which the bridge company would suffer if the property was so taken. They gave notice that they would proceed under the plan named in the petition, and from that notice the bridge company received information of how it and its property were to be affected.

It may be, as the telegraph company contends, that only a general allegation is made in the petition, and that the particular manner in which the wires and other fixtures are to be attached to the bridge is not specified. But the commissioners were appointed to appraise the damages which the bridge company would suffer if the property was so taken, and they must have some knowledge of the manner in which the property is to be taken, and the damage done to it, in order to make a proper appraisal.

tion of its purpose was necessary in the petition, and that a detailed statement of the manner of construction was not required under the statute; but that is not this case. There is no complaint that the petition was too general or too meager in its statement, but rather that it contained too much. The company has chosen to specifically state its purpose and plans, and has thereby made out its own case. That which it proposed and threatened to do is confessedly impracticable and unauthorized by law, and afforded the bridge company sufficient grounds to maintain injunction.

It is said that the new plan is practicable and proper, but it was not suggested until the action to enjoin had been begun, and only then in the answer filed in the injunction proceeding; and the extent of the decree in the present case is to restrain the telegraph company from carrying out the first plan, or, in other words, from proceeding further under the petition, order, and notice, which proposed to do that which the law does not permit to be done. The decree rendered does not prevent the company from presenting another application, and instituting another condemnation proceeding, providing that which is asked for is within the law. It appears from the records of this court that the telegraph company has abandoned the first application, and is now prosecuting another one, wherein it attempts to obviate the objections raised in the first.

We think there was no error in the ruling of the district court, and its judgment must be affirmed.

(All the justices concurring.)

(71 Cal. 504)

FITZGERALD v. FERNANDEZ and others. (No. 9,620.)

(*Supreme Court of California. December 31, 1886.*)

1. HOMESTEAD—TENANT IN COMMON—EXCLUSIVE POSSESSION—CALIFORNIA ACT OF MARCH 9, 1868.

When a person is entitled to a homestead, the California act of March 9, 1868, §1, gives him one in a tract of which he has exclusive occupation, and which he duly incloses, selects, records, and resides on as such, although he has only an undivided interest therein. *Held*, that a tenant in common or joint tenant, having an undivided interest less than the whole, who, with his family, entered into actual possession of a part in the name of the whole, but did not inclose the same, acquired no homestead under this act.¹

2. SAME—CALIFORNIA ACT OF MARCH 9, 1868—APPLICATION TO PREVIOUSLY RECORDED HOMESTEAD.

The second section of the act says: "This act shall apply to all homesteads heretofore recorded under the laws of this state, as well as those that may hereafter be acquired." *Held* not to validate homesteads previously recorded on lands held in joint tenancy, or in tenancy in common, unless the first section was complied with.

3. SAME—FORECLOSURE OF MORTGAGE GIVEN BY HUSBAND ALONE—WIFE A PARTY—BOUND ON DEFAULT BY JUDGMENT.

In an action to foreclose a mortgage executed by a husband on lands claimed by his wife to be a homestead, she is a proper party: and if, after being duly served, she does not appear, but is represented by her husband's attorney, without her knowledge and consent, a judgment against her is binding, unless she can show a valid cause for her failure to appear.

Commissioners' decision.

Department 2. Appeal from superior court, Contra Costa county.

A. H. Griffith, for appellant. *Eli Chase, W. S. Tinning, and Theodore Wagner*, for respondents.

SEARLS, C. This is an action to set aside and annul a decree of foreclosure against the plaintiff herein, to vacate an order of sale issued under such decree, and to enjoin D. P. Mahan, the sheriff of Contra Costa county, and Ber-

¹ As to the title and occupation to support a homestead claim and declaration, see *King v. Goetz*, (Cal.) 11 Pac. Rep. 656, and note; *Bothell v. Sweet*, (N. H.) 6 Atl. Rep. 646.

nardo Fernandez, the other defendant, from making a sale of the mortgaged premises, or from enforcing the judgment of foreclosure, upon the ground that the mortgaged property is the homestead of plaintiff. Defendants had judgment, from which, and from an order denying a new trial, the appeal is prosecuted by the plaintiff. There is no statement or bill of exceptions, and the case is presented on the judgment roll.

Two principal questions are involved in the appeal—*First*, were the premises in question the homestead of plaintiff and her husband at the date of the execution of a mortgage thereon (September 25, 1873) by the latter to defendant Fernandez? *Second*, was the plaintiff concluded, and her right to a homestead, if any she had, foreclosed, by the decree of May 6, 1880, rendered in an action to foreclose the mortgage of September 25, 1873, in which action plaintiff was a party defendant, was served with a summons, and was represented by an attorney, who answered for her, but who was employed by her husband without her knowledge or authorization?

The facts essential to an understanding of the first proposition, as gleaned from the findings, are as follows: John Fitzgerald and plaintiff were husband and wife. On the second day of December, 1860, the former purchased from tenants in common or joint tenants, who owned undivided interests therein, less than the whole, their interest in and to the premises in question, and with his family, including the plaintiff, entered into the actual possession of a part, in the name of the whole, of the premises so purchased, and has ever since resided thereon. On the tenth day of November, 1865, John Fitzgerald filed, and caused to be recorded in due and regular form, a declaration of homestead on said premises. The land was not in the exclusive occupation of John Fitzgerald, and was not fully inclosed prior to 1869 or 1870, and was and still is owned by said Fitzgerald and others as tenants in common. On the twenty-fifth day of September, 1873, John Fitzgerald executed a mortgage on the premises to defendant Bernardo Fernandez, to secure the payment of \$1,500, and interest, payable on demand.

Was the lien of this mortgage superior to the homestead claim? Prior to the act of March 9, 1868, (St. 1868, p. 116,) a homestead could not be carved out of land held by one in joint tenancy, or as a tenant in common. *Wolf v. Fleischacker*, 5 Cal. 244; *Reynolds v. Pixley*, 6 Cal. 165; *Giblin v. Jordan*, Id. 417; *Kellersberger v. Kopp*, Id. 564; *Bishop v. Hubbard*, 23 Cal. 517; *Elias v. Verdugo*, 27 Cal. 419; *Seaton v. Son*, 32 Cal. 483.

The act of March 9, 1868, *supra*, under which appellant claims her homestead became valid, is as follows:

"Section 1. Whenever any party entitled to a homestead under the laws of this state shall be in exclusive occupation of any parcel or tract of land, having the same inclosed, and shall select and record and reside upon the same as a homestead, such party so selecting and claiming shall be entitled to such homestead, and to all the rights and exemptions provided by the general law relating to homesteads, to the extent of such claimant's interest in such homestead property, although such land be held in joint tenancy, or tenancy in common, or such claimant own only an undivided interest therein.

"Sec. 2. This act shall apply to all homesteads heretofore recorded under the laws of this state, as well as those that may hereafter be acquired."

As will be seen, the first section of this act gives to joint tenants or tenants in common, *who shall be in the exclusive occupation of land, having the same inclosed*, the right to select and record the same as a homestead; and the second section applies the act to homesteads theretofore recorded under the laws of the state, as well as to those subsequently recorded. John Fitzgerald was not in the exclusive occupation of the land upon which he sought to impress the homestead character, and did not have it inclosed. He did not, therefore, by virtue of the act, become entitled to a homestead in the premises. The contention of appellant that, by virtue of the second section, homesteads pre-

viously recorded upon lands held in joint tenancy, or in tenancy in common, were validated without reference to compliance with the provisions of the first section, cannot be maintained. The language of the second section is not that such second action applies, but that "this act shall apply to all homesteads heretofore recorded," etc. As the act, taken together, only gives the homestead right in such cases to those in the exclusive occupation of the land, and having it inclosed, plaintiff and her husband were wanting in an essential element requisite to a valid homestead.

The very question now under consideration was involved in *Cameo v. Dupuy*, 47 Cal. 79, in which a homestead had been declared in 1864, and this court held (1) that the homestead of 1864 was not valid, for the reason that the premises were then held in joint tenancy; (2) that the defect was not cured by the act of 1868, (St. 1867-68, p. 116,) for the reason that such last-mentioned act only provides for the acquisition of such right in lands held in joint tenancy, or tenancy in common, where the person filling the declaration is in the exclusive occupation of the tract sought to be dedicated as a homestead.

It follows that the premises in question were not impressed with the homestead character, and the court below did not err in its conclusion.

The conclusion reached renders an inquiry into the second proposition involved unnecessary to a disposition of the appeal. We may, however, say: (1) That where a mortgage is executed by the husband alone, upon property claimed by husband and wife as a homestead, the latter is a proper party defendant in an action to foreclose. *Maybury v. Ruiz*, 58 Cal. 11. (2) Where, as in this case, an action against husband and wife is brought to foreclose a mortgage, and process is served upon both, whereby the court acquires jurisdiction of the person of the wife as well as of the subject-inatter, a decree of foreclosure entered therein is not void because the wife did not appear, but was represented by an attorney employed by the husband without her knowledge or consent, who appeared and answered for her. (3) In such a case, if there had been no appearance for her, the plaintiff would have been entitled to a default and decree against her, and his position should not be held worse by an appearance with which he had no connection. (4) As her complaint in this case fails to show any excuse or cause why she did not appear, or why she did not apply to the court in which the action to foreclose was pending for leave to defend, the court below properly held the decree of foreclosure valid and binding upon her, and a bar to her present cause of action.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(19 Nev. 379)

YOUNG v. BREHI. (No. 1,235.)

(Supreme Court of Nevada. January 8, 1887.)

ESTOPPEL—BY JUDGMENT—PENDING MOTION FOR NEW TRIAL—EVIDENCE.

In an action on a promissory note, when the defense is made that the defendant executed and delivered to the plaintiff a deed of lands, which was accepted by him in full payment of the note sued on and other notes due from defendant to plaintiff, the record of an action by the same plaintiff against the same defendant, on one of the other notes, in which the same defense was made, and where it was decided that the deed was never delivered and accepted as alleged, is conclusive against defendant, and the fact that a motion for a new trial is pending in that action does not affect the operation of the judgment therein as an estoppel, and plaintiff having no opportunity to plead the matter in estoppel, it is just as conclusive when admitted in evidence.

Appeal from an order of Sixth judicial district court, granting plaintiff a new trial.

Henry K. Mitchell, for appellant. *Baker & Wines*, for respondent.

LEONARD, C. J. In May, 1884, defendant owed plaintiff nearly \$6,000, upon promissory notes secured by mortgages, and for money paid out. On the second day of October, 1884, plaintiff brought an action in the district court of Eureka county to recover \$2,647, and interest, upon two promissory notes, and for money paid out. That case was transferred to White Pine county for trial. In his answer defendant denied any and all indebtedness, and alleged that he had paid plaintiff in full all sums of money claimed in the complaint to be due. After trial upon the merits, plaintiff recovered a verdict and judgment for \$2,372.

At the trial in this case it was admitted and agreed that, in the *White Pine Case*, defendant had filed and served notice of intention to move for a new trial; that no statement had been settled; that said motion was still pending; and that defendant had not executed any bond or undertaking on appeal. Plaintiff instituted this action in the district court of Eureka county, October 9, 1884, to recover \$2,600, and interest, alleged to be due upon two other promissory notes. In his answer, as in the *White Pine Case*, defendant denied any and all indebtedness, and pleaded full payment of each note described in the complaint. The record shows, without contradiction, that in the *White Pine Case*, to sustain his allegation of payment, defendant insisted, and introduced much evidence tending to prove, that, on or about May 31, 1884, in pursuance of an agreement entered into between plaintiff and defendant, he sold and delivered to plaintiff certain personal property, and conveyed, by good and sufficient deed, real estate in full payment and satisfaction of all indebtedness then existing against him in favor of plaintiff, which included that claimed in the action then being tried, and also the amount in question in this action; and that said sale and conveyance were accepted by plaintiff in full payment and satisfaction of the entire indebtedness mentioned; that, on the contrary, plaintiff claimed and insisted, and introduced evidence tending to prove, that the attempted settlement was never consummated; that the deed was never delivered to, or accepted by, him, and therefore that the notes then in question had not been paid.

The verdict in the case must have turned on those issues, for there were no others, and it was in favor of plaintiff. Yet in this action, between the same parties, those are the precise questions which defendant endeavored to agitate again; and to that end he introduced evidence substantially the same as that produced at the trial in *White Pine*.

After defendant had rested, for the purpose of proving what questions were submitted and determined in the former case, plaintiff introduced in evidence copy of complaint, summons, answer, order of removal to White Pine county for trial, verdict, and judgment in the case, and also oral testimony showing what evidence was introduced by the respective parties in support of the issues there made. The court charged the jury, among other things, that if they found the verdict of the jury and the judgment of the court in the case tried at White Pine were in favor of plaintiff upon the issues of delivery or non-delivery, acceptance or non-acceptance of the said deed, and if they further found that defendant in this action relied upon the execution and alleged delivery to plaintiff of the same deed, and claimed that the said deed was executed and delivered at the same time testified to by him upon the trial in White Pine county, then said verdict and judgment so rendered and entered in favor of plaintiff, and against defendant, upon the trial of said action in White Pine county, were conclusive upon defendant in this action, and their verdict must be for plaintiff; unless they found from the evidence that there was some payment made by defendant, of the notes sued on in this ac-

tion, other than the execution and delivery of said deed. The jury found for defendant, and judgment was entered in his favor for his costs. Plaintiff moved for a new trial on the ground that the evidence was insufficient to justify the verdict, and did not support the verdict. The court ordered a new trial upon the ground stated in the motion, and defendant appeals from that order.

The district court in White Pine county had jurisdiction of the parties and the subject-matter of the action. The court and the district court of Eureka county had concurrent jurisdiction. In the two cases mentioned, the parties and the issues made by the pleadings were the same. The facts put in issue and found by the jury in the *White Pine Case* in favor of plaintiff, upon which recovery was based, were identical with those that defendant attempted to establish in his favor in this action, and upon which he relied to defeat plaintiff's recovery. The verdict and judgment in the former case established the fact, conclusively, that the deed referred to was not delivered or accepted in payment or satisfaction of plaintiff's demands, and consequently that the notes and claims in question in that action had not been paid thereby. If there was not such delivery or acceptance of the deed as to constitute payment of the demands in question in that action, the same was true of the notes involved in this, because the transaction was entire, and the conveyance covered and satisfied the whole indebtedness, if any part of it. Upon these facts the judgment in the former case, as evidence, was conclusive against defendant upon the only material issues raised in this case. *McLeod v. Lee*, 17 Nev. 103; 1 Greenl. Ev. § 534; *Caperton v. Schmidt*, 26 Cal. 496; *Gardner v. Buckbee*, 3 Cow. 125; *Burt v. Sternburgh*, 4 Cow. 562; *Burke v. Miller*, 4 Gray, 115; *Doty v. Brown*, 4 N. Y. 72; *White v. Coatsworth*, 6 N. Y. 139.

The estoppel was not pleaded in bar, but, when there has been no opportunity to do so, the matter of estoppel, when admitted in evidence, is just as conclusive as it would have been if it had been pleaded. 1 Greenl. Ev. (13th Ed.) § 531; *Perkins v. Walker*, 19 Vt. 148. In this case plaintiff had no opportunity to plead it. *Clink v. Thurston*, 47 Cal. 28. In fact, the only reason suggested by counsel for appellant why the judgment in the former case was not conclusive against defendant in this action, upon all material issues,—that is to say, upon the questions of delivery and acceptance of the deed, and consequently as to payment of the notes in suit,—is, that the judgment admitted in evidence was not final, and therefore not a bar; because in that case a notice of intention to move for a new trial had been filed, and was still pending, although no appeal had been taken, and no bond or undertaking on appeal or to stay execution had been executed. We are referred to no authorities that sustain counsel's position, and know of none. Although the question as to the effect of an appeal from a judgment of a district court to the supreme court, with or without a stay-bond, is not in this case, yet this court, on two occasions, has decided that the validity of such judgment is not suspended or affected by a bare appeal. *Rogers v. Hatch*, 8 Nev. 39; *Cain v. Williams*, 16 Nev. 430. See, also, *Nill v. Compart*, 16 Ind. 108; *Burton v. Burton*, 28 Ind. 843; *Burton v. Reeds*, 20 Ind. 87. The pendency of motion for a new trial did not even stay execution. *People v. Loucks*, 28 Cal. 70; *Jones v. Spears*, 56 Cal. 164; Haynie, *New Trials*, § 3. The judgment disposed of every issue in the case, and was final. *Perkins v. Sierra Nev. S. M. Co.*, 10 Nev. 405; *Lake v. King*, 16 Nev. 216.

Defendant did not claim that he had paid the notes in question, unless the execution and alleged delivery of the deed of May 31, 1884, constituted such payment. Upon that point the former judgment was conclusive against him, and the court did not err in granting a new trial.

Order appealed from affirmed.

(2 Ariz. 223)

JOHNSON v. TULLY and others.

(Supreme Court of Arizona. January 8, 1887.)

COURTS—UNITED STATES SUPREME COURT—APPEAL FROM TERRITORIES—AMOUNT IN CONTROVERSY.

Under the act of congress of March 3, 1885, providing that no appeal shall be allowed from a judgment of the supreme court of any territory unless the matter in dispute, exclusive of costs, shall exceed \$5,000, an appeal will not lie from a judgment for \$4,304.98, acquiesced in by the plaintiff, and affirmed by the supreme court of Arizona; there being nothing in controversy but the sum for which judgment was given.

Campbell & Silent, Sumner Howard, and O. T. Rouse, for appellant. *Jef-fords & Franklin*, for appellees.

BARNES, J. This was an appeal from the district court of Pima county, from a judgment in favor of the plaintiff, Johnson, against the defendants L. Zeckendorf & Co. The amount of the judgment appealed from was \$4,304.98, and was rendered in said court on the twenty-sixth day of September, 1885. On the eighth day of November, 1886, in this court, the said judgment was affirmed. 12 Pac. Rep. 65. Thereafter the defendants filed their petition for a rehearing, which petition was, on the eighth day of January, 1887, denied. The defendants thereupon prayed an appeal to the supreme court of the United States, and their application is accompanied with the affidavit of L. Steinfeldt, one of the defendants, who swears that the amount in dispute exceeds the sum of \$5,000.

The act of congress of March 3, 1885, provides that "no appeal or writ of error shall hereafter be allowed from any judgment * * * in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."

The affidavit does not state that the matter in dispute, exclusive of costs, is over \$5,000. The person who makes the affidavit has evidently based it upon the idea that the accrued interest since the rendition of the judgment in the district court, added to the judgment, makes a sum in excess of \$5,000, and therefore his affidavit that the matter in dispute does exceed the sum of \$5,000. The interest upon a judgment is an incident to the judgment, created by law, and it is not a part of the judgment itself. The judgment in favor of the plaintiff was acquiesced in by the plaintiff, and an appeal was taken by the defendant, against whom the judgment was rendered, and by the defendant the appeal is now prayed. The amount in controversy must be the amount of the judgment. The supreme court of the United States, in the case of *Merrill v. Petty*, 16 Wall. 341, lays down the doctrine that the amount required is to be ascertained and determined by the sum in controversy at the time of the judgment in the circuit court, and not by any subsequent additions thereto, such as interest; and, further, that if the verdict is given against the defendant for a less sum, and judgment is rendered against him accordingly, nothing is in controversy between him and the plaintiff, if the plaintiff acquiesces in the judgment, beyond the sum for which the judgment is given. This case, and cases cited, together with the case of *Barney v. Martin*, 91 U. S. 365, seem to be decisive of this question. We are therefore compelled to hold that the amount in controversy in this case does not exceed the sum of \$5,000, and therefore an appeal cannot be had to the United States supreme court from this court.

The appeal from this court is denied.

(2 Cal. Unrep. 682)

COOK v. ROCHFORD. (No. 11,134.)

(Supreme Court of California. August 23, 1886.)

SALE—DELIVERY—ATTACHING CREDITORS.

In an action against a sheriff for the recovery of property attached by him as that of one C., where it is claimed that C. sold the property to plaintiff before the attachment, testimony of plaintiff and C. to the effect that on a day named prior to the attachment C. sold the property to plaintiff, taking his promissory note in payment, and gave him a bill of sale of the property, viz., saloon furniture and stock; that C. delivered to plaintiff the keys of the safe and the saloon, took his account-book, and left, and has had nothing to do with the business since, and that plaintiff has continued to own the property, and carry on the business, up to the time of the levy of the attachment; that there was but one advertisement in any paper authorized by C., and that was changed on the day of the sale by the insertion of plaintiff's name in the place of that of C.; that the advertisements that appeared in various other papers were not changed; that the sale was made in good faith; that the plaintiff was C.'s bar-tender at the time of the sale, and the business was conducted after the transfer just as it had been before, plaintiff continuing to tend bar: *held*, insufficient evidence of an immediate delivery and continued change of possession of the property in controversy.¹

Department 1. Appeal from superior court, Modoc county.

Replevin.

The complaint in this action alleges that the defendant is sheriff of Modoc county, California; that on the first July, 1884, at Alturas, Modoc county, California, plaintiff was the owner and in the exclusive possession of certain saloon furniture, fixtures, and stock set out in the complaint; that the value of such goods was \$1,109.75; that the defendant, as such sheriff, on the first July, 1884, without the consent of plaintiff, took such goods from the plaintiff's possession; that before the commencement of this action, on July 2, 1884, plaintiff demanded of defendant possession and return to him of such goods, which defendant refused, and still refuses, to do. Defendant's answer denies that plaintiff was the owner or in possession of the property; denies any damage to plaintiff; alleges that he, as sheriff of Modoc county, on July 1, 1884, levied upon and attached the property described in the complaint under process of court issued in the case of *Sykes & Co.* against *Whiting & Culver*; that the goods were the property of J. B. Culver, of the firm of Whiting & Culver; that any claim of title of plaintiff thereto, based upon any contract with said Culver, is fraudulent and void. There was a verdict and judgment for plaintiff. Motion for new trial by defendant denied by the court. Defendant appeals from the judgment, and from the order denying the motion for a new trial.

The testimony offered on behalf of plaintiff and defendant, respectively, is as follows:

W. D. Cook, having been duly sworn, testified as follows:

"I am the plaintiff. I am an unmarried man. I am twenty-four years of age. Have resided in the town of Alturas, in this county, for the past eighteen months. I had been laboring as a bar-keeper in the Branch saloon, in this town, during my residence here, up to about the twentieth day of November, 1883. Shortly after this I began laboring for John B. Culver, as bar-keeper in the Delta saloon, in this town, and continued so to labor for him until the twenty-sixth day of June, 1884, when I purchased of Culver all the property described in the complaint, and then took of him a written bill of sale therefor. Culver first proposed a sale to me of the property about the first of June, when I took the matter under advisement, and on the day we traded I approached him, and asked him if he was still willing to sell upon the terms he had offered. He answered that he was, and we closed the trade. No one was present at the sale other than Culver and myself. It was made

¹See note at end of case.

at the saloon. The articles or property was not inventoried, nor in anywise examined or listed; but a lumping was made. I knew what there was in the saloon. Culver, a few hours after the sale, gave me a bill of sale, then took his account-books, and left. The purchase price was \$1,183. I had no property nor money whatever at the time I made the purchase. I bought the property on credit. I gave my individual, unsecured promissory notes to Culver for the purchase money in part, and assumed, as between Culver and myself, only the payment of certain debts of Culver for the balance. I knew at the time of making the purchase that Culver was indebted to some parties in San Francisco for some of the stock on hand, but did not then know that he was indebted to E. Sikes & Co.

"As I have said, I assumed the payment of certain debts of Culver in San Francisco. I did not, in writing or otherwise, agree with Culver's creditors to pay these debts, but merely so contracted with Culver. Since this action was begun I have paid those debts so assumed, and also paid about all I owe Culver on the promissory notes. I made the purchase in good faith. I could make no money keeping bar, and I thought I could do no worse running the saloon on my own responsibility, was the reason I made the purchase. I did not know at the time I made the purchase that F. W. Ewing, attorney for E. Sikes & Co., was then endeavoring to collect their claim against Culver. Culver said nothing to me about it. The defendant, as sheriff, on the first day of July, 1884, levied upon and attached all of the property described in my complaint, and then took the same into his official custody, and so kept and detained the same continuously until the twenty-first day of that month. His taking was by virtue of a writ of attachment in the action then pending in the superior court of this county in favor of E. Sikes & Co. and against John B. Culver. At the time of the sale, nor at any other time thereafter, until attached, was anything done with reference to the property in controversy that would evidence to a person that there had been a change of ownership or possession thereof. The bar fixtures, and everything in the saloon, remained just the same, and I continued to tend the bar just the same as I had while laboring for Culver. On the same day that I purchased the property I went to the office of the Northern Picket, a weekly newspaper published in town, and ordered Culver's name removed and my own inserted in the advertisement as the proprietor of the Delta saloon, which was done, and have had the advertisement in that paper ever since. Culver did not stop there after the sale, but would come around, and be in the saloon; but he and I were in the saloon, sitting there, when the defendant came in to make the attachment. Culver then told the sheriff that he had sold out to me, but I did not say anything about it. I did not then, nor have I ever, shown him my bill of sale. I assisted the sheriff in making the inventory of the property. I did not make any demand upon the sheriff for the return of the property until the next day. The property in controversy was, at all times alleged, worth \$1,109.75. I have been damaged \$100 by defendant's keeping the said property from the time it was attached until the twenty-first July, 1884. After I had made the purchase, and immediately thereafter, Culver gave me possession by handing me the keys of the door and safe, and, with a wave of his hand, said, 'There is the property,' or words of similar import. Culver then took his account-book and left, and has never had anything to do with it since, and from that time has had no interest in it, one way or another."

John B. Culver, sworn on behalf of plaintiff, testified as follows: "When I made a sale of the property in controversy to plaintiff I was indebted to E. Sikes & Co., of San Francisco, to the amount of \$350. I never have paid their claim, but I expect to as soon as I get able. I made the sale to Cook in good faith, and without any intention of defrauding E. Sikes & Co. The saloon building, and which I had rented, has been long known as the 'Delta Saloon,' and so advertised in various local newspapers, with myself as pro-

prietor. There was but one of these advertisements, to-wit, the one in the Northern Picket, that was authorized by me. This advertisement was discontinued by me on the day of the sale. I have done nothing with reference to the other advertisements. At the time of the sale, nor at any time subsequently that I know of, was anything done to evidence the change of the possession of the property, other than that I took my accounts, and left the saloon, and gave plaintiff the keys thereto. When the sheriff made the attachment I told him the property belonged to Cook; that I had sold it to him five days before; and afterwards Mr. Cook told him the same."

C. C. Rochford, being sworn, testified as follows: "I am the defendant herein. I attached the property in controversy in the Delta saloon, in this town, on the first day of July, 1884. The plaintiff and John B. Culver were both in the saloon when I went into and when I did make the attachment. I had been well acquainted with Culver and Cook when Culver was proprietor of the saloon and Cook his bar-tender; had been in the saloon very frequently during that time. When I made the attachment of the property in controversy I did not see or know anything that evidenced a change of possession or ownership thereof, excepting only that Culver told me, while making the levy, that he had sold to Cook. Cook did not say a word about it, but assisted me in making the levy. He did not claim the property until the next day. I placed a keeper in possession of the saloon, and, at plaintiff's request, conducted the business, selling for cash only; all receipts of which were turned over to plaintiff on July 21, 1884, when he gave a bond for the return of the property. After plaintiff demanded a return of the property, E. Sikes & Co. indemnified me by their attorney giving me his word that I should be saved from all expense for damages in the premises if I would hold the property, but no writing of indemnity was given me, nor have I any now."

J. S. Whiting was duly sworn on behalf of the defendant, whereupon defendant offered to prove by this witness that E. Sikes & Co., by their attorney, had presented and were pressing Culver for the payment of their claim on the day before the sale from Culver to Cook, and that Culver replied, asking for an extension of time for a few days, that he might hear from E. Sikes & Co.; to which plaintiff objected on the ground that such testimony would be incompetent, irrelevant, and immaterial. The court sustained the objection, and the defendant excepted.

J. J. May, for plaintiff and respondent. *Ewing & Clafin*, for defendant and appellant.

BY THE COURT. The court below should have granted a new trial. The evidence was insufficient to show that there was an immediate delivery and continued change of possession of the property in controversy.

Judgment and order reversed, and cause remanded for a new trial.

NOTE.

As to what is a sufficient change of possession to overcome the presumption of fraud, see *Bailey v. Johnson*, (Colo.) 12 Pac. Rep. 209; *Ross v. Sedgwick*, (Cal.) 10 Pac. Rep. 400; *Cessna v. Nimmick*, (Pa.) 4 Atl. Rep. 193; for circumstances held sufficient to justify the submission of the question to the jury, see *Tuckwood v. Hawthorn*, (Wis.) 30 N. W. Rep. 705; what is insufficient, see *Comaita v. Kyle*, (Nev.) 5 Pac. Rep. 666; *Seavey v. Walker*, (Ind.) 9 N. E. Rep. 347.

(71 Cal. 513)

DUFF and another v. DUFF and another. (No. 9,681.)

(*Supreme Court of California*. December 31, 1886.)

1. NEW TRIAL—MOTION—PRACTICE AS TO TIME—WHEN TRIAL CLOSED—FINDINGS BY JURY AND JUDGE—EXCEPTIONS ON APPEAL.

An action was brought in February, 1881, to have defendants adjudged trustees for plaintiffs of real estate alleged to have been fraudulently and collusively conveyed to them, and for an accounting and the appointment of a receiver. Certain special ques-

tions or issues were submitted to a jury for the court's advisement, which, in September, 1881, responded to the same by a verdict. In November, 1881, defendant moved to set aside this verdict, on grounds of error in giving and refusing instructions, and insufficiency of evidence to support certain of the findings. No statement or bill of exceptions was made on this motion, which was denied on the ground that the court would reserve its decisions on these findings till the conclusion of the trial. In February, 1883, the court filed a series of findings, followed by an interlocutory judgment filed in July, 1883, adjudging certain trusts in favor of plaintiffs, and directing defendants to account for rents and profits. The court itself took and stated the amount, and filed findings thereon on January 31, 1884, and gave final judgment on February 1, 1884. No notice was given defendants of the filing of the final findings of the court on January 31, 1884. On February 11, 1884, defendants filed and served notice of intention to move for a new trial, on the grounds of the insufficiency of the evidence to justify the findings of the jury, and the findings of facts and decision of the court; that findings of the court were against law and evidence, and of error in law occurring at the trial, and excepted to by the defendants. A bill of exceptions embodying these objections was settled and certified by the court, both parties being present. Defendants' motion for new trial was heard and denied May 10, 1884, and on July 5, 1884, defendants appealed from the interlocutory judgment, from the final judgment, and from the order denying their motion for a new trial. Held, the trial did not end till the filing of the findings of the court on January 31, 1884, the notice for new trial was given in time, and the appellants had the right to be heard on the matters stated in their bill of exceptions; following *Hinds v. Gage*, 58 Cal. 486.

2. APPEAL—INTERLOCUTORY JUDGMENT.

No appeal lies from an interlocutory judgment in an action to have a trust declared in real property alleged to have been fraudulently conveyed.

3. EVIDENCE—ADMISSIONS—OF PARTY IN INTEREST—AGAINST INTEREST—DESCRIPTION IN PETITION FOR LETTERS OF ADMINISTRATION.

A statement in a petition for letters of administration, drawn by an attorney instructed to draw a suitable petition, which describes certain real estate by lots and block, or metes and bounds, as belonging to the estate, and signed, "F. S. D., by S. M. B., his Atty., etc., etc., is not admissible, in a suit against F. S. D., to recover from him lands answering such description, as an admission that said lands belonged to the estate, unless it is shown that such statement was made with his knowledge, direction, or sanction, and not merely under general instruction to draw the petition in which they occur.

4. SAME—STATEMENT FOR ARBITRATION OF ANOTHER MATTER.

Statements made by defendant, under his signature, for the purpose of submitting to arbitration matters of difference in another action, cannot be used against him as evidence of admissions made by him touching the subject-matter in litigation.

5. STATUTE OF LIMITATIONS—FRAUD IN RELATION TO REAL ESTATE—CODE CIVIL PROC. CAL. § 338, SUBD. 4.

Whether actions for relief, on the ground of fraud, in relation to real property, come within Code Civil Proc. Cal. § 338, subd. 4, as to limitation of actions, *quere*; but if not, they are governed by the same rules, as to limitation, as have been adopted and enforced with regard to such subdivision and section.¹

6. EQUITY—FRAUD IN RELATION TO REAL ESTATE—GROUNDS OF RELIEF—LACHES.

A complaint in an action for relief on grounds of fraud in relation to real property, which sets forth that plaintiff's husband in 1863 executed a power of attorney to defendant's ancestor, by which he authorized him, *inter alia*, to sell and convey for the constituent the property referred to therein; that, immediately after, he left the state, and never returned; that subsequently, from 1866 to 1872, said attorney conveyed, under the power, certain of the property to defendants, respectively, without consideration, for the purpose of defrauding plaintiff's ancestor, and in collusion with defendants; that plaintiff's husband died in 1875, having devised all his property, whatsoever and wheresoever, to her, without knowledge of such conveyances aforementioned; that, shortly after her husband's death, plaintiff was informed by defendants, his brothers, that he was not entitled to any of the lands sued for, and that she was only informed in 1879 of his title to such lands,—shows a case of concealed fraud, and a sufficient cause of action, not barred by laches or lapse of time.

7. SAME—JURISDICTION—CONCURRENT REMEDY AT LAW NOT GROUND FOR REFUSAL—LENGTH OF TIME.

In an action for relief on the ground of fraud in relation to real estate, where the complaint avers that the conveyances alleged to be fraudulent were without consid-

¹See note at end of case.

eration, but the allegations in the complaint show that there has been a great lapse of time, the court, taking into consideration the probability of the statute of limitations being invoked, will not refuse relief in equity on the ground that, the conveyances being alleged to be without consideration, plaintiff's complaint shows a complete and adequate remedy at law by ejectment.

8. NEW TRIAL—APPEAL—INSUFFICIENT FINDINGS—TITLE.

In an equitable action involving the issue of the title of plaintiff's devisor to real estate, a finding that such devisor was "the owner of the legal title of the lands," is not sufficient, but it should be found that he was or was not the owner of the land; and where facts are alleged in the answer tending to show that the purchase of the land in suit was made, and the purchase money paid, by others, who caused the legal title to be made to such devisor, by which a resulting trust in favor of the parties paying the money was created, a finding that such devisor "did not acquire the legal title in trust for other persons" is not sufficient.

9. SAME—ACTUAL NOTICE.

Where, in such a case, there is an implication by defendants that circumstances were known to the constituent which should have stimulated him to inquiry, a finding that said constituent, in his life-time, had not *actual* knowledge or information of any deeds by his attorney, is not sufficient to support the allegation of want of notice.

10. SAME—POWER OF ATTORNEY.

A finding that property referred to in a letter, being a power of attorney, is held in trust for plaintiff, as stated in it, should find that the property referred to in the letter is held in trust "in the manner and proportions mentioned" in the letter.

11. SAME—FINDING AS TO BAR OF ACTION UNDER STATUTE.

A court, in its findings upon the question of an action being barred by the statute of limitations, should not only find facts on which its decision as to the defense of the statute of limitations may be based, but should find, in addition to such facts, whether the cause of action is barred by the statute or not.

In bank. Appeal from superior court, Humboldt county.

Action for a surrender of real estate. Judgment for plaintiffs. Defendants appeal.

S. M. Buck, James Hanna, and Horace L. Smith, for appellants. *J. D. H. Chamberlin, J. J. De Haven, L. D. McKisick, and S. M. Wilson*, for respondents.

THORNTON, J. The plaintiffs are Julia Duff, the widow, and Agnes Duff, the infant daughter, of William R. Duff, deceased. The defendants are Robert P. Duff and Frank S. Duff, the brothers of the decedent above named. The object of the action is to have defendants adjudged trustees for plaintiffs of the real property alleged to have been fraudulently conveyed to them by Richard Duff, their father, under powers of attorney executed to him by William R. Duff; that the defendants be decreed to reconvey the said real property to the plaintiffs, and that they account to them for the rents and profits received by them from the property aforesaid; and that a receiver be appointed to take charge of said property, and collect the rents, etc., during the pendency of this action.

Issue being joined by the several answers of the defendants; certain special questions on issues, 14 in number, were framed, and submitted to a jury, who, on the twenty-second of September, responded to the same by a verdict. On the fourteenth of November, 1881, the defendant moved the court to set aside so much of the verdict as answers the issues numbered 1, 10, 11, and 13, on the ground—*First*, that the court erred in giving the instructions to the jury as requested by plaintiffs; *second*, in refusing to instruct as requested by defendants; *third*, insufficiency of the evidence to justify the verdict. Under this last ground several particulars are specified in which the evidence was so insufficient. The record states that "the above motion is made upon the papers in the case, the documentary evidence introduced on the trial of said issues, and all evidence introduced on said trial, as shown by the minutes of the court." No statement or bill of exceptions was made on this motion. The court, on the thirtieth of July, 1882, denied the mo-

tion. In denying the motion, an opinion was filed, in which the learned judge said that it was conceded that the verdict or findings of a jury, in a case of the kind before the court, are merely advisory, and may be adopted in full, or modified or wholly rejected, by the court; that, if the court had mistaken the law, and misdirected the jury in the instructions given, or erred in refusing instructions asked, all such errors can be corrected when the case is finally submitted, and no injury can result to either party; that, though the case was tried half a dozen times, it would still be in the power of and the duty of the court "to reject, modify, or approve any or all the findings of the jury, and adopt such findings only as might be justified by the evidence."

The opinion proceeds as follows: "As far as I am now informed, I am satisfied that I will have to reject some of the findings, and perhaps modify others. My understanding is that other issues and further evidence are yet to be submitted to the court before the final submission of the cause for decision. I prefer withholding a definite and ultimate decision upon the matters involved in this motion until all the evidence is in, and the trial concluded. I see no impropriety in the practice, more particularly as the arguments and briefs of counsel on the motion seem to me to cover substantially the whole grounds of the controversy. Reserving the right hereafter to adopt such findings as are sustained by the evidence, to reject those which are not, and to modify others if necessary, I shall deny the motion."

On the twenty-third of February, 1883, the court filed a series of findings covering the most important issues in the cause. An interlocutory judgment followed, which was filed on the twenty-fourth of July, 1883. By this decree it was adjudged that certain trusts in said property existed in favor of plaintiffs, and defendants were directed to account to them for rents and profits, etc., and a referee was appointed to ascertain certain matters, and report to the court, and take and state the account above referred to. It appears that the referee never acted, and that the inquiry was made and the account was afterwards taken and stated by the court. Additional findings were made by the court covering the matters of which an account was to be taken. These findings were filed on the thirty-first of January, 1884.

The final judgment herein was filed on the first day of February, 1884, and on the eleventh day of the same month a notice of intention to move for a trial was, on behalf of defendants, served and filed. The notice stated that the motion would be made on a bill of exceptions to be settled and filed, and on the following grounds: "(1) Insufficiency of the evidence to justify the findings of the jury upon the issues of fact submitted; (2) insufficiency of the evidence to justify the findings of facts and decision of the court; (3) that the findings of fact and decision of the court are against law and evidence; (4) error in law occurring at the trial, and excepted to by the defendants."

Both parties appeared before the judge on the settlement of the bill, which was certified and allowed on the eighteenth day of April, 1884. On the tenth of May, 1884, defendants' motion for a new trial was denied, and the fifth day of July following the defendants appealed from the interlocutory judgment, from the final judgment, and from the order denying their motion for a new trial.

What can be heard by this court on these three appeals?

No appeal lies from an interlocutory judgment except in an action for the partition of real property. Code Civil Proc. § 939, sub. 3. The appeal from the interlocutory judgment may therefore be disregarded.

There is no appeal from the order of July 30, 1882, denying defendants' motion to set aside the verdict of the jury as to certain of the special issues above stated. It is urged, on behalf of respondents, that this motion was for a new trial, opportunely made, and its denial was appealable, and that on such appeal the insufficiency of the evidence to justify the findings of the jury and

the errors of law properly reserved might have been considered; but no appeal having been taken from the order of the thirtieth July, 1882, which it is contended denied defendants' motion for a new trial, and no bill of exceptions or statement settled on such motion, the defendants cannot now be heard on their bill of exceptions as to that part of the trial which was had before the jury. Is this contention maintainable?

In *Hinds v. Gage*, 56 Cal. 486, which was an action to dissolve a partnership, for an accounting between the partners, for the payment of the partnership debts, and to set aside certain alleged fraudulent judgments and sales, the court below, on the twentieth of June, 1878, filed its findings of fact, and on the twenty-seventh of same month a decree was entered setting aside the judgments and sales, dissolving the partnership, directing the property to be sold by a receiver who had been theretofore appointed, and ordering a reference to a referee to take an account between the partners, and to ascertain the indebtedness of the firm to third parties and between themselves. It was also ordered that the referee report the result of the accounting, and that upon the coming in of the report, and its approval, the proceeds of the partnership property be applied as stated in the decree. On the fifth of July, 1878, defendants gave notice of their intention to move for a new trial, which motion was denied March 5, 1879. The report of the referee was filed October 18, 1878, and after hearing the objections of the defendants thereto, it was confirmed. The court held that, as the notice of motion for a new trial was given before the report of the referee was filed, it was therefore premature, and that the appeal from the order denying such new trial should be dismissed. The court relied on and followed *Crowther v. Rowlandson*, 27 Cal. 377, in which it was held that it was the intention of the legislature that the proceedings in new trials should be postponed until cases had been tried, and that the trial of the case was not complete until the final report of the referee was filed. The case of *Hinds v. Gage* has never been overruled.

In the case before us the referee did not act, and the account was taken and stated by the court. The findings on this branch of the case were filed on the thirty-first of January, 1884. If the trial in the case of *Hinds v. Gage* did not end until the report of the referee was filed, by a parity of reasoning the trial in this case did not end until the filing of the findings of the court on the day first above mentioned. The notice of new trial was served and filed on the eleventh of February following; and, though this was on the eleventh day after such filing, still, as it does not appear that any notice of the filing of these findings was ever served on the defendants, from which service the 10 days in which they had to be given notice of such motion is to be computed, we must hold the notice given in time. The appellants, then, on their appeal from the order of the tenth day of May, 1884, denying a new trial, within the reason of the rule laid down in *Hinds v. Gage*, have a right to be heard on the matters stated in their bill of exceptions.

Another view may be taken in relation to this matter, which would accord to the defendants the right to be heard as above stated. The case should be regarded as having been tried by the court, and the findings as incomplete until findings latest in date were filed. The defendants, then, have a right to be heard, on giving notice of their motion for a new trial within 10 days after receiving notice of the filing of the findings. As above said, they have received no notice of the filing, and, therefore, their motion was in time.

We think that it is eminently just that the defendants should be here heard on their bill of exceptions. The court, in denying the motion to set aside the findings above mentioned, seemed to be of opinion that the defendants would lose nothing by deferring their notice as they did. This is apparent from the opinion of the court above stated. It is evident from his remarks that the learned judge did not regard the case as finally submitted, and the motion seems to have been denied, without considering the merits of it, on the

ground that it would be better to make it after the final decision,—a course of procedure from which he said "no injury could result to either party." Though this course of procedure, taken at the suggestion of the judge, would not warrant us in establishing a practice not sustained by the Code, still, as we find the course proper, we advert to it to show that, if the defendants are not heard here in regard to the questions arising on their bill of exceptions, injustice would be done them. In fact, their motion for a new trial was not heard on the merits at all in the lower court until after the second set of findings was filed. When the bill of exceptions was settled, no objection was made to it as containing matters not proper to be inserted in it at that stage of the case, and the motion proceeded and was determined as if it was in all respects regularly made.

The parties appear to have acted on the intimation of the court. On the twenty-third of February, 1883, the court, after having been advised by the verdict, filed the first set of findings: and on the fifth of March, 1883, the parties consented in writing that defendants should have 20 days from March 1, 1883, to prepare and serve a bill of exceptions, and file and serve a notice of motion for new trial. On the same day, and in pursuance of this consent, an order of court was accordingly entered. This consent was continued in writing, and by order, to a day subsequent to the settlement of the bill of exceptions. Under these circumstances it would be most unfair now to hold that the bill of exceptions should not be considered in its entirety.

In the course of the trial several exceptions were reserved by defendants to the rulings of the court upon the admissibility of evidence offered on behalf of plaintiffs, which we proceed to consider.

The plaintiffs offered in evidence a petition signed, "F. S. DUFF, by S. M. BUCK, his Atty.," for letters of administration on the estate of Richard Duff, deceased. The petition was filed in December, 1877, and described by metes and bounds, or by reference to lots in certain blocks in the city of Eureka, giving the numbers of the lots and blocks, certain parcels of land as belonging to the estate of Richard Duff, deceased, and stated that certain of the parcels described as belonging to the estate were held by Robert P. Duff. Some parcels of this property described as held by Robert P. Duff were really claimed by and had been conveyed to Frank S. Duff. These parcels, or some of them, are portions of the property involved here. When this paper was offered, there was no proof that F. S. Duff (who is the defendant Frank S. Duff) ever signed it, or knew of its contents, or, in fact, ever heard of it.

At no time has the statute ever required that the real property belonging, or claimed to belong, to the estate of a decedent, should be described in the petition for letters of administration. It is only required that the value and character of the property, "when known to the applicant," should be stated. As the petition must state the facts essential to give jurisdiction of the case, it may in some cases be necessary to state that the deceased left property in the county in which the application is made. Code Civil Proc. § 1294. But the statute never required any further statement regarding the property than that above pointed out.

The paper in question was not offered to prove the fact that an application to procure letters of administration on the estate of the decedent was made by defendant Frank, but as an admission by Frank that certain statements made in it that certain parcels of the land individually claimed by him were not his property, but belonged to the estate of Richard Duff, deceased. This petition is a pleading, and the rules in regard to admissions in pleadings apply to it. *Foster v. Wilber*, 1 Paige, 540; *Van Vleck v. Burroughs*, 6 Barb. 344; *Carle v. Underhill*, 3 Bradf. Surr. 101; Code Civil Proc. §§ 420, 1371. Conceding that it contained the admissions of facts which would be evidence against a party who had knowingly made them, are they evidence against him under the circumstances above mentioned?

In 2 Whart. Ev. § 838, it is said "that the pleadings of a party in one suit may be used in evidence against him in another suit, not as estoppel, but as proof, open to rebuttal and explanation, that he admitted certain facts. But, in order to bring such admission home to him, the pleading must either be signed by him, or it must appear that it was within the scope of the attorney's authority to admit such facts." The learned author cites the following cases: *Parsons v. Copeland*, 33 Me. 370; *Green v. Bedell*, 48 N. H. 546; *Currier v. Siloway*, 1 Allen, 19; *Gordon v. Parmelee*, 2 Allen, 212; *Bliss v. Nichols*, 12 Allen, 443; *Brown v. Jewett*, 120 Mass. 215; *Cook v. Barr*, 44 N. Y. 156; *Tabb v. Cabell*, 17 Grat. 160; *Hammat v. Russ*, 16 Me. 171; *Ayers v. Insurance Co.*, 17 Iowa, 176; *Meade v. Black*, 22 Wis. 241; *Hobson v. Odgen*, 16 Kan. 388.

In *Cook v. Barr*, 44 N. Y. 156, the commission of appeals, speaking by EARL, C., said: "When a party to a civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence; and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Admissions do not furnish conclusive evidence of the facts admitted, unless they were made under such circumstances as to constitute an estoppel, or were made in the pleadings in an action, when they are conclusive in that action. They may be contained in a letter addressed to the opposite party, or to a third person, and in either case are entitled to equal weight and credit. They are received in evidence because of the great probability that a party would not admit or state anything against himself or his own interest unless it were true. And I am unable to see why the rule does not apply to admissions contained in the pleadings in an action under our system of practice, which requires the facts to be alleged truly in the pleadings. It must first be shown, however, by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction."

In *Boileau v. Rutlin*, 2 Exch. 664, a question arose on the admissibility of a bill in chancery as evidence of the admission by the complainant of the truth of the facts stated therein, and it was held inadmissible for any such purpose, but only for the purpose of showing that a suit was instituted, and the subject-matter of it. This case was decided in 1848, and Judge CURTIS, in *Church v. Shelton*, 2 Curt. 275, states that it was held as above after a very careful examination of all the previous authorities both in England and Ireland. The same learned judge further says of this ruling: "I consider this decision to be in conformity with the weight of authority in this country;" and cites *Adams v. McMillan*, 7 Port. (Ala.) 73; *Durden v. Cleveland*, 4 Ala. 225; and *Isaac's Lessee v. Clarke*, 2 Gill, 1.

In *Church v. Shelton, supra*, the question arose as to the admissibility of a libel as evidence of a confession, by the party filing it, of the particular facts stated in it. The learned judge held it inadmissible as a confession, but admissible on another ground and for another purpose. The purpose for which it was admitted in the case cited does not exist in the case before us.

In the cases excluding bills in chancery, they seem to have been considered as the mere suggestions of counsel, for which the parties on whose behalf they were filed should not be held responsible.

In *Boileau v. Rutlin, supra*, it seems that the privy of the party complainant appeared. Still the bill was held inadmissible as an admission of the facts stated in it.

In *Marianski v. Cairns*, 1 Macq. 212, the defendant offered in evidence a pleading (answer) of plaintiff in a suit brought against him by his wife for alimony, as an admission of his poverty. Its admissibility was sustained by the house of lords on the ground that it was signed by the plaintiff. As to this Lord TRURO said: "The document in question stands on a footing quite different from that of pleadings in general, for it is signed by the party him-

self; and I recollect to have asked (though I do not remember that I have received an answer) whether it was upon oath or not. Assuming, however, that it was not upon oath, still it was a representation made by the individual himself, under his hand, as to the state of his own circumstances. By that document he described himself as living upon 8s. a week. And, one of the points in this case being whether Marianski had the means to make the advances which he claimed to be due to him, the document was tendered to show his position and resources at a period shortly antecedent to that at which the advances were alleged to have been made by him. Now, it certainly appears to me that this document is not open to the objection which would apply to pleadings in ordinary; and I am of opinion that being a statement of his own circumstances, made by the individual, and signed by him, the fact of its having been made in the course of another suit ought not to render it inadmissible as evidence in *this* suit."

In *McDermott v. Mitchell*, 47 Cal. 249, the joint answer of Root and Mitchell in the action of *Brock v. Mitchell and Root*, verified by Root, but not by Mitchell, was offered in evidence. It was held admissible as to Root, but not as to Mitchell. "As to the latter," the court said, "it was the mere work of the attorney, and not admissible as evidence against the client in another action."

In the cases above cited from Massachusetts, the pleadings were admitted on the ground that they were the statements of an agent (the attorney for the party) while employed and acting within the scope of his authority. 2 Allen, 215.

In this case it appears that the petition admitted was not signed by the petitioner, Frank S. Duff. His name was written at the end of the paper by his attorney. So far as appears, the authority of the attorney was to file a petition appropriate to the procurement of an order of court for letters of administration. This authority would not extend beyond the insertion of such allegations which the law required such application should contain. As is clear from the section of the statute above cited, a description of the property of the decedent's estate was not required, but only the value and character of such property. The character of the property would sufficiently appear by a statement in the petition that it was realty or personalty. The attorney was only authorized to file a petition stating the character and value of the property. In going beyond this, he was not acting within the scope of his authority, and therefore the statements in the petition describing the property were not on that ground admissible.

Evidence in relation to the preparation and filing of this paper was put in at a subsequent stage of the trial. The evidence shows that Frank Duff and his brother, James, called to see the attorney who drew it (Mr. Buck) about the date of its filing. James Duff said to him that he claimed that a portion of the property held by Robert Duff belonged to the estate of his father, and desired to have some one appointed administrator, and a suit brought for the purpose of testing his right. After some conversation Buck proposed to James Duff to file a petition, and asked him who should become the administrator. It seems not to have occurred to James that he could not very well be such because he was not a resident of the state. Buck suggested Frank as a proper person, to which Frank reluctantly assented. Frank had nothing to say about the business. Buck then asked about the property, and James said that it was the property of Robert Duff, and distinctly stated in Frank's presence that he made no claim to the portion of it that belonged to Frank Duff. Buck then asked where he could get a description of the property, to which James replied that he did not know unless from the records. Instead of sending to the recorder's office, Buck sent to the assessor's office, and told the person sent to copy the property assessed to Robert Duff. It turned out that some of Frank's property was assessed to Robert, and this portion of

Frank's property so assessed was put by description in the petition. There is no evidence that Frank knew of this until a subsequent period, when a second petition for letters of administration was drawn up.

If the second petition, which omitted all the property of Frank S. Duff and that claimed by Robert P. Duff, was filed as a substitute for the first, was not the first petition inadmissible, within the rule declared in *Mecham v. McKay*, 37 Cal. 154, and followed in *Ponce v. McElvy*, 51 Cal. 223? As it does not appear that the second petition took the place of the first, the question does not arise here, and we do not determine it. It does not appear that any letters were granted or obtained on this petition.

As the petition was not signed by Frank Duff personally, and it does not appear that the facts were inserted with his knowledge or under his direction and with his sanction, we are of opinion, on the authorities above cited, that the court erred in admitting it as evidence. It is well settled that, an error against the appellant being shown, injury to him is presumed, and that it devolves upon the respondent to show that no injury has in fact been done. *Ponce v. McElvy*, 51 Cal. 223. On an examination of the record we are not satisfied that no injury was done to the defendants by admitting this paper in evidence.

The statements as to R. P. Duff's property in the petition offered are entirely irrelevant as to any issue proffered by Frank Duff, and are not admissible against Robert P. Duff. There is no such joinder of interest between Frank and Robert Duff as will make any admissions of Frank binding on Robert Duff. If not admissible against the former, they are not against the latter. The statements are not admissible as declarations of a co-conspirator, as they do not appear to be in furtherance of any common design, or made in the execution of such design. They were in no sense any part of the *res gestae*.

The judgment roll in the case of *William R. Duff v. James T. Ryan and James R. Duff* was offered in evidence by plaintiffs. It was objected to by defendants as irrelevant. This objection was overruled, and defendants excepted. The action of *Duff v. Ryan* was brought to recover a claim for \$11,017 77, assigned by Richard Duff to the plaintiff in that action. Plaintiff recovered judgment on the thirty-first of August, 1885, for \$11,572.39. It does not appear that anything was ever paid on the judgment to William R. Duff. We cannot see how this evidence was relevant to any issue in the case. If William R. had collected anything on it, it might be relevant as evidence that he had means, and was able to purchase the property in question here, but the judgment roll alone was irrelevant, and should have been ruled out. Such evidence might have misled the jury, and for that reason should not have been admitted. While we might not reverse the judgment on account of the admission of this document, on a subsequent trial it should not be admitted without further evidence which would show its relevancy.

We cannot see on what ground the paper marked "copy of R. P. Duff's statement" was admissible. Conceding that it was sufficiently proved that it was a copy of an original paper signed by R. P. Duff, still the admissions, if any, contained in it (and it was offered to prove those admissions) were made for the purpose of submitting to arbitration some matters of difference between the heirs of Richard Duff and R. P. Duff, and were doubtless made for the purpose of dispensing with proofs of the facts admitted. An admission for that purpose cannot be offered in this action, any more than an admission in one action, made for the purpose of dispensing with proof otherwise required, can be offered in another action which is not allowed. The court acts on such admission on the trial of the action, to use the language of Mr. Greenleaf, "not as truth in the abstract, but as a formula for the solution of the particular problem before it,—namely, the case in judgment,—without injury to the general administration of justice." 4 Greenl. Ev. § 206.

It is urged that section 388, subd. 4, Code Civil Proc., does not apply to an action like this, which, though founded in fraud, is but an action to recover real property. In support of this point, attention is called to the fact that the heading to the chapter of which the above section is a part, is in these words: "The time of commencing actions other than for the recovery of real property," and that the first section (385) in the chapter is as follows: "The periods prescribed for the commencement of actions other than for the recovery of real property are as follows." And it is further said that this is really an action to recover real property; referring to *Oakland v. Carpentier*, 18 Cal. 552, where it was said of a like provision in section 17 of the then statute: "We think that this provision has no relation to an equitable proceeding to set aside a fraudulent deed of real estate, when the effect of it is to restore the possession of the premises to the defrauded party. In such a case, the action is substantially an action for the recovery of real estate. Indeed, it is literally."

Granting that this action is of the character above stated, the result would be that there is not now, and never has been, any statute of limitations in this state in regard to actions for relief on the ground of fraud in relation to real property, and we would then be compelled to fall back on the rules of equity as a part of the common law governing actions for relief on the ground of fraud in the sale and purchase of real property. These rules are substantially the same as those which have been adopted and enforced in regard to the subdivision and section above mentioned. See *Boyd v. Blankman*, 29 Cal. 46, 47; 2 Pom. Eq. Jur. § 917, and cases cited in note 3.

It may be remarked that the section and subdivision of the statute under consideration has in many cases been applied to actions for relief on the ground of fraud in purchases of real property. See *Boyd v. Blankman, supra*; *Moore v. Moore*, 56 Cal. 90; *People v. Blankenship*, 52 Cal. 619. In the case last cited this section and subdivision were held applicable to an action brought by the state to cancel a patent alleged to have been procured by fraud. But, in the view above taken, it is immaterial whether the section and subdivision apply or not.

The complaint states facts sufficient to constitute a cause of action. Its allegations are substantially as follows: That in 1863 W. R. Duff was the owner of the property involved herein; that in August, 1863, he executed to Richard Duff a letter of attorney, by which he authorized Richard, *inter alia*, to sell and convey for the constituent the property referred to; that, immediately after the execution of this letter, William R. Duff departed from this state, and never returned to it; that subsequently, during a period extending from the fifth day of July, 1866, to the third day of April, 1872, Richard Duff, assuming to act for his principal under the letter, by deeds purporting to be executed under it, conveyed to defendant, Robert P. Duff, certain of the property aforesaid; that prior to the seventh of July, 1867, Richard, acting under the letter of attorney, by deeds purporting to be executed under it, conveyed to the defendant Frank S. Duff certain portions of the property aforesaid; that between the first day of November, 1867, and the first of January, 1880, Robert P. Duff conveyed to Frank certain of the parcels of the land in controversy; that between the sixth day of July, 1867, and the commencement of the action, Frank conveyed to Robert certain parcels of the land in suit; that the deeds above mentioned, executed by Richard to Robert and Frank, were "without any consideration of any kind given or agreed to be given to William R. Duff, or any person for the use and benefit of William," and that the deeds executed by Robert to Frank, and by Frank to Robert, were without any valuable consideration, and neither of them were purchasers for value; and that Robert and Frank, when these last-mentioned lands were conveyed to them, respectively, had full knowledge of all the matters hereinbefore alleged; and that the conveyances executed by Richard as attorney were made with the intent and purpose of defrauding William, and that they had been

accepted by Robert and Frank acting in collusion with the attorney, Richard, with the intent to defraud William; that, during a period of seven years preceding the commencement of this action, defendants had received the rents and profits of the land, to the amount of \$1,000 per annum; that William R. Duff died intestate, leaving the plaintiffs surviving him, Julia K. Duff, his widow, and Agnes, a minor, only child of the said Julia and William; that William devised his property to his wife, Julia; and Agnes, born after her father's death, is entitled to share because not mentioned in the will. The complaint further alleges the proper appointment of William L. Duff as guardian *ad litem* of Agnes; that Julia Duff had no knowledge or information of the aforementioned conveyances, and the acts stated in relation to them, and their fraudulent character, until an intimation was made to her in a letter received by her from Mrs. Louisa Wilson, sister of the defendants, on or about the twentieth of April, 1879, in consequence of which she was led to make inquiry concerning the property owned by William R. Duff in the county of Humboldt; that she has made discovery of the aforementioned acts of Richard and the defendants since April, 1879.

We are of opinion that the complaint sets forth a case of concealed fraud. It is averred that William was ignorant of the conveyances during his whole life. Let it be observed that there is no allegation that the deeds were recorded. So, conceding, as contended, that William was bound to look at the records of the county of Humboldt, it does not appear that they would have given him any information.

But a relation of trust and confidence existed here between Richard Duff and William. The former was the attorney of the latter, and under such circumstances it is the duty of the attorney to keep his constituent informed of all sales and conveyances that he has made of the property to which his agency extends. "An agent must use ordinary diligence to keep his principal informed of his acts in the course of his agency." Civil Code, § 2020. This has always been the rule governing the relation of principal and agent. It does not appear that anything had occurred to put William on inquiry.

It must also be observed that William was absent from the state while the transactions above referred to occurred, having left the state immediately after the execution of the letter of attorney, and remained absent during the remainder of his life. Under these circumstances, we think the averment that William was ignorant of the conveyances, and had no knowledge or information that the conveyances had been executed by his attorney, is sufficient. See *Buckner v. Calcote*, 28 Miss. 597, and cases there cited. His wife and child were also absent, and we do not see why the same rule does not apply to them, though the agency terminated on the death of Richard. William lived about five months after Richard's death, but we do not see that his failure to come to California during this period, and look after his property, when he might have ascertained what had been done, puts him in fault. The averments show reasonable and proper diligence on the part of plaintiff Julia K. Duff. The other plaintiff was an infant of tender years, and no negligence, under the circumstances appearing in the complaint, can be attributed to her.

But it may be urged that the grantees in the deeds executed by Richard Duff under the letter of attorney could act upon the presumption that Richard had kept William informed of all his acts, and of his conveyances to the defendants. On this point we are of opinion that, conceding the fraud and collusion attributed to the defendants by the allegations of the complaint, (which must be conceded on this demurrer,) they must stand on the fact as it is, that no such information was given to the principal by his agent and attorney. We think the complaint sufficient.

It is further urged that this is an action in equity, and a court of equity has no jurisdiction, because it appears that the remedy at law, to recover possession by ejectment, is complete and adequate, for the reason that the con-

veyances to the defendants under the letter of attorney, as they were made without consideration, were utterly void, and they constitute no defense to an action of ejectment; and we are referred, to sustain this contention, to *Dupont v. Wertheimer*, 10 Cal. 854, and *Mott v. Smith*, 16 Cal. 533. In the case of *Dupont v. Wertheimer*, where there was a recovery in ejectment, the above rule was declared. But the complaint sets forth a case of fraud, and of fraud according to the principles laid down in *People v. Houghtaling*, 7 Cal. 348, of which a court of equity had jurisdiction. In that case an action in equity was sustained for a specific fund of money declared to be a trust fund, though the action for money had and received could have been maintained for the money, and the recovery would have been the same in the latter action as in the former. We do not think we would be justified in holding that a court of equity would have no jurisdiction.

The jurisdiction in equity in matters of fraud is very broad; and, although it has been held in various of the states that the jurisdiction in equity will not be exercised when the remedy at law is certain, complete, and adequate, still the jurisdiction is not denied. Upon the facts alleged in the complaint, showing that there has been a great lapse of time since the conveyances assailed herein were executed, from which it might well be inferred that the statute of limitations would be invoked as a defense, we must hold the contention not maintainable.

For the errors above pointed out the case must go back for a new trial. As the issues of fact will have to be tried again, we refrain from saying anything on the point that they were not sustained by the evidence. But we think it proper to remark that the first finding is not as definite as it should be. It states that "upon August 4, 1863, William R. Duff was the owner of the legal title of the lands," etc. It should be found that he was the owner of the lands; and as facts are averred in the answer from which it would seem that the purchase of most, if not all, of the land in suit was made, and the purchase money paid by others, who caused the conveyance of the legal title to be made to William R. Duff, by which a resulting trust in favor of the parties paying the money was created, we think there should be a finding on the issue so made. The mere finding that William R. Duff did not acquire the legal title in trust for other persons is not sufficient.

The ninth finding is not sufficient. It states that William R. Duff, in his life-time, had no *actual* knowledge or information of any deeds, etc. The finding should be that he had no knowledge or information of any kind on the subject, if the evidence establishes the fact that he had no knowledge or information of any circumstances to put him on inquiry as to the deeds, etc. As the finding now stands, there is an implication that circumstances were known to William R. which should have stimulated him to inquiry.

The thirteenth finding is a finding of evidence, not of the fact that the property mentioned in it was held in trust as stated in it. The finding should be that the property referred to in the letter was held in trust in the manner and proportions mentioned in the letter.

If the court finds that the cause of action is not barred by the statute of limitations, it should so find, and not merely facts from which it may be inferred. This court is not authorized to infer facts from facts found. That is the province of the trial court. On the facts found this court determines questions of law arising on them, not facts by inference from facts found. We intend to say that, *in addition to the facts found* on the issue joined in regard to the defense of the statute of limitations, the court below should have found whether the cause of action was barred by the statute or not.

The judgment and order are reversed, and the cause remanded for a new trial. So ordered.

We concur: MYRICK, J.; SHARPSTEIN, J.; MCKINSTRY, J.; MCKEE, J.

NOTE.

STATUTE OF LIMITATIONS—FRAUD. The statute of limitations does not commence to run, against an action based on fraud, until the discovery of the fraud. *Traer v. Clews*, 6 Sup. Ct. Rep. 155; *S. C.* 10 N. W. Rep. 838; *Rosenthal v. Walker*, 4 Sup. Ct. Rep. 382; *McAlpine v. Hedges*, 21 Fed. Rep. 689; *Dicken v. Hays*, (Pa.) 7 Atl. Rep. 58; *Hughes v. First Nat. Bank*, (Pa.) 1 Atl. Rep. 417; *Vigus v. O'Bannon*, (Ill.) 8 N. E. Rep. 778; *O'Dell v. Rogers*, (Wis.) 30 N. W. Rep. 229; *Tompkins v. Hollister*, (Mich.) 27 N. W. Rep. 651; *O'Dell v. Burnham*, (Wis.) 21 N. W. Rep. 635; *Perry v. Wade*, (Kan.) 2 Pac. Rep. 787.

In Kentucky no action for relief from fraud can be brought after the lapse of 10 years from the perpetration of the fraud. *King v. Graham*, 1 S. W. Rep. 822; *Dorsey v. Phillips*, Id. 667. In Missouri the statute begins to run at the time of the discovery, within 10 years, of the facts. *Leavenworth Co. v. Chicago, R. I. & P. Ry. Co.*, 18 Fed. Rep. 209.

The question of knowledge or discovery of the fraud is one of fact. *Rosenthal v. Walker*, 4 Sup. Ct. Rep. 382; *Johnson v. Powers*, 13 Fed. Rep. 315; *Barlow v. Arnold*, 6 Fed. Rep. 351.

See, also, *Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. Rep. 261.

(36 Kan. 129)

RUSH, Adm'x, etc., v. MISSOURI PAC. RY. CO.

(*Supreme Court of Kansas*. January 7, 1887.)

1. NEGLIGENCE—QUESTION FOR JURY—RAILROAD COMPANY—BLOCKING RAILS.

A railway company, in the construction of its railway, did not use any blocking or other protection between the main rails of its tracks and the guard rails. Whether this was negligence or not in the abstract, and whether the question is one of fact for the jury or one of law for the court, not decided.¹

2. SAME—INJURY TO EMPLOYEE.

But where a railway is so constructed, and a competent railroad man is employed to work in one of the company's yards as yard switchman, and in such yard there are many switches and about 20 guard rails, and the employee voluntarily and without complaint does switching in such yard every day for about two and one-half months, when he steps between the main rail and the guard rail of one of the company's railway tracks, and because thereof receives injury, *held*, that the condition of the railway tracks and the danger must have been known to the employee, and therefore that he assumed the risk; that he waived any negligence that might otherwise be imputable to the railway company; that, as between the railway company and himself, the railway company cannot be charged with culpable negligence, for the reason that one party cannot be guilty of culpable negligence as towards another party unless the first party is guilty of some breach of duty as towards the other party; and that all these questions, as presented in this case, are questions of law for the court, and not questions of fact for the jury.

(*Syllabus by the Court.*)

Error from Bourbon county.

McClure & Austin and *J. D. McCleverty*, for plaintiff in error. *David Kelso* and *Blair & Perry*, for defendant in error.

VALENTINE, J. This was an action brought in the district court of Bourbon county, Kansas, under section 422 of the Civil Code, by Mary A. Rush, administratrix of the estate of Michael O'Connor, deceased, to recover damages against the Missouri Pacific Railway Company for wrongfully and negligently causing the death of the deceased. The damages sought to be recovered are claimed for the benefit of Michael O'Connor, Sr., the father and next of kin to the deceased. The deceased had been in the employment of the defendant railway company, as yard switchman, at Fort Scott, Kansas, for

¹ As to when negligence is a question of law, and when of fact, see *Dwyer v. New York, L. E. & W. Ry. Co.*, (N. J.) 7 Atl. Rep. 417; *Pottstown Iron Co. v. Fanning*, (Pa.) 6 Atl. Rep. 578; *Delaware & H. C. Co. v. Webster*, Id. 841; *Pittsburgh, O. & E. L. Ry. Co. v. Kane*, Id. 845; *Moynihan v. Whidden*, (Mass.) 9 N. E. Rep. —; *Chicago & E. I. R. Co. v. O'Connor*, (Ill.) 9 N. E. Rep. 263; *Barbo v. Bassett*, (Minn.) 29 N. W. Rep. 198, and note; *Lane v. Central Iowa R. Co.*, (Iowa) 29 N. W. Rep. 419; *Burns v. Chicago, M. & St. P. Ry. Co.*, (Iowa) 30 N. W. Rep. 25, and note; *City of Plattsburgh v. Mitchell*, (Neb.) 29 N. W. Rep. 593, and note; *Nichols v. Chesapeake, O. & S. W. R. Co.*, (Ky.) 2 S. W. Rep. 181.

some two or three months prior to the accident which caused his death. On March 18, 1884, in pursuance of an order given to him by E. W. Head, the yard-master, he went with the switch-engine No. 45 to place a car upon the track of the St. Louis, Fort Scott & Wichita Railroad. After throwing open the connecting switch of the two roads, he walked along the side of the engine and cars for the purpose of uncoupling a defective car from the engine, and placing it at a point designated by the yard-master. While performing this duty, he stepped upon the track, and between the cars, and, while attempting to remove the coupling pin, his foot was caught and fastened between the main rail and the guard rail, so that he was unable to extricate it, and the cars, being at the time in motion, passed over his body, and instantly killed him. There was no blocking or other protection between the main rail and the guard rail for the purpose of preventing such an accident. At the time of his death, O'Connor was 25 years old, healthy, temperate, strong, and a competent and careful railroad man, and was receiving wages at the rate of \$50 per month from the railway company. He was unmarried, and his father, who survived him, was the next of kin to him. This suit was brought by his administratrix for his father's benefit. His father is about 67 years old, has no property, is unable to support himself, and was mainly dependent upon his son for his maintenance. From the time the deceased was 15 years old, up to the time of his death, one-half of his earnings were given for the support of his father. The case was tried by the court and a jury. After the plaintiff had submitted all her evidence to the jury, the defendant interposed a demurrer thereto, on the ground that the same did not prove a cause of action, which demurrer was overruled by the court. Thereafter the defendant introduced its evidence to the jury, and, among other things, introduced evidence tending to show that the failure to block between the main rail and the guard rail was not an act of negligence, and that such failure did not increase the danger of the employees; and also introduced evidence tending to show that many railroads, including that of the defendant, did not use any such protection. After the introduction of all the evidence on the part of the plaintiff and the defendant, the court instructed the jury to find a verdict for the defendant, which was accordingly done, and to which instruction the plaintiff duly excepted, and thereafter filed a motion for a new trial, which was overruled by the court, to which ruling she also duly excepted. The court rendered judgment in favor of the defendant, and against the plaintiff for costs; and to reverse this judgment, and the foregoing rulings of the trial court, the plaintiff, as plaintiff in error, brings the case to this court.

The questions presented in this case are as follows: (1) Under the circumstances of this case, was the failure of the railway company to use blocking, or some other protection between the main rail and the guard rail where the plaintiff's intestate was injured, culpable negligence as towards the plaintiff's intestate? (2) If so, did the plaintiff's intestate, by any acts of his, waive such negligence. (3) If the defendant was guilty of culpable negligence, and if the plaintiff's intestate did not waive it, then was he guilty of contributory negligence, in attempting, at the time and place and in the manner he did, to uncouple the cars, considering the condition of the railway tracks? (4) Were these questions questions of fact for the jury or questions of law for the court to determine?

In order to consider these questions intelligently, it will perhaps be necessary to restate some of the facts in greater detail, and to state some additional facts. The railway was not out of repair; it was in just the same condition as it was when it was originally constructed; and it was constructed in the yard where the plaintiff's intestate worked precisely as it was constructed in all the other yards belonging to the defendant, and in precisely the same manner as many other railways belonging to other companies are constructed. In the vicinity of the place where the accident occurred there were in all about

eight or ten guard rails and several switches; and in the entire yard where the plaintiff's intestate worked there were about twenty guard rails and a great many switches, and all were constructed alike so far as blocking or other protection was concerned; and he had worked in this yard for about two and one-half months prior to the accident. He was 25 years old, and a strong, healthy, temperate, competent, and careful railroad man. During his employment in this yard he had worked daily therein, and in all parts thereof, and during each day he had assisted in switching many railway cars. The accident occurred on March 18, 1884, in broad daylight, and at about 1 o'clock in the afternoon, and the condition of the railway track, where the accident occurred, was in plain view. The plaintiff's intestate evidently had full and complete knowledge of the exact condition of all the railway tracks in that yard,—of the main track and the switch tracks, of the main rails and the guard rails, and of the want of blocking or other protection where guard rails were used,—and he seemed to be satisfied; at least, he made no complaint of the condition of the railway tracks, or of their want of blocking or other protection, and never gave to the railway company any notice of their supposed unsafe condition; and there was no promise at any time made for or on the part of the railway company that the tracks should be made safer. Upon these facts this case must be decided.

As to whether the railway company was guilty of negligence or not in not making its tracks safer, we think it is hardly necessary to express any opinion. Neither do we think that it is necessary to express any opinion as to whether this question is one of law for the court or one of fact for the jury; for, if the railway company was not guilty of any negligence, then the plaintiff cannot recover; and, if the railway company was guilty of negligence, then the plaintiff's intestate must also have been guilty of negligence,—contributory negligence; for he had the same means of knowing the condition of the railway tracks in that vicinity as the company had, and he was as competent to determine their safety or unsafety as the company was, and therefore the plaintiff cannot recover. He was not a child of tender years, nor an inexperienced or ignorant person; nor was he ignorant of the manner in which this particular railway was constructed; nor is there even room to suppose that there was any lapse of memory with regard to this particular guard rail, for it was not different from the other guard rails in that yard, nor different from any of the other guard rails of the defendant's 5,000 miles of railway, nor different from the guard rails of many of the other railways in this country, nor different from what it was when it was originally constructed.

For the purposes of this case, but as abstract propositions, we shall assume, but without deciding the questions, that the railway company was negligent in not blocking its guard rails, or in not making them safer in some other manner; and that the company was guilty of negligence, as towards the plaintiff's intestate, when it first employed him, unless it first informed him of the danger and of the exact condition of its railway tracks, and that this negligence continued, as towards the plaintiff's intestate, until he had full and complete knowledge of the danger, and of the condition of the railway tracks. But in all probability he obtained knowledge of the condition of the railway tracks on the very first day of his employment, for it is admitted that he was a competent railroad man; and with such knowledge he remained in the company's employment, not merely a day or several days, but about two and one-half months. The question then arises, did the company, after the plaintiff's intestate acquired such knowledge, remain negligent as towards him? It is true that masters must not expose their servants or employes to any unnecessary hazards. It is also true that every master must exercise reasonable and ordinary care and diligence to provide his servant or employe with a reasonably safe place at which to work, and with reasonably safe machinery, tools, implements, appliances, and instrumentalities with which to work; but in

the very nature of things men must sometimes work in dangerous places, and with dangerous instruments or machinery, and in all such cases they may rightfully engage to do so, and be employed to do so; and, when rightfully employed to do so, neither the employer nor the employe can properly be charged with culpable negligence as towards the other. In such cases all that can be required of the employer is that he shall see that the employe is informed with respect to all the dangers and hazards incident to the work; and, when this is done, the employe will assume all the risks and hazards of his employment. The employer must always act in good faith towards his employe, and see as far as he reasonably can that the employe does not take any unknown risks or hazards; but where the employer and the employe are equally competent to judge of the risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negligent as towards the employe, although the work may be dangerous or hazardous, and although it might be made safer by the employer if he should choose to do so. In some cases it is very difficult to determine which of two ways of doing a thing is the better and the safer way, (and it is claimed by the defendant that this is one of such cases,) and in such cases witnesses could easily be found who would testify on either side, and that either way was a safer and a better way than the other. Now, in such cases, an employer should certainly have the privilege of adopting the way or the plan which might seem best to him; and if, after adopting a plan, he should inform his employe as to which of the plans he had adopted, or if the employe should obtain knowledge as to which of the plans had been adopted without being expressly so informed, it could hardly be said that the employer was guilty of any culpable negligence as towards his employe, although it might be that the plan not adopted was the safer and the better plan. Indeed, in such a case, the employer and the employe might be in full and complete agreement and concordance that the plan adopted was the safer and the better plan; and in such a case neither should be charged with culpable negligence as towards the other. In such a case, it should be assumed that the employe was hired and paid for taking the risk, and that he voluntarily assumed the risk. Culpable negligence on the part of one person as towards another always involves *a breach of duty* on the part of the former as towards the latter. Where there is *no breach of duty*, there can be no culpable negligence; and it is only for negligence of a culpable character that any person can be held responsible in law. Where an employe is hired and paid for assuming a known danger, and the thing itself is not contrary to law, it cannot properly be said that the hirer has been guilty of any breach of duty as towards the person hired, and therefore it cannot be said that the hirer has been guilty of any culpable negligence as towards the person hired.

It is claimed on the part of the plaintiff's intestate, and perhaps rightly, that, where the danger is not obvious or imminent, the employe may rightfully continue in the employment of the master without being chargeable with contributory negligence. Some of the authorities lend support to this view; but still, if we recognize this view as correct, and if the danger is as well known to the servant as it can be to the master, another principle enters in to prevent the servant from recovering from the master for any injuries that might result from the supposed danger; and that principle is this: If the servant has full knowledge of the danger, and continues in the master's employment without complaint, receiving from the master full pay for his services, he assumes the risk himself of the known danger, and waives any negligence that might otherwise be imputable to the master. This distinction between contributory negligence on the part of the servant and the waiver of the master's negligence on the part of the servant has been recognized in some of the books; but, while it may be admitted that there is ample room for such a distinction, still it is doubtful whether the distinction can be

of much practical value. In all cases of contributory negligence the employe has in some sense waived the negligence of the master; for by encountering the danger, he says, in effect, "There is no danger except such as I will wholly assume myself," and in all cases of the waiver of the master's negligence the servant has, in some sense, by his own negligence, contributed to the resulting injury. The better view, perhaps, of the subject is this: When the danger is not obvious or imminent, and both the employer and employe, with full knowledge of the same, enter into the contract of employment, or continue the same, neither party is guilty of culpable negligence as towards the other; while, if the danger is obvious and imminent, and it is encountered by the servant, then both parties are equally guilty of culpable negligence;—that of the employe being culpable contributory negligence. In all cases, the continuance, on the part of the servant, in the master's employment, with full knowledge of the danger, is either negligence or it is not negligence. If it is negligence, and injury results, then no recovery can be had, because of the culpable contributory negligence of the servant; but, if it is not negligence on the part of the servant, then neither can it be negligence on the part of the master. What the servant may lawfully do without negligence, the master may lawfully hire him to do without negligence. The master cannot be bound to take greater care of the servant than the servant is of himself. If the danger is such that an ordinarily prudent man could assume it without being guilty of negligence, then the same facts and the same reasoning which would show this would also show that there could not be any culpable negligence or any breach of duty on the part of another person for hiring him to assume it. There cannot be negligence on the part of the one, and not on the part of the other, where both are capable of understanding the danger, and both are fully informed as to all the facts.

There are cases where a servant, knowing the danger, may nevertheless recover; but this is not one of such cases. Usually, where some instrument or appliance has become unsafe from use or otherwise, and the danger from its use is not imminent or obvious, the servant may continue in the master's employment, and use it for a short time, with the expectation that the master will restore the defective instrument or appliance to its former condition. Also, where the master has been informed with regard to some defect in some instrument or appliance, and he agrees to remedy the defect, the servant may continue for a reasonable time in the master's employment, so as to give him an opportunity to fulfill his promise. Also, where the danger is one to which the servant is not exposed in the ordinary course of his employment, but is one which he is at the time required to immediately encounter by a special command of his master or of a superior servant, without time for reflection or choice on the part of the servant, he may obey the command without being guilty of contributory negligence, or without forfeiting his right to recover in case injury results. But not one of these cases is the present case. The plaintiff's intestate could have had no hope, in the present case, that the railway tracks would ever be changed; there was no promise that they would be changed; they were just as they were when they were originally constructed; and, in the ordinary course of his employment, the plaintiff's intestate was using them every day, and knew that he must so use them every day.

We have carefully considered this case, and after such careful consideration we have come to the conclusion that the defendant has not been guilty of any breach of duty as towards the plaintiff's intestate, and therefore has not been guilty of any culpable negligence as towards him; and, under the facts of this case, we think this question is a question of law for the court, and not one of fact for the jury; and, as these views harmonize with the decision of the court below, its judgment must be affirmed.

(All the justices concurring.)

(36 Kan. 157)

ROBINSON and others v. KINDLEY.

(Supreme Court of Kansas. January 7, 1887.)

1. PRINCIPAL AND AGENT—REAL-ESTATE BROKER—COMMISSIONS.

K. employed land brokers to procure a purchaser for his land. A condition of the employment was that, if he sold the land without the intervention or assistance of the brokers, they would not be entitled to commission. K. began negotiations with S. for a sale of the land, of which the brokers had notice, but, before the sale had been effected, the brokers procured and produced purchasers for the land, when K. stated that he had made a definite proposal to S. to sell, and was then looking for an answer through the mails from him. It was then agreed among all the parties to wait five days for the answer expected, and, in case the proposal was not accepted by S., that the proposed purchasers would take that and another tract recently acquired by K. Within that period K. received a letter from S. accepting his proposition, and the land was conveyed to S. in substantial compliance with the proposition. Held, that the second or modified agreement superseded the former one, and under it K. might sell the land to S. within five days, without liability to the brokers for commission; and, as S. accepted K.'s proposal, and agreed to purchase the land within that time, the commission of the brokers was not earned.¹

2. SAME—ACCEPTANCE OF PROPOSAL.

The purpose of S. is to be determined from the terms of his letter of acceptance read in the light of the surrounding circumstances, and the court did not err when it refused to allow him to state what his secret intentions were when the letter was written.

(*Syllabus by the Court.*)

Error from Osborne county.

Robinson, Watson & Co. brought this action against Samuel T. Kindley, in the district court of Osborne county, to recover commission for the sale of several tracts of land, alleging that they procured a purchaser in compliance with the terms of a contract made with the defendant. The parties waived a jury, and submitted the cause to the court for trial. Findings of fact and of law were made, which are as follows:

"(1) That the plaintiffs are a firm of real-estate brokers doing business at Osborne, Kansas.

"(2) That on or about the fifth day of May, 1884, the defendant was the owner of the land described in the first and second counts of the plaintiffs' petition, and at said time employed the plaintiffs, as such brokers, to procure for him a purchaser for said lands within six months therefrom, and subject to raise or fall in price. The price set for land in first count described was \$1,600, and one-third of crop was to go with land if sold in two months, and plaintiffs were to have a commission of 5 per cent. for selling same. The price for land described in second count was \$6,300, and plaintiffs were to have (\$300) three hundred dollars for selling same. There were other conditions as to terms of payment and so on agreed upon at the same time, and the defendant reserved the right to sell the land himself without paying the plaintiffs a commission unless the purchase was obtained through plaintiffs or their advertisement, and provided that defendant should not sell at less prices than those given to plaintiffs.

"(3) About July 1, 1884, defendant purchased the land described in the third part of the petition, and, soon after such purchase, had a conversation with a member of plaintiff's firm, in which defendant said if plaintiffs brought a purchaser over for the other land, and could include that tract in the sale,

¹As to when the commissions of real-estate brokers are earned, see Fultz v. Wimer, (Kan.) 9 Pac. Rep. 320; Pratt v. Patterson's Ex'r's, (Pa.) 3 Atl. Rep. 858, and note; Dunclos v. Cunningham, (N. Y.) 6 N. E. Rep. 790, and note; Desmond v. Stebbins, (Mass.) 5 N. E. Rep. 150, and note; Bradford v. Menard, (Minn.) 28 N. W. Rep. 248, and note; Hamlin v. Schulte, (Minn.) 27 N. W. Rep. 301, and note; Casady v. Seely, (Iowa,) 29 N. W. Rep. 432.

he would pay them a commission of 5 per cent., but made no definite contract to employ plaintiffs to sell this tract.

"(4) About June 20 to 25, 1884, a Mr. Shafer, then residing in Missouri, was at defendant's residence, described in said second count, and defendant commenced negotiating with him for the sale of said last-mentioned tract, and about June 26, 1884, defendant informed plaintiffs of such negotiations, and requested plaintiffs not to seek a purchaser for said tract for a couple of weeks until he could know the result of such negotiations, to which plaintiffs assented.

"(5) On July 14, 1884, a member of plaintiffs' firm took two land seekers, Walrath and Hand, to defendant's premises to look at the land, and they looked at all the land described in the petition, and they desired to buy all the land at the prices set upon the same by defendant to plaintiffs; the tract in the third count described being then priced at \$1,800.

"(6) The defendant informed Mr. Robinson, of plaintiffs firm, who was present, in the presence of Messrs. Walrath and Hand, that he had by letter made a definite proposition to Mr. Shafer, then at his home in Missouri, for the sale of the second tract, (described in second count,) and that he was expecting an answer, and that he felt bound by his proposition, and could not then sell that tract.

"(7) It was then agreed between defendant Robinson, Walrath, and Hand that they would wait until Saturday, July 19, 1884, for defendant to get an answer from Shafer, and that if defendant received no answer by that time, or if Shafer did not take the land, then Walrath and Hand should take the land at said prices, the terms of payment not being definitely specified; and in any event Walrath or Hand, or one of them, should take the first tract, (described in first count,) and that Kindley should go to Osborne on said July 19th to make the deed or deeds, and to inform them whether or not he had heard from Shafer. In making this agreement, the parties did not contemplate any conveyance of the land from defendant to Shafer, or the execution of any formal contract to sell and purchase before the 19th, but such an acceptance or rejection of the proposition in defendant's letter as one farmer would ordinarily make to another.

"(8) The defendant's letter to Shafer was dated July 7, 1884, was mailed the next day, and is as follows:

"DOWNS, July 7, 1884.

"*Mr. John Shafer—SIR:* Mr. Fink came down to my place, and said that you sent ten dollars in money to pay on my land. That is not enough to pay down. In fact, there should be some written agreement when I give possession, and that I should have the crop this year. But since Fink was over to see me there has been a man here, and offered me \$200 more, making \$6,500. He wants the place very bad. He said it was the nicest place he had seen since he left Illinois. I told I would not let him have it until I heard from you again, you was here first, and that you should have the first chance of the land at \$6,500; then, if you did not take it, he might have it. I told him \$6,300 was what you offered me, but I had not agreed positive to keep it for you. I told you that might spoil a trade for somebody else. I would not bind myself to keep it for you, but you would have got the place if you had sent more money, and signed a contract that I was to have the crop this year. Now, if you want the place at what the other man offers, \$6,500, you can have it. This must be our agreement, that I have until Christmas to make sale of my stock and grain and move off of the place. You can have possession of one house, one stable, one well, one hog lot, one pasture, plow, and sow wheat any day you wish it. Now, if you see fit to pay 3 or 5 hundred dollars down, I will sign a contract that you shall positively have the land; then you pay me \$3,000 or \$3,500 down when you get the deed, then I will wait two years for one-third of the balance, then two years longer for the

next third, then two years longer for the last third. That make six years' time on a part of it. You must pay the interest once a year. If I have any plowing or other work done on the place before we make our contract, you must pay me just what it cost me; but I will not have any great amount of work done, for you or the other man will get the place. My wife would rather I would not sell, and my neighbors tells me not to sell. They say my place in two years from now will bring ten thousand dollars. But I am going to sell now. People is not quite done cutting wheat yet. We have had some nice rains since you was here. The prospects for oats and corn is better than the wheat and rye. My fruit trees, yard trees, and grove are looking fine,—cannot be beat. Now, if this suits you, write immediately, and we will have the business fixed up according to law by a lawyer. We can do this without your coming out, but I would some rather you would come; it would save writing backwards and forwards. It could be done quicker if you was here yourself. Write soon. Direct to Samuel T. Kindley, Osborne Co., Downs, Kas. If you don't come out, and you want Fink to do the business for you, you must write a letter just the same as you write to me, and at the same time.

“Yours, truly,

S. T. KINDLEY.’

“(9) Shafer's reply thereto was dated and mailed at Bethel, Mo., July 11, 1884, and is as follows:

“BETHEL, Mo., July 11, 1884.

“*S. T. Kindley*—SIR: I received your letter, and was much surprised, as I had sold out, and was just finishing up my business, and now I will be ready to start in two or three weeks. I thought the understanding was you would keep the farm for me; and when I got home I sold out right away, and, being that Fink was going out, I thought it would be the best chance to pay \$10 to insure me the first chance, because I want the farm, and will be there with my family in 2 or 3 weeks. Now, about having work done on the farm, I would rather you would not have more work done than you can help, as I intend to be there in time to put out the crop myself after we made the bargain. Hoping this being satisfactory until we see each other again, I remain,

“JOHN SHAFER, Bethel, Mo., Shelby Co.

“P. S. If this is not satisfactory, or if you think you cannot wait 2 or 3 weeks until I come out, and so we can make out in person, you will please let me know as soon as convenient.”

“(10) July 17th the defendant wrote and mailed to Shafer the following letter in reply to the above:

“JULY 17, 1884.

“*Mr. John Shafer*—SIR: If you want my place at the price I told you in my other letter, I will have to know it soon, and have some money on it, and have a written contract about my reserving the crops this summer. The other man that was here since you were here went back to sell out. He wants the next chance after you at \$6,500. There were two men here last Monday from Minnesota. One of them bought one of my upland farms, the other one wants all the balance of my land together. Said he would pay cash for the whole amount, but I don't care whether it is all cash or not,—rather let a part of it stand at 10 per cent. I cannot wait two or three weeks, for in this time they might buy some other land, and I want to sell now, while I have time to do up my business before winter.

“Yours, truly, S. T. KINDLEY, Downs, Osborne Co., Kas.’

“On the back of above last-named letter is the following blank indorsement:

“*Mr. Shafer*—SIR: Don't delay one hour if you want my farm.”

"(11) July 19, 1884, Watson, a member of plaintiffs' firm, went to defendant's residence with Walrath, and Walrath was, and expressed himself to the defendant to be, able, ready, and willing to buy the first and second tracts according to the terms and for the price which plaintiffs had undertaken to sell them for, and to buy the third tract for \$1,800, but would not consent to take the first tract alone without the crop was included in the sale. The defendant refused to convey the second tract to Walrath, but offered to convey the first tract according to the terms upon which he had authorized plaintiffs to sell it, *i. e.*, without the crop, more than two months having elapsed since he had given plaintiffs the agency.

"(12) July 23, 1884, Shafer arrived at the depot at Downs, Kansas, the nearest station to the Kindley farm, with his family and household goods, and on the next day moved a portion of his household goods into a building on the second tract of Kindley's farm.

"(13) July 26, 1884, the sale of the second tract from Kindley to Shafer was fully consummated in substantial compliance with the proposition in Kindley's letter to Shafer of date July 7, 1884, and on the same day Kindley and wife executed to Shafer a deed for said land. Shafer paid Kindley \$6,500 for said land.

"(14) Shafer's letter to Kindley of date July 11, 1884, was intended as an acceptance of the proposition in Kindley's letter to Shafer of date July 7, 1884, and conveyed an expression of his intention to take the land, as the defendants, Robinson, Walrath, and Hand reasonably contemplated in their agreement of July 14, 1884.

"CONCLUSION OF LAW.

"The plaintiffs cannot recover in this action."

A motion for a new trial was made, the grounds of which were that the findings and decision were not sustained by sufficient evidence, and were contrary to law, and also for errors of law occurring at the trial. This motion was overruled, and judgment given in favor of the defendant, and the plaintiffs bring the case here.

R. G. Hays and *E. F. Robinson*, for plaintiffs in error. *A. H. Ellis*, for defendant in error.

JOHNSTON, J. Two reasons are assigned for a reversal of the judgment of the district court: *First*, that its conclusion of law is not sustained by the facts; and, *second*, that competent and proper testimony offered by the plaintiffs at the trial was excluded. None of the testimony is preserved, and the facts stated by the court must be accepted here.

There is no real controversy regarding the agreements between plaintiffs and defendant. The first agreement was made about the fifth day of May, 1884, by which the defendant employed the plaintiffs as brokers to procure purchasers for two tracts of land within six months, at a stated price, and for a stipulated commission. One of the conditions of that agreement was that, if the defendant sold his land during that time without the intervention or assistance of the plaintiffs, no commission would be paid them. The defendant began negotiations with a resident of Missouri, named Shafer, about June 20, 1884, for the sale of his land; and of these negotiations the plaintiffs had notice. On July 14, 1884, and before a conclusion had been reached between Shafer and the defendant, the plaintiffs brought two persons who were ready to purchase not only the lands included in the agreement first made, but also another tract purchased by defendant about July 1, 1884. The defendant then informed plaintiffs and the proposed purchasers that he had sent a definite proposition by mail to Mr. Shafer to sell a portion of his land, and was looking for an answer, and hence could not sell that portion. Instead of taking the other tracts, or of insisting upon a sale of all the land, it was agreed by

the plaintiffs that they would wait until July 19, 1884, to enable the defendant to hear from Shafer; and, if Shafer did not then accept the defendant's proposition, a sale of all the defendant's land, including the tract last purchased by him, should be made to the proposed purchasers. This modified agreement superseded the former one, and under it the defendant's reserved right to sell for himself was extended to July 19th. The letter containing this proposition to Shafer was dated July 7, 1884, and mailed the next day, and Shafer's letter in reply was dated and mailed on July 11, 1884, and was received by the defendant before July 17, 1884; and just what was intended by Shafer's letter, and whether it constituted an acceptance of the defendant's proposition, is the actual controversy in the case.

It will be noticed that this letter was written and mailed before the time when the plaintiffs procured and produced purchasers for the defendant's land; and the findings also disclose that, for the defendant to make compliance with the modified agreement of July 14th, it was enough that an agreement had been reached between himself and Shafer to sell and purchase the land. It was not necessary that the transaction should be fully consummated; nor was it in the contemplation of the parties, as the court finds, that a conveyance should be made, or that a formal agreement should be executed. The defendant's letter of July 7th made a distinct and definite proposition to sell to Shafer, the terms of which evidently differed somewhat from an earlier proposition that had been made. In his letter, Shafer expresses surprise in regard to the change of the terms, but he distinctly says: "I want the farm, and will be there with my family in two or three weeks." The court, after hearing the evidence, which is not before us, held that the letter constituted an acceptance of defendant's proposal, and found that it was such an acceptance as the parties contemplated in their agreement of July 14, 1884, and we are bound to presume that this finding was made upon sufficient evidence. Shafer is a farmer who is evidently not skilled in the use of language, and his letter does not very clearly state his purpose; but, in the absence of the evidence, we are unable to say that the findings and conclusion of the court are erroneous. The subsequent conduct of Shafer, to some extent, confirms the theory of acceptance. He came on from Missouri at once, arriving at Downs, in Osborne county, the nearest railway station, on July 23, 1884; and, instead of stopping to make further negotiations with the defendant, proceeded at once to move his goods on and take possession of the land for which he had been negotiating. Three days afterwards the defendant and wife executed a deed to Shafer for the price required in defendant's letter of July 7th, and the bargain was fully consummated in substantial compliance with the terms then proposed by the defendant.

It is claimed that the latter part of Shafer's letter, in which he says: "Now, about having work done on the farm, I would rather you would not have more work done than you can help, as I intend to be there in time to put out the crop myself after we *made* the bargain,"—indicates that the bargain was not closed. This was Shafer's reply to the statement of defendant, made in his letter of July 7th, that all plowing or work done on the place, before the contract was made, should be paid for by Shafer, and the direction given to defendant not to continue plowing, or not to have more work done, is not inconsistent with an intention on Shafer's part to take the land. It is true, he uses the words "after we made the bargain;" and in the postscript of the letter he says that "if this is not satisfactory, or if you think you cannot wait two or three weeks until I come out, and so we can make out in person, you will please let me know as soon as convenient." It is not improbable that the words "made" and "make out" were used with reference to the formal execution of the conveyance and the final consummation of the transaction, and this, the court finds, was not within the contemplation of the parties in making the second agreement. Looking at the correspondence alone, we would

be in considerable doubt in regard to whether Shafer's letter constituted an acceptance; but the facts have not been presented to us as they were to the trial court, and hence we do not feel warranted in disturbing its findings.

An objection is made to the refusal of the court to permit Shafer to state what his intentions were in writing the letter of July 11, 1884. The court was called on to determine, not what Shafer secretly intended, but rather what purpose the letter, read in the light of surrounding circumstances, indicated. The witness was not asked to decipher any of the characters employed, nor to give the meaning of any provincial or peculiar words used in his letter. He is asked, long after the letter is written, to state what his secret intentions were when he wrote and sent it, and this was not permissible. 1 Greenl. Ev. § 277.

The judgment of the district court will be affirmed.

HORTON, C. J., concurring.

VALENTINE, J. With very grave doubts. I concur.

(36 Kan. 121)

CHICAGO, K. & W. R. CO. v. PUTNAM and others, Board of Co. Com'rs, etc.

(Supreme Court of Kansas. January 7, 1887.)

1. MUNICIPAL CORPORATIONS—BONDS TO AID RAILROAD—ELECTION—SUBSCRIPTION TO STOCK.

A proposition was submitted to the voters of a county to subscribe to the capital stock of a railroad company, payable in bonds of the county, upon certain conditions therein named, which proposition, at an election properly called therefor, was legally carried, and, upon a canvass of the votes, the proposition was duly declared carried by the board of county commissioners of the county. Upon the day of the canvass of the votes, and after the proposition had been declared carried, the county clerk asked one of the members of the board, in the presence of all the other members, while the board was in session for the transaction of business, "if it was his duty now to subscribe for the stock at the proper time." Said member, in the presence of the other members, answered "that it was." No objection was made to this direction by any member of the board. The clerk understood the answer to be an order from the board for him to go ahead and subscribe for the stock. The chairman of the board heard the clerk ask the question concerning the subscription of stock, and the order given him, and also understood thereby that the board directed the clerk to subscribe the stock. The order for the subscription was not entered of record in the proceedings of the board. Soon afterwards the county clerk subscribed the stock as directed, in the name of the county. Afterwards the railroad was constructed in compliance with the terms of the proposition voted upon; and in an action brought against the county upon its subscription for the stock to compel the county to issue its bonds therefor, it was contended, on the part of the county, that there was no subscription, upon the ground that no resolution or order, in writing or otherwise, had been adopted authorizing the subscription made by the county clerk. Held, that it was competent to prove, by parol evidence, that the county clerk was directed by the board of county commissioners to subscribe the stock; and also held, that the evidence in said action from one of the commissioners, that he did not hear the order or direction given to the clerk, did not render the order invalid. Held, further, that, upon the facts testified to in this case, the subscription made in the name of the county is valid.

2. RAILROAD COMPANIES—CONSOLIDATION—VALIDITY OF ORGANIZATION.

After a railroad company has been merged by consolidation into another railroad company, and such new corporation is transacting and carrying on business, and is a *de facto* corporation, the existence of the corporation can only be attacked in a direct proceeding brought for that purpose; such a matter will not be inquired into collaterally.¹

3. CORPORATIONS—ORGANIZATION—VALIDITY.

The existence of a corporation, organized under the general laws of the state, dates from the time of filing its charter, and it is not prerequisite that all the capital stock of the corporation be subscribed, for it to transact business.

(Syllabus by the Court.)

Original proceedings in *mandamus*.

Geo. R. Peck and *A. A. Hurd*, for plaintiff. *J. W. Rose* and *Waters & Chase*, for defendants.

HORTON, C. J. This is an action to compel the defendants, as the board of county commissioners of Stafford county, to issue 72 bonds of that county, of the denomination of \$1,000 each, with interest coupons attached, upon an alleged subscription, in writing, to the capital stock of the Arkansas River & Western Railroad Company. This railroad company was duly incorporated under the laws of the state, and empowered to construct, operate, and maintain a railroad, commencing at or near the city of Hutchinson, in the county of Reno, and extending southerly through the counties of Reno, Stafford, Pawnee, and Hodgeman. On October 18, 1885, a proposition was submitted to the voters of Stafford county to subscribe to the capital stock of the rail-

¹The validity of the organization of a corporation can be questioned only by the state. *Stout v. Zulick*, (N. J.) 7 Atl. Rep. 382; *North v. State*, (Ill.) 8 N. E. Rep. 159; *Broadwell v. Merritt*, (Mo.) 1 S. W. Rep. 855; *Broadwell v. Weller*, Id. 857; *Broadwell v. Jenkins*, Id.; *Broadwell v. Alexander*, Id. 858; *Broadwell v. Terry*, Id.

road company in the sum of \$128,000, upon the conditions that, as soon as the proposition should be determined in the affirmative by a canvass of the votes cast at the election, the board of county commissioners, for and on behalf of the county, should order the county clerk to make, and the county clerk should make, a subscription, in the name of the county, for 1,280 shares of the capital stock of said company; and upon completion of the road, and its operation by lease or otherwise, from a connection with the Atchison, Topeka & Santa Fe Railroad Company at or near Hutchinson, by way of the city of Stafford, in Stafford county, to the city of St. John, in Stafford county, the company should receive \$72,000 of the bonds, and issue therefor 720 shares of stock; and, upon the completion of the road and its operation to the west line of Stafford county, the company should receive an additional \$56,000 of bonds, and issue therefor \$56,000 of shares of its stock; that the board of county commissioners should cause the bonds, when earned, to be issued in the name of the county, and should deliver the same to the company, on delivery or tender to the board of county commissioners, by the railroad company, certificates of shares of fully paid up capital stock of said company equal in amount with the bonds.

After the election upon the proposition, and a canvass of the returns thereof, it was duly ascertained and declared that the proposition to subscribe to the capital stock of said railroad company had been legally carried. On October 31, 1885, T. A. Hays, the county clerk of Stafford county, subscribed for 1,280 shares of the capital stock of said railroad company, of the par value of \$100 per share, in the name of the county; the same to be paid for in bonds of the county issued to the railroad company in accordance with the terms and conditions of said proposition above referred to. Afterwards the Arkansas River & Western Railroad Company entered into a contract with another company, by which it sold all of its stock and bonds in order to obtain the necessary funds to construct its road; and with these funds the road was constructed in compliance with the terms of the proposition. On May 31, 1886, the Arkansas River & Western Railroad Company was merged, by consolidation, in the Chicago, Kansas & Western Railroad Company, which was a consolidation of several constituent companies. On October 9, 1886, the charter of the consolidated company was so amended as to authorize the construction of additional lines of road. On July 6, 1886, the plaintiff tendered to the county treasurer of Stafford county certificates of its capital stock, fully paid up, in amount of \$72,000, and demanded the issuance of bonds therefor, as required by the terms of the proposition submitted on October 13, 1885.

The principal question presented for our determination is whether there was a valid subscription. There was no written order or resolution of the board of county commissioners ordering the county clerk to make any subscription. It is claimed, however, that an order was actually made, and, as the record of the proceedings of the board is silent in this respect, that the order may be proved by parol evidence. While the statute requires that the county clerk shall record all the acts and proceedings of the county board, yet there is no statute that renders such acts or proceedings void if not recorded, and no statute that makes the records of the county board the only evidence of their acts and proceedings. *Gillett v. Commissioners Lyon Co.*, 18 Kan. 410. Therefore, if any order was made by the board to the clerk to make the subscription, and the same was not properly recorded, the order may be established by parol evidence. This has been decided in *Butler v. Commissioners Neosho Co.*, 15 Kan. 178, and *Gillett v. Commissioners Lyon Co., supra*; *City of Troy v. Railroad Co.*, 11 Kan. 519. See, also, *Town of Solon v. Bank*, 35 Hun, 1.

An examination of the detailed facts, as proved, show that, on the day that the votes upon the proposition to subscribe the stock were canvassed, the

board of commissioners . . . afford county consisted of Messrs. Dewey, Wilbur, and McCoomb. After the proposition had been declared by the board as having been carried, the county clerk asked Wilbur, while the board was in session, "If it was his duty now to subscribe for the stock at the proper time." He answered "that it was." No objection was made by any of the other members of the board, and the clerk understood the answer to be an order from the board for him to go ahead and subscribe the stock.

Wilbur testified, among other things, as follows: "*Question.* Were you present at the time the vote was canvassed for the election to vote bonds to the Arkansas River & Western Railroad Company? *Answer.* Yes, sir. *Q.* State whether there was any order, either verbal or otherwise, given to the clerk at that meeting authorizing him to subscribe to the capital stock of that railroad company. *A.* The matter was talked over, and Mr. Hays was instructed to make the subscription of stock. *Q.* Was that done by written instruction, or verbal? *A.* It was done by verbal instruction. *Q.* Was it done in the usual and customary manner of doing business, where there was no dispute between the members of the board? *A.* As preliminary, I want to state how we were in the habit of doing in all matters that came up. When there was no difference of opinion between members of the board, it was customary for one member to speak up, and ask if that meets with the concurrence of the others. It was not customary, until within the last three or four months, since we got into this railroad muddle, to differ from that custom by making motions, and putting matters to a vote; for, as I said before, that we did not put any motions except there was a controversy or difference of opinion between members of the board. *Q.* And this order was made in the same manner? *A.* Yes, sir."

E. W. Dewey, the chairman of the board, testified as follows: "*Question.* You may state if you were present at the time the vote was canvassed for voting bonds to the Arkansas River & Western Railroad Company. *Answer.* I was. *Q.* And took part in the proceedings? *A.* Yes, sir. *Q.* You may state now whether, at that time, any order or instruction, verbally or otherwise, was given to the county clerk to make the subscription to the capital stock of that company. *A.* My recollection is that there was. It was this way: We got together for the purpose of canvassing the votes which had been cast at that election. After we canvassed the vote, Mr. Hays asked the question if it was right for him to subscribe the stock, and Mr. Wilbur told him that it would be all right,—to go ahead and subscribe the stock. *Q.* The board was in session at that time? *A.* Yes, sir. *Q.* What was the custom of doing business by the board at that time? *A.* The usual custom was to talk over matters together; and, if there was no difference of opinion existing among the members of the board, there was no vote taken. The county clerk simply took down the minutes of the proceeding, and made up his journal that way. *Q.* And when one of the commissioners told the clerk what to do, and the others said nothing, it was usually done? *A.* Usually so. Sometimes we all told him what to do. *Q.* And if nobody demurred, it would be considered it would be the order of the board? *A.* Yes, sir."

Robert M. Blair testified that he was a member of the board of county commissioners prior to September, 1885, and was present at the canvass of the vote; that he heard the clerk speak to Mr. Dewey, the chairman, and ask him if he was satisfied; that Dewey said, "Yes," and that, "as the result is the wish of the people, it satisfies me;" that Wilbur said to the clerk, "the next thing for him to do was to subscribe for the stock."

T. F. Halverson testified that he was the county attorney of Stafford county at the time of the canvass of the vote; that he was before the board in the afternoon of the day of the canvass; that in the presence of the members of the board, while in session, the clerk told him the board had directed him to make the subscription of the stock.

The only evidence of importance conflicting with the foregoing is the testimony of McCoomb, one of the members of the board, and C. S. Mace, sheriff of Stafford county at the time of the canvass. McCoomb testified he did not hear any order or direction given to the clerk to subscribe any stock, and, to his knowledge, nothing was said or done at the time of the canvass, by the board, or any of the members, concerning the subscribing of stock. Mace testified he was present at the meeting of the board at the time of the canvass, and did not hear of any action being taken by the board regarding the subscription.

Under the statute, which differs from the one cited in *Land-grant Ry. & T. Co. v. Commissioners Davis Co.*, 6 Kan. 256, it was the duty of the board, upon the canvass of the election returns, after ascertaining that the proposition voted on had been carried, to order the county clerk to make the subscription. Section 72, c. 84, Comp. Laws 1879. The clerk, acting as a public officer, did make the subscription. The evidence largely preponderates that he made this subscription under the order of the board of commissioners. The board was in legal session at the time of the direction to the county clerk, and the mere inattention or forgetfulness of one of its members as to what was actually done ought not to defeat the subscription. "Whenever there is a legal session, unquestionably a majority of the commissioners can act and bind the county." *Paola & F. R. R. Co. v. County Com'rs Anderson Co.*, 16 Kan. 302.

The evidence of both McCoomb and Mace is of a negative character, and is largely overthrown by other witnesses who testified positively. The law esteems the latter class of evidence more highly and of more value than the former. *Railroad Co. v. Lane*, 33 Kan. 703; S. C. 7 Pac. Rep. 587. Upon the evidence presented, our conclusion is that the subscription for 1,280 shares of the capital stock of the Arkansas River & Western Railroad Company, made by the clerk of Stafford county on October 31, 1885, in the name of that county, is valid.

It is next insisted that the plaintiff is not entitled to the bonds sued for, upon the ground that there has been no legal consolidation of the Arkansas River & Western Railroad Company with the Chicago, Kansas & Western Railroad Company. The objections alleged to the consolidation are numerous. This is not the time, however, to consider these objections. The law authorizes railroad companies to consolidate. This law was in force at the dates of election and the subscription to the stock of the Arkansas River & Western Railroad Company, and such subscription was made under the express provision of the law that the company might consolidate with other companies at the instance and approval of stockholders representing two-thirds of all the stock held in each company or road so consolidated. Section 1, c. 92, Laws 1870. The mere consolidation of one railroad company with another company, since the taking effect of the act of 1870, will not discharge or release a non-assenting subscriber of stock. *Railroad Co. v. Commissioners of Phillips Co.*, 25 Kan. 261. Subsequently the legislature authorized any corporation organized or existing under the general statutes of the state to amend its charter in any of its parts, when authorized by a two-thirds vote of the stockholders of the corporation. Section 1, c. 62, Sess. Laws 1886.

As the plaintiff is a *de facto* corporation, under the decisions of this court, its existence as such corporation can only be attacked in a direct proceeding brought for that purpose. Such a matter will not be inquired into collaterally. *Reisner v. Strong*, 24 Kan. 410; *Railroad Co. v. Wilson*, 33 Kan. 223; S. C. 6 Pac. Rep. 281; *Pacific Railroad Removal Cases*, 115 U.S. 1-15; S. C. 5 Sup. Ct. Rep. 1113. In this connection, however, it is best to say that the provisions of the statute, by unavoidable implication, show it is not prerequisite that all the capital stock of a corporation be subscribed before it is organized. For instance, all corporations are organized in this state under General

Laws. The existence of a corporation dates from the time of filing its charter. If the full amount of the capital stock is not subscribed at the time the charter is filed, the directors, within three months thereafter, are required to open books for receiving subscriptions to the stock of the corporation. The capital stock unsubscribed may be disposed of by the directors in such manner as the by-laws prescribe. Section 10, art. 2, c. 23, Comp. Laws 1879; Sections 16, 23, art. 3, Comp. Laws 1879; *Hunt v. Bridge Co.*, 11 Kan. 412.

The case of *State v. Commissioners Nemaha Co.*, 10 Kan. 569, cited to show that consolidation of railroad companies is a good defense for a county to refuse to issue bonds in payment of its subscription to one of the old companies, is inapplicable; for the statute, at that time, authorizing consolidation, expressly reserved to each stockholder of the original companies the right to determine whether he would become a stockholder in the new corporation.

The peremptory writ of *mandamus* will issue as prayed for.

(All the justices concurring.)

¹⁶ Mont. 261)

POWER and another v. FIRST NAT. BANK OF FORT BENTON.

(*Supreme Court of Montana*. January 5, 1887.)

BANKS AND BANKING—COLLECTIONS—BANK LIABLE FOR AGENT'S DEFAULT.

Where a bank accepts a draft from a customer for collection, without any special contract as to its liability, and transmits it for collection to an agent, who collects it, and fails to account for the proceeds, the bank is liable to its customer for the amount collected on such draft.¹

Appeal from Choteau county, Third district.

H. G. McIntire, for appellants. *Buck & Hunt*, for respondent.

MCLEARY, J. This was an action brought by the appellants against respondent to recover the amount of a draft drawn by Kilburn on Ulm, and deposited by plaintiffs with defendant for collection, and alleged to have been collected, and the proceeds retained, by the defendant. It was tried by the court on an agreed statement of facts, and judgment rendered therein for defendant, from which judgment the plaintiffs appeal to this court.

The agreed statement of facts, among other formal matters, contains the following: "That on the seventeenth day of September, A. D. 1884, the plaintiffs were the owners and holders of a certain draft for the sum of \$325.57, drawn by J. M. Kilburn on William Ulm, at Sun River, Montana territory; that on said date the plaintiffs deposited said draft with defendant for collection; that plaintiffs were regular depositors with defendant; that on said seventeenth day of September, A. D. 1884, the defendant forwarded said draft to its customary correspondents, the firm of George Steell & Co., who were at that time a firm of merchants at Sun River aforesaid, in good standing, and who were accustomed to make collections, there being no bank at that place, with instructions to collect and remit; that defendant and said firm of George Steell & Co., at that time, had no current account between them; that on September 25, 1884, or thereabouts, the said firm of George Steell & Co. collected said draft, to-wit, the sum of \$325.57 from the said William Ulm, but kept the money, and failed to remit or account for the same to defendant, and on the eighteenth day of October, A. D. 1884, became insolvent; that defendant never received the money collected on said draft, but, after the insolvency of George Steell & Co., was informed that the money collected on said draft had been, by said George Steell & Co., credited on their books to it, defendant, at the time of the collection thereof, which was the first knowledge the defendant had that the draft had been collected. At the time of the deposit of said draft by plaintiffs with defendant no in-

¹See note at end of case.

structions were given or special agreement had with reference thereto. Said draft was payable at Sun River, in Lewis and Clarke county, Montana territory, which place is sixty miles distant from Fort Benton, the place of business of defendant as aforesaid. That on the fifteenth day of November, A. D. 1884, the plaintiffs demanded of the defendant the payment of said money collected on said draft, but that the same was then and there refused, and that defendant has never paid the same."

The question of how far a bank is liable for the default of a correspondent or collecting agent in regard to a collection is one which has been solved in at least three different ways by the many courts of last resort in the United States which have at different times had the matter under consideration. One class of cases maintains the absolute liability of a bank for any default of its correspondent or collecting agent, in the same manner as it would be for the default of its own employes, on the principle that the bank, by undertaking the collection, obligated itself to see that every proper measure was taken, and regarding the collector as the agent of the bank, and not as the agent of the owner of the commercial paper. A second class of cases holds that the bank is liable only for the exercise of due care and diligence in selecting a trustworthy agent or correspondent, and that, there being in the deposit for collection the implied authority to employ a subagent, that such subagent becomes, when chosen, the agent of the holder, and not of the bank which selected him. The third class of cases draws a distinction between the cases in which the payor resides where the bank is situated and the cases where he resides at a distance; in the first place making the bank liable absolutely for any default or wrongful act, and in the second place only making the bank liable for the proper selection of a competent and reliable agent, with proper instruction. *1 Daniel, Neg. Inst. § 841.*

The cases of the first class are found principally in the decisions of the courts of the United States and the states of New York, New Jersey, Pennsylvania, Ohio, and Indiana. The cases of the second class are found chiefly in the reports of Massachusetts, Connecticut, Maryland, Mississippi, Missouri, and Iowa. The third class of cases is made up of those decided by the courts of Illinois, Tennessee, Wisconsin, and Louisiana.

Inasmuch as there is such a variety of opinions to be found among the highest courts on this important question, it is proposed to examine at some length such of them as are accessible to us, and thence deduce what we consider to be the true rule governing such cases. There has never been any adjudication on a question similar to this in this court; and, so far as concerns this territory, this is a case of first impression. We will review these cases in their chronological order.

The English cases concur in holding the bank which receives the paper for collection liable, in any event, for the default of its correspondents; and this agrees with the line of decisions rendered by the supreme court of the United States and other national courts, and the doctrine laid down in the court of appeals of New York and the other courts which have followed these authorities. It has been held in the house of lords that, where Edinburgh bankers transmitted a bill to London bankers, who forwarded it to their correspondents in Calcutta, who in turn collected it, and failed, that the Edinburgh bankers were liable to the owner of the bill, on the ground that they being agents to collect the bill, and the collection being made, their principal could not be called on to suffer any loss by the conduct of their subagents; there being no privity between them. *Mackersy v. Ramsays*, 9 Clark & F. 818-850; cited in *Broom, Leg. Max.* (6th Amer. Ed.) 603.

In the year 1827, the supreme court of Connecticut said: "Where Lawrence, residing in New York, having drawn a bill on a person in Stonington, in this state, payable to his own order, indorsed it in blank, and lodged it in a bank in New York for collection, the cashier of that bank indorsed it in blank, and

forwarded it to the Eagle Bank at New Haven. The cashier of the latter bank indorsed it in the same manner, and transmitted it to the Stonington Bank,—each of these indorsements being made for the purpose of collection only. The acceptor paid the amount of the bill to the Stonington Bank, and in an action brought by the drawer against this bank to recover the sum so paid, as money received by the defendant to the plaintiff's use, it was held that parol evidence was admissible to show the nature of the indorsements, and the purpose for which they were made. In such case the successive indorsees were merely agents of the drawer for the collection and transmission of his money; and, further, the Stonington Bank was not the factor or banker of the Eagle Bank; nor had the Stonington Bank, as agent or in any other capacity, a lien on the avails of the bill for the general balance of its account with the Eagle Bank, by virtue of which it was entitled to set off such avails against such balance." *Lawrence v. Stonington Bank*, 6 Conn. 521.

In *Mechanics' Bank v. Earp*, 4 Rawle, 385, decided by the supreme court of Pennsylvania in 1834, the bills were drawn and deposited in bank, under a special agreement that they were to be transmitted to Virginia for collection, and the facts show that the bank carried out the contract; and hence the depositor could not recover. Then it cannot be considered a case parallel with the one at bar, though in the opinion the discussion covers the principles involved herein. *Mechanics' Bank v. Earp*, 4 Rawle, 384, 385.

The question came before the supreme court of Connecticut again in 1837, and the case of *Lawrence v. Stonington Bank* is quoted and confirmed, in the following language: "A., residing at Saybrook, in this state, being the holder of a bill of exchange, drawn by B., in London, on C., in New York, and accepted by C., payable to the order of A., indorsed it, and transmitted it, some time before it became due, to the East Haddam Bank for collection. The cashier of this institution, without indorsing it, transmitted it, with other bills, to the Merchants' Exchange Bank in New York for collection. When it came to maturity, the latter bank had it presented to C., who then was and still is insolvent, for payment; and, payment not being made, it was protested for non-payment, and due notice was given to B., the drawer, but no notice was given to the East Haddam Bank; and it, supposing the bill had been paid in New York, credited A. with the amount, and paid it to him on his check. On discovering the mistake, the East Haddam Bank sought to recover back the money so paid, in an action for money had and received against A. It was held that the plaintiffs were not precluded from a recovery, (1) by reason of their not having indorsed the bill before it was transmitted to the Merchants' Exchange Bank, or advised that bank of A.'s place of residence; or (2) on the ground that the plaintiffs were responsible for the default of the collecting bank; or (3) by reason of their having credited A. with the amount of the bill, and paid over the money to him. Consequently, the plaintiffs, having obtained a verdict, were entitled to retain it." *East Haddam Bank v. Scovil*, 12 Conn. 303.

The leading New York case on this subject is *Allen v. Merchants' Bank of New York*, decided in 1839, and reported in 22 Wend. 215-244. In that case reference is had to a case decided by Chief Justice MARSHALL, (*Bank of Washington v. Triplett*, 1 Pet. 25,) and from which it is distinguished, and to the English case of *Van Wart v. Woolsey*, 3 Barn. & C. 419, which it follows on the point under consideration. The court of errors was divided in the case of *Allen v. Merchants' Bank of New York*, by a vote of 14 to 10; and the following principle, arising out of this case, was resolved: "Resolved, that when a bank or broker receives, upon a good consideration, a note or bill for collection, in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or misconduct of the bank or agent to whom the note or bill is sent, either in the negotiation, collection, or paying over the money,

by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied." 22 Wend. 244.

In the first Massachusetts case on this subject (in 1839) it is said by SHAW, C. J., in delivering the opinion of the court that, when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or agent at the place of payment; and, as a part of the same doctrine, it is well settled that, if the acceptor of a bill or a promissory note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promisor, and the same rule shall then apply as if, on the face of the note, it was payable at that place; citing *Bank of Washington v. Triplett*, 1 Pet. 25; *Allen v. Merchants' Bank*, 15 Wend. 482; *Jackson v. Union Bank*, 6 Har. & J. 146; *Lawrence v. Stonington Bank*, 6 Conn. 528; *Fabens v. Mercantile Bank*, 23 Pick. 332.

In the case of *Wingate v. Mechanics' Bank* it was decided by the supreme court of Pennsylvania (in 1848) that, where a bank in Pennsylvania received for collection a note payable in Mississippi, under an agreement to collect it for a commission of 7 per cent., and transmitted it to a bank in Rodney, Mississippi, where payment was refused, and the Pennsylvania bank neglected to give information to the owner of the non-payment, and to return the note to him within a reasonable time, so that it was barred by the statute of limitations, it thereby became liable to pay the note and interest, less the 7 per cent. commission. *Wingate v. Mechanics' Bank*, 10 Pa. St. 107. This case turns upon an express contract between the parties, evidenced by the peculiar circumstances of the case, and really does not fall within any of those classes referred to; and, though quoted as authority in some of the leading cases, can hardly be so considered in cases parallel with the one at bar.

The supreme court of Massachusetts, in *Dorchester & Milton Bank v. New England Bank*, (decided in 1848,) follows the case of *Fabens v. Mercantile Bank*, 23 Pick. 330, and confirms it as well founded in principle, and supported by a decided weight of authority. The case of *Allen v. Merchants' Bank*, 22 Wend. 215, is said to be the only opposing decision, and is criticised severely. *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 186.

This question was incidentally again before the supreme court of Massachusetts, in 1852, in the case of *Warren Bank v. Suffolk Bank*; and the cases of *Fabens v. Mercantile Bank*, 23 Pick. 330, and *Dorchester & Milton Bank v. New England Bank*, 1 Cush. 186, were quoted and followed; and the cases of *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13, and *Bellemeire v. Bank of U. S.*, 4 Whart. 105, were cited with approval. The case of *Allen v. Merchants' Bank*, 22 Wend. 215, is referred to, but disregarded. The decision in the case of *Warren Bank v. Suffolk Bank* is rested, however, on an implied agreement between parties arising from a known usage of long standing among the banks of Boston. It was held that a bank receiving a note for collection was not liable to its customer for the negligence of a notary to whom the collecting bank had handed the note for demand and protest. *Warren Bank v. Suffolk Bank*, 10 Cush. 585.

In 1852 the court of appeals of the state of New York, in the well-considered case of *Montgomery County Bank v. Albany City Bank*, reviews all the cases which had been decided in that state up to that time, and Mr. Justice JEWETT, in delivering the opinion of the court, uses the following language: "I consider it a rule of law well settled in this state that, when a bank receives from the owner a bill for collection, payable either at the place where such bank carries on its business, or at some distant place, it thereby becomes the agent of the owner for the collection; and in the discharge of its obliga-

tions as such, if the bill has not been accepted, it is bound to present the same for acceptance without unreasonable delay, as well as to present the same for payment when it becomes payable; and, if not accepted when presented for that purpose, or not paid when presented for payment, it must take such steps, by protest and notice, as are necessary to charge the drawer and indorser, or it will be liable to its principal, the owner, for the damages which the latter sustains by any neglect to perform such duties, unless there be some agreement to the contrary, express or implied. And if it be necessary or convenient for the bank to employ some other bank or individual to collect the bill, either at the place of its location or at a distant place where the bill is payable, and it does employ another bank or individual, to whom it transmits the bill for that purpose, the latter, on receiving the bill, and entering upon the discharge of the trust, becomes the agent of the former bank, and not of the owner; and, in the absence of any agreement to the contrary, is answerable to it for any neglect in the discharge of its duties as agent whereby the former bank sustains any loss or damage. The principle is that where a trust is confided to an agent, and he whose interest is intrusted is damned by the neglect of one whom the agent employs in the discharge of the trust, the agent employed shall answer to the person damned." *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 460, 461.

In 1854 the court of appeals of New York again reviewed the cases previously decided, in the case of *Commercial Bank of Pennsylvania v. Union Bank of New York*. That was a case where the Bank of Wilmington was the owner of a bill of exchange, payable at sight, at Troy, and indorsed and transmitted to the plaintiff, the Pennsylvania Bank, under an arrangement by which the latter collected and retained the proceeds of paper thus remitted to it, and, with the same, redeemed the circulating notes of and paid drafts drawn by it. The Bank of Wilmington and the Pennsylvania Bank indorsed and transmitted the bill to the New York bank, its correspondent in New York, for collection, and the same was by the latter sent to the Troy City Bank for the same purpose, which latter bank collected the bill, and surrendered it to the drawee. The court of appeals, in an elaborate opinion, uses the following language:

"The liability of the defendants for the acts and omissions of the Troy City Bank, and their officers and agents, in and about the collection of the draft, is no longer an open question. It was definitely settled by the court for the correction of errors in *Allen v. Merchants' Bank of New York*, 22 Wend. 215, in which it was resolved that when a bank, broker, or other money dealer receives, upon good consideration, a note or bill for collection, in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the bill or note is sent, either in the negotiation, collection, or paying over the money, by which the money is lost, or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied; and this doctrine was reasserted and directly approved by this court in *Montgomery County Bank v. Albany City Bank*, decided December, 1852, in this court."

"If a liability has been incurred by the defendants, by reason of an omission of duty on the part of the bank at Troy, either in the payment of the money collected, or in charging the prior parties to the bill, upon its dishonor by the drawee it is quite evident that such liability is to the plaintiff, which alone can enforce it by action. To this effect is the decision of *Montgomery County Bank v. Albany City Bank*. It was there held that the plaintiff, who had transmitted a bill payable in New York to the Albany City Bank for collection, could not maintain an action against the Bank of the State of New York, to which, as the correspondent and agent in New York of the Albany City Bank, the latter had transmitted it for the same purpose, for an omission to

charge the drawer and indorsers, upon non-payment by the drawee; reversing the decision of the supreme court holding the contrary doctrine. 8 Barb. 396. JEWETT, J., says: 'And, if it be necessary or convenient for such bank [the bank receiving the bill or note for collection] to employ some other bank or individual to collect the bill at the place of its location, or at a distant place where the bill is payable, and it does employ such other bank or individual, to whom it transmits the bill for that purpose, the latter, on receiving the bill, and entering upon the discharge of the trust, becomes the agent of the former bank, and not of the owner, and, in the absence of any agreement to the contrary, is answerable to it for any neglect in the discharge of its duties as such agent, whereby the former bank sustains any loss or damage.' And again: 'The New York State Bank was the agent directly guilty of the neglect. The bank was employed to do this service by the plaintiff's agent, the Albany City Bank, as its agent, to whom it was alone responsible for its acts and neglects; and the latter, according to the settled rule, was responsible to the plaintiff for its acts and omissions in the matter; there being no agreement to the contrary, express or implied.'

"The doctrine put forth in *Bank of Orleans v. Smith*, 3 Hill, 560, that where a note payable at a distance is deposited with a bank for collection, and the latter transmits it to another bank for the same purpose, both are to be regarded as agents for the holder, is disapproved in the same opinion. Indeed, it seems to follow necessarily, from the adjudication in *Allen v. Merchants' Bank*, that the defendant, being the agent of the plaintiff, is responsible to it, as principal, for the proper discharge of the duties of the agency. The contract of the agent respecting the business of the agency, which the law implies, is with his immediate principal; and, where the relation of principal and agent is established, as it is between the parties to this action, by the authorities cited, the contract and consequent rights and liabilities result as necessary sequents, unless expressly provided against by agreement." *Commercial Bank of Pennsylvania v. Union Bank of New York*, 11 N. Y. 211, 212.

The supreme court of Ohio, in 1858, in the case of *Reeves v. State Bank of Ohio*, 8 Ohio St. 468, in a very learned opinion by BRINKERHOFF, J., reviewed all of the English and American cases up to that date, and elects to follow the decisions of the New York court of appeals, which, in turn, had followed the English doctrine. In that case the correct rule is stated to be as follows: "Where a bank in this state receives for collection a draft payable in New York, and, for the same purpose, forwards the draft to its correspondent in New York, the bank here is responsible to the owner for the conduct of such correspondent, and for the proceeds of the draft, immediately upon its collection by such correspondent. Such correspondent is the agent of the bank here, and not the subagent of the owner of the draft; and payment to the agent is payment to the bank, unless there was some agreement or authority between the owner and the bank, beyond the mere fact of the draft being received for collection." The doctrine laid down in *Bank of Orleans v. Smith*, 3 Hill, 560; *East Haddam Bank v. Scovil*, 12 Conn. 303; and *Fabens v. Mercantile Bank*, 23 Pick. 330,—is rejected as not sustained by weight of reason and authority. And the cases of *Lawrence v. Stonington Bank*, 6 Conn. 521; *Bank of Metropolis v. New England Bank*, 1 How. 234; *Gordon v. Kearney*, 17 Ohio, 572; and *Wilson v. Smith*, 3 How. 763,—are distinguished from cases such as that and this by the fact that they were all suits brought by the owners of bills and notes deposited for collection with banks or bankers, against a secondary agent to whom they had been transmitted by the primary agent; and in all of them the plaintiffs were entitled to recover, subject, however, in some of the cases, to the right of the secondary agent to retain for a general balance existing in his favor against the primary agent. *Reeves v. State Bank of Ohio*, 8 Ohio St. 468.

This Ohio case has since been followed as a leading case in upholding the doctrine first announced in America by the New York court of appeals.

The supreme court of Wisconsin, in 1860, decided, in the case of *Stacy v. Dane County Bank*, "that the contract implied from the receipt, by a bank, of a note for collection, payable at a distance from its place of business, is not absolutely to make due presentment of the note, and give due notice of its non-payment, but to place it in the hands of some competent and responsible agent for that purpose, and that, if the bank exercises reasonable care and skill in selecting such agent, it is not liable for his default." *Stacy v. Dane County Bank*, 12 Wis. 707.

In the case of *Aetna Ins. Co. v. Alton City Bank*, decided by the supreme court of Illinois in 1861, Mr. Justice WALKER, delivering the opinion of the court, after reviewing many cases, says: "Where a bank receives a bill or note for collection against a drawee or maker, resident at the place of the bank, or where the bank undertakes for its collection by their own officers, there can be no doubt that it would be liable for any loss that might result from neglect; but, when received for transmission, it has fully discharged its duty by sending the instrument in due season to a competent, reliable agent, with proper instructions for its collection." *Aetna Ins. Co. v. Alton City Bank*, 25 Ill. 243.

In 1872 the supreme court of Pennsylvania adopts the doctrine before announced in New York. The case of *Bradstreet v. Everson*, 72 Pa. St. 132, was a case where a collection agency received for collection in Pittsburgh certain acceptances, and transmitted the same to Wood, an attorney in Memphis, who collected, and failed to remit Bradstreet & Son. The collecting agency was held liable. The opinion in this case, rendered in 1872, reviews many similar cases, and clearly establishes the principle, which seems to us very applicable to the case at bar; the responsibility of bankers for collections undertaken appearing to be equally as great as that of collecting agents or attorneys at law.

The last New York case which has fallen under our notice was decided in 1872. In that case (*Ayrault v. Pacific Bank*) the court of appeals of New York decided a case under the following state of facts: Ayrault, a customer of the Pacific Bank, deposited with the said bank two promissory notes for collection. They were not paid, and were handed by the bank to a notary for demand and protest. He failed to properly protest the notes, whereby the indorsers were discharged, and collection was lost. The court in its opinion says: "The doctrine established by the court for the correction of errors in *Allen v. Merchants' Bank*, 22 Wend. 215, has been repeatedly reaffirmed, and has never been questioned in this state. By the receipt of negotiable paper for collection the bank or banker receiving it undertakes that the necessary means shall be taken to charge the drawer, indorser, and other parties, upon default, or refusal to pay or accept. A bank receiving a bill or promissory note for collection, whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection by which any of the parties are discharged, whether of the officers and immediate servants, or of the agents of the bank or its correspondents, or agents employed by such correspondents." *Ayrault v. Pacific Bank*, 47 N. Y. 573.

In 1874 the supreme court of Tennessee decided the case of *Bank of Louisville v. Bank of Knoxville*, 8 Baxt. 105, in which it reviews numerous cases, and holds "that the more reasonable and just construction of the undertaking of the bank in which the bill is deposited for collection is that, when the bill is payable at another and distant place, the bank so receiving the bill discharges itself of liability by transmitting the same, in due time, to a suitable and reputable bank or other agent at the place of payment; and in such case it is manifest that a subagent must be employed, and the assent of the principal is implied, as it cannot be said that the receiving bank was expected or

bound to send one of its own officers to the distant point of payment for the purpose of personally attending to the collection for the very inadequate compensation usually paid to banks for such service." *Bank of Louisville v. Bank of Knoxville*, 8 Baxt. 105.

There seem to have been four cases decided in the circuit courts of the United States, to-wit: *Bank of Trinidad v. First Nat. Bank*, 4 Dill. 290; *Hyde v. First Nat. Bank*, 7 Biss. 156; *Kent v. Dawson Bank*, 13 Blatchf. 237; *Taber v. Perrot*, 2 Gall. 565,—in all of which the case of *Allen v. Merchants' Bank* is believed to have been followed, though we have only been able to examine these authorities at second hand, the original reports not being accessible.

This brings us to an examination of the cases decided by the supreme court of the United States, in which the English doctrine, which had been previously followed in New York, is adopted, after a full examination of all the leading authorities.

The question at bar first came directly before the supreme court of the United States in 1875. In the case of *Hoover v. Wise*, 91 U. S. 308, Mr. Justice HUNT, delivering the opinion of the court, discusses a long line of cases, English and American, and concurs in the principles laid down in the case of *Reeves v. State Bank of Ohio*, 8 Ohio St. 466, and in *Allen v. Merchants' Bank*, 22 Wend. 215, and in other New York cases, and in *Bradstreet v. Everson*, 72 Pa. St. 124, and other cases to the same effect. This case presented the following state of facts: An account was delivered by its owners, Wise & Co., to Archer & Co., a collecting agency in New York, with instructions to collect. Archer & Co. sent it to McLennan, in Nebraska. Oppenheimer, the debtor, was in failing circumstances, and had already committed several acts of bankruptcy, when McLennan prevailed on him to confess judgment in favor of Wise & Co. The money was collected on this judgment, and paid over to Archer & Co., but was not by them paid over to Wise & Co. Oppenheimer was thrown into bankruptcy, and Hoover, his assignee, sued Wise & Co. to recover the money paid in violation of the bankrupt law. The supreme court held that McLennan was the agent of Archer & Co., and not of Wise & Co., and that Wise & Co. were not responsible for the guilty knowledge of the attorney, so as to render them liable for the money collected. This case, as viewed by the court, falls clearly within the principles laid down by the cases cited and discussed, and the dissenting opinion of Mr. Justice MILLER and others is not based on any doubt as to the correctness of the principles of those cases, but because, in their view, the facts of the case did not bring it within the principles announced therein; that the judgment having been taken in the name of Wise & Co., and they receiving the benefit of it, and they being liable for costs in the event of failure, and Archer & Co. not being liable, and having no interest in the account, and not being liable to the attorney for the fees, that McLennan was the attorney of Wise & Co., and not of Archer & Co. So the dissenting opinion by no means weakens the authority of this case in so far as the case under consideration is concerned. *Hoover v. Wise*, 91 U. S. 308.

The supreme court of Iowa, in 1881, reviews a large number of cases, and arrives at the following conclusion: "Where the holder of a bill of exchange, payable at a distant place, deposits it with a local bank for collection, he thereby assents to the course of business of banks to collect through correspondents, and the correspondent of the local bank to which the bill is forwarded becomes his agent, and is responsible to him directly for negligence in failing to present the bill for payment within the proper time." *Guelich v. National State Bank of Burlington*, 56 Iowa, 434; S. C. 9 N. W. Rep. 328. The cases of *Hyde v. Planters' Bank*, 17 La. 560; *Baldwin v. Bank of Louisiana*, 1 La. Ann. 13; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; *Agricultural Bank v. Commercial Bank*, 7 Suned & M. 592; *Bowling v.*

Arthur, 34 Miss. 41; *Jackson v. Union Bank*, 6 Har. & J. 146; *Citizens' Bank v. Howell*, 8 Md. 530; and other cases,—are cited by the Iowa supreme court as sustaining this view of the question. 56 Iowa, 436, and 9 N. W. Rep. 328. These authorities are not accessible to us, and have not been examined. However, we presume they follow in the wake of Massachusetts and Connecticut cases, which seem to lead that line of decisions.

The case of *Britton v. Nicolls*, decided by the supreme court of the United States, (104 U. S. 757,) does not fall parallel with the cases at bar. It was decided in accordance with the decisions of the supreme court of Mississippi, and on the force of a local statute of that state prescribing certain duties of a notary public, and treating him as a public officer; and this merely holds that the notary was not, in this matter, the agent of the bankers, and that for any failure to perform his duties he alone was liable. 104 U. S. 766. The decision was not made upon any general principle of commercial law, and establishes none, and is clearly distinguished from the latest case of *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 284-287, S. C. 5 Sup. Ct. Rep. 141, where it is discussed, and from the case now under consideration, where no such questions as were there decided were involved.

The latest discussion and decision of the question presented in the case at bar by any court of last resort was, had in 1884 by the supreme court of the United States, in the case of *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, 112 U. S. 280; S. C. 5 Sup. Ct. Rep. 141. The doctrine of the liability of the bank receiving a draft for any default of its correspondent is thoroughly discussed, and clearly enunciated. In that case the Pittsburgh bank had sent to the New York bank several unaccepted drafts for collection. The New York bank sent them to a bank in Newark. The Newark bank failed to take the proper acceptance, and by this negligence the payment of the drafts failed to be made. The supreme court held that the New York bank was liable to the Pittsburgh bank for all damages that it had sustained by the negligence of the Newark bank. In the course of the opinion, Mr. Justice BLATCHFORD, delivering the opinion of the court, says: "On its receipt of the drafts, under these circumstances, an implied undertaking by the New York bank arose to take all necessary measures to make the demands of acceptance necessary to protect the rights of the holder against previous parties to the paper. From the facts found, it is to be inferred that the New York bank took the drafts from the plaintiff in the usual course of business. * * * The contract then became one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper. Its undertaking is to do the thing, and not merely to procure it to be done. In such case the bank is held to agree to answer for any default in the performance of its contract; and whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing subagents to perform a part of what it has contracted to do, becomes responsible to its customer. * * * Whether a draft is payable in the place where a bank receives it for collection, or in another place, the holder is aware that the collection must be made by a competent agent. In either case there is an implied contract of the bank that the proper measures shall be used to collect the draft, and a right on the part of the owner to presume that proper agents will be employed; he having no knowledge of the agents. There is, therefore, no reason for liability or exemption from liability in one case which does not apply to the other." *Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York*, 112 U. S. 280; S. C. 5 Sup. Ct. Rep. 141.

The reasoning of this opinion effectually obliterates all distinctions between the cases of the second and third classes which have been attempted to be drawn

in some of the courts of last resort, as hereinbefore adverted to, and as commented on by text writers in treating this subject; and the doctrine maintained in the first class of cases mentioned above, and upheld by Senator Daniel in his valuable work on Negotiable Instruments, is clearly and ably sustained, and established to our entire satisfaction. This is believed to be the latest enunciation of the views of the supreme court of the United States upon this subject, and is binding as an authority on this court, and, aside from this, it is beyond a doubt the correct doctrine, sustained by the weight of reason and the general current of authority.

The foundation for all the differences of opinion among the learned judges who have had the matter under consideration appears clearly to rest in the interpretation of the implied contract between the depositor and the bank at the time the negotiable paper is deposited for collection. Where there is an express contract, it must, of course, be followed, and there is no room for a difference of opinion; and all of the decisions herein styled cases of the second and third classes are founded on the idea that the course of business or the customs of bankers, or the necessities of the case, or the peculiar circumstances, raise some other presumption than the one that the bank receiving the deposit for collection undertakes to collect it, and assumes all the risks from the negligence or default of the agents which it employs. We do not believe that any other contract can be inferred from the mere tender and acceptance of negotiable paper for collection. No matter where the debtor may reside, nor what agencies are necessary to employ in the collection, the depositor is not supposed to be acquainted with the methods to be employed by the bank in collecting its paper, or the carefulness, skill, solvency, or honesty of the agents whom it may be necessary to employ in such collections. Besides, it is the universal custom of banks, on receiving collections, to pass them to the credit of the owner, and to indorse and transmit them to their correspondents, where they are in like manner passed to the credit of the indorser, and so on until collected; and, if the collection fails on account of the insolvency of the debtor, and through no fault of any intermediate bank or agent, the paper is returned, and charged back, until it reaches the original depositor and indorser, who is called upon to make it good. Such was the course pursued in the case at bar, and the defendant is clearly liable for the amount collected.

On mature consideration of the authorities, supporting all shades of opinion on this subject, we fully agree with the views expressed in Daniel, Neg. Inst. 342, and hold that, in the absence of a special contract, a bank is absolutely liable for any laches, negligence, or default of its correspondent whereby the holder of negotiable paper suffers loss. By such a rule alone can the depositor who intrusts his business to a bank be secure against carelessness or dishonesty on the part of collecting agencies employed by banks to carry out their contracts. Banks can easily avoid the effects of this stringent rule by making special contracts in special cases, or declining to undertake collections at points where they have any fears as to the reliability or solvency of the agents whom they will be obliged to employ; but when they undertake collections, either at their own location, or at distant points, without a special contract limiting their liability, they must be held to do so for a sufficient consideration, and to be responsible absolutely to the owner of negotiable paper for the payment of all money collected thereon, and for all losses occurring through the negligence of the agent, resulting in a failure to make such collection.

In accordance with these views, the judgment is hereby reversed, and the case remanded for a new trial.

NOTE.

A bank which sends a bill or draft to another bank for collection becomes responsible to the depositor for the honesty and competency of such other bank. Exchange Nat. Bank v. Third Nat. Bank, 5 Sup. Ct. Rep. 141, reversing S. C. 4 Fed. Rep. 20; Tradesmen's Nat. Bank v. Third Nat. Bank, 5 Sup. Ct. Rep. 149; Simpson v. Waldbey. (Mich.) 30 N. W. Rep. 199. The contrary is held in Nebraska, Guelick v. Burlington Nat. State Bank, 9 N. W. Rep. 328; in Kansas, Bank of Lindsborg v. Ober, 3 Pac. Rep. 324.

(2 Ariz. 225)

GRAY v. SALT RIVER VALLEY CANAL CO.

(Supreme Court of Arizona. January 8, 1887.)

CONTRACT—CONDITION—WATER COMPANY.

In an action against an irrigation company, for failure to deliver water purchased, where it appears that there was a contract to be delivered to purchasers restricting the liability of the company for failure to deliver water in certain cases, and providing for a *pro rata* distribution when there was an insufficiency of water to fill all the orders, the plaintiff, not having received such contract, is not bound by the terms thereof, although, as a stockholder of the company, he is cognizant of its provisions.

Tweed & Hancock, for appellant, Salt River Valley Canal Co. *Cox & Campbell*, for appellee, Gray.

PORTER, . . . The plaintiff brings his action for damages for failure to deliver 100 inches of water, purchased by him. Gray was a stockholder in the defendant company, and, under its rules, an application for water during the "water year" was required. He did so apply for 100 inches of water, and paid part of the purchase money, the treasurer telling him it was not sufficient, and would not enter such payment on the books. Subsequently, on receiving the required sum, viz., \$125, he did enter such payment on the books of the company. When the payment was made, Gray did not sign a note for the balance, which was one of the rules of the company, and on the fifth of July, 1884, he paid all that was due, making the full sum of \$250. There was a certain form of contract to be signed, restricting the liability of the company in many particulars, and in this, that there should be a *pro rata* division in case of insufficiency of water to supply all the customers where such insufficiency occurred by reason of such a rise in the river as would break the dam or ditch, or by some unavoidable accident, and fixing the damages of non-delivery of water at a fixed sum. These contracts were to be executed by the president of the company, and delivered to purchasers of water. No such contract was delivered to plaintiff. He paid the full amount due for the water on the fifth of July, 1884, to the treasurer, and it was entered upon the books of the company; and at such payment plaintiff refused to receive the usual contract.

It is contended that Gray, having been a director of the company, knew of the provisions of these contracts, and should be bound by them. We can see no good reason why he should be, when the company received his money without the *onus* of such a contract. The company ignored its own by-laws, and, having received the money, cannot now go behind its action. The case of *Pixley v. Western P. R. Co.*, 33 Cal. 183, cited by respondents, well applies to this case. There the company had a certain by-law, by which no contract was to be binding on them unless made in writing. Pixley was attorney for the company, and performed his duties with knowledge of the company, and without such written contract. The court say: "It may be that, while such contract remains executory on both sides, an action could not be maintained by either party to enforce it; but, where one of the contracting parties has completely performed it on his part, and thereby rendered to the other the consideration stipulated, the party having received the consideration promised cannot be permitted to escape liability on the naked

letter of the statute, because the motive of the law is not such as to afford immunity from liability in such a case."

So, in this case, the company received the money for the water through its proper officer. The knowledge of the servant is the knowledge of the company. *Denver, S. P. & P. R. Co. v. Conway*, 5 Pac. Rep. 142.

As to the sufficiency of water furnished, there was such a conflict of evidence, that this court will not review it. *Ehrlich v. Ewald*, 51 Cal. 172 *et seq.*

It is somewhat difficult to arrive at the damages; but, when we consider the loss of the rent of land from the tenants, and what was a fair rental value of the land upon which a crop was prevented by reason of there being no water, we do not deem the amount of the verdict excessive.

There was no assignment of errors in the refusal of instructions asked for by defendant, hence this court will not review any error therein. *Richardson v. Kier*, 37 Cal. 263.

Judgment affirmed.

(9 Colo. 422)

PEOPLE ex rel. THOMAS, Atty. Gen., v. SCOTT, County Clerk Arapahoe Co.

(*Supreme Court of Colorado*. December 24, 1886.)

1. TAXATION—CONSTITUTIONAL LIMITATIONS—CONST. COLO. ART. 10, § 11.

Under Const. Colo. art. 10, § 11, providing that, when the assessed value of property in the state shall have reached \$100,000,000, the tax for "state purposes" shall not exceed four mills per dollar of valuation, rates of taxation for state purposes aggregating five and seventeen-thirtieths mills per dollar, declared after the assessed value of property in the state had reached \$100,000,000, are in excess of the constitutional limit, although only four mills thereof is declared to be for state purposes, and the remainder is for the support of state institutions authorized by the constitution.

2. SAME—"STATE PURPOSES"—WHAT ARE.

Any legitimate expenditure of the state, necessary to be provided for by a state tax, is a "state purpose," and the tax to be provided is a tax for a "state purpose."

3. SAME—THE ROLL—COLORADO ACT OF APRIL 7, 1885—GEN. ST. COLO. §§ 15, 2243, 2444, 2881, 3108, 3167, 3456.

The Colorado act of April 7, 1885, declaring a tax of four mills for state purposes, does not repeal by implication Gen. St. §§ 15, 2243, 2444, 2881, 3108, 3167, 3456, declaring rates of taxation for various state institutions, but those rates should be extended in separate columns of the tax-list, and deducted from the aggregate rate of four mills, and the remainder of that rate extended in the column of the list in which assessments for taxes to be applied to the expenses of the state government are placed.

This is an original proceeding instituted in the supreme court for a writ of *mandamus* to compel the county clerk of Arapahoe county to extend on the tax-list of said county, for the year 1886, certain taxes in conformity with a notice sent him by the state auditor. The petition is presented by the attorney general, and states as grounds of application:

"That on the sixteenth day of August, A. D. 1886, at a regular meeting of the state board of equalization, the said board ordered a tax levy of four mills on each dollar of valuation for state purposes; that on the thirtieth day of August, A. D. 1886, the state auditor sent to, and the defendant received, the following notice, to-wit:

"OFFICE OF AUDITOR OF STATE.

"DENVER, August 30, 1886.

"Hon. Charles H. Scott, Clerk of Arapahoe County—DEAR SIR: At a regular meeting of the state board of equalization, held August 16, 1886, the following tax was ordered levied for the year 1886: For state purposes, four mills on the dollar. The following taxes are levied by acts of the general assembly, viz.: For mute and blind, one-fifth mill on the dollar, (section 2444, Gen. St.); for university, one-fifth mill on the dollar, (section 3456, Gen. St.)

for agricultural college, one-fifth mill on the dollar, (section 15, Gen. St.); for insane asylum, one-fifth mill on the dollar, (section 2243, Gen. St.); for school of mines, one-fifth mill on the dollar, (section 3108, Gen. St.); for stock inspection, one-fifteenth mill on the dollar, (section 3167, Gen. St.); for capitol building, one-half mill on the dollar, (section 2881, Gen. St.); for military poll, one dollar upon each male inhabitant of your county not exempt by law, (Sess. Laws 1885, p. 269.) The above rates will be charged against your county on the grand total of abstract of assessment, as certified by you to this office.

"Very respectfully, HIRAM A. SPRUANCE, Auditor of State."

— "That upon the receipt of said notice it became and was the duty of the defendant, as county clerk of Arapahoe county, in making up the tax-list, to compute and carry out in the proper column the state tax at four mills on the dollar of valuation; that it became and was the further duty of the defendant, as such clerk of Arapahoe county, in making up the tax-list for the year A. D. 1886, to combine under one head upon the tax-list, under the head of 'State Institutions,' in one column, the following taxes: For mute and blind, one-fifth mill on the dollar; for university, one-fifth mill on the dollar; for agricultural college, one-fifth mill on the dollar; for school of mines, one-fifth mill on the dollar; for insane asylum, one-fifth mill on the dollar; for stock inspection, one-fifteenth mill on the dollar; for capitol building, one-half mill on the dollar."

The petitioner then avers the extension of the *four-mill* rate for state purposes by the respondent, and his refusal to extend the rates levied by acts of the general assembly for the support of the state institutions, and for the capitol building fund.

The answer of the respondent denies the power or authority of the state board of equalization to order the tax levy mentioned in the notice, averring, upon the advice of counsel, that the only power vested in said board with respect to a tax levy at said meeting was to reduce the rate fixed by statute for state purposes. Respondent denies that he has neglected or refused to extend upon the tax-list the rates prescribed by law for the several state institutions, but avers the extension of the same in the manner required, and admits that, in making up the tax-list for the year 1886, he only extended four mills on the dollar of valuation *for all state purposes*, the state institutions included. The answer then sets up, in defense of the course pursued by the respondent, in this behalf, and as further cause why a writ of *mandamus* should not be issued against him, that in the year 1886, the taxable property within the state amounted to more than \$100,000,000, and that section 11 of article 10 of the state constitution provides that "the rate of taxation on property, for state purposes, shall never exceed six mills on each dollar of valuation; and, whenever the taxable property within the state shall amount to one hundred million dollars, the rate shall not exceed four mills on each dollar of valuation." The answer further avers that the rate of taxation for all state purposes, including the support of state institutions, for the year 1886, is limited by the constitution to *four* mills, and that, in so far as any statute provides for or levies a greater rate, it is null and void.

To this answer the attorney general demurs on the ground of insufficiency to constitute a defense to the application.

T. H. Thomas, Atty. Gen., for the People. Wm. B. Mills, Co. Atty., and Sullivan & May, for respondent.

BECK, C. J. We deem it unnecessary, for the purposes of the present case, to discuss the powers of the state board of equalization, for the reason that it appears from an examination of the laws in force levying state taxes that all the levies sought to be enforced by the peremptory writ prayed for were made

by the legislature, and not by the state board of equalization. It is averred in the petition that the four-mill rate for state purposes was levied by the state board of equalization, but these taxes were in fact levied by the fifth general assembly, and no change in the rate so prescribed was made by the state board. Laws 1885, p. 318, § 3. The same is also true of the rates levied for the support of the state institutions. A separate act was passed in each instance, fixing a rate to be levied annually on all taxable property within the state for the support of each of these institutions. Some of these laws were enacted at the first session of the general assembly of the state, and some at later sessions thereof, but all prior to the session of 1885. These laws remain in force, and must be regarded as standing levies of the rates prescribed, and as authorizing an extension of the taxes therein provided for. 1 Desty, Tax'n, 468; *Davis v. Brace*, 82 Ill. 542. The legislature has so regarded these levies, as appears from amendments made to some of the acts fixing the same; and while they were understood to be levies for legitimate state expenses, and duly authorized by the constitution, yet they were evidently not understood to be covered and included in the constitutional provision which limited the rate of taxation "for state purposes." This is shown by the whole course of legislation bearing on the subject.

At every regular session of the legislature since the adoption of the state constitution a rate of taxation has been prescribed "for state purposes." In the same section of these several acts, up to and including the year 1883, the county clerk of each county has been required to extend these taxes in a separate column of his tax-list. The language of these several acts is as follows: "The clerk of each county, in making up the tax-list required by this act, shall compute and carry out, in the proper column, a state tax at the rate aforesaid." Laws 1877, p. 756, § 44; Laws 1879, p. 152, § 1; Laws 1881, p. 208, § 1; Laws 1883, p. 247, § 1. The amendment of April 7, 1885, adopts the same provision, by reference to section 70, Gen. St. (Laws 1885, p. 318, § 3.)

The form of the first tax-list prescribed by the legislature exhibits the same intent. It provides a column for state taxes, one for deaf-mute tax, and indicates, by a blank column and foot-note, an intent that other columns are to be added for other special state levies. Gen. Laws, 758. By the first section of an act approved February 4, 1876, which is still in force, it was provided that "all taxes for state institutions in each year shall be combined under one head, and entered by the clerk of each county of this state upon the tax-list, under the head of 'State Institutions,' in one column." Gen. St. p. 837, § 2868.

That it was the legislative intent to make separate provisions for the support of the state institutions from that provided for defraying the expenses of the different departments of the state government is further shown by the acts of 1881 and 1883, above cited. The first provides "that for the years 1881 and 1882, the rate of taxation shall be, *for state purposes* four mills on the dollar, and for the purpose of establishing a fund for a capitol building one-half of one mill on the dollar, unless the state board of equalization shall fix a lower rate." Laws 1881, p. 208. The act of 1883 provides "that for the years of 1883 and 1884, and annually thereafter, the rate of taxation shall, *for state purposes*, be three and one-half mills on the dollar, and for the purpose of establishing a fund for a capitol building one-half of one mill on the dollar, unless the state board of equalization shall fix a lower rate." Laws 1883, p. 247. The capitol fund, in these acts provided for, has no reference to the "interest fund," or the "capitol sinking fund," provided for by the act of February 11, 1883. The understanding of the legislature that the *rates* levied for the state institutions should be in addition to the rate levied for the so-called *state purposes*, and that they should be separately extended on the tax-rolls, is still further apparent from the language of sections 1 and 3 of the act approved February 12, 1881. Section 1 provides "that in all cases wherein county clerks have failed, from any cause whatever, in whole or in part, to compute and extend the taxes

on the county tax-rolls for the years 1879 and 1880, for the mute and blind institute, state university, agricultural college, school of mines, insane asylum, and military poll funds, according to the levies fixed by law for these several purposes, the county commissioners of any such county are hereby authorized and required to cause such deficiency to be paid into the state treasury from the general county funds." Section 3 imposes a penalty of not less than \$500, nor more than \$1,000, upon any county clerk who fails to compute and extend the taxes for any state fund according to the levy made therefor by law.

From this review of the legislation on the subject under consideration it sufficiently appears that the rate of taxation levied "for state purposes" was not intended by the legislature to include, as part and parcel thereof, the rates levied for the state institutions. Respecting both purposes, then, the rates were separately levied, and the laws in force required them to be separately extended, the rate for state purposes in one column, and that for state institutions in another column. This review also shows the legislative construction of the limitations on the rate of taxation imposed by section 11 of article 10 of the constitution. The rates therein prescribed relate only to taxes *for state purposes*; and, if this clause does not cover and include *all* state purposes, (the position assumed by the relator,) it follows that, as to the state purposes not included, there was no limitation.

We now approach the main question involved in this case. If the four mills so levied by the legislature of 1885 were designed to be in addition to the specific levies, the total rate levied for all state purposes or expenditures for the year 1886 amounts to five and seventeen-thirtieths mills on the dollar. The question, then, to be decided is, has the state legislature power and authority, under the constitution, when the valuation of the property within the state amounts to or exceeds \$100,000,000, to levy an annual state tax at a rate exceeding four mills on the dollar of valuation for *all* state purposes?

Article 10 of the constitution is devoted to the subject of revenue, and upon a correct construction of its provisions depends the solution of this question. This article requires the general assembly to provide by general laws for the levy and collection of state, county, and municipal taxes; that the laws to be enacted shall prescribe such regulations as shall secure uniformity of taxation, and a just valuation of the property to be taxed. It specifies what property shall be exempt; provides for a state board of equalization, and defines its powers; requires the general assembly to provide by law for an annual state tax, which shall be sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year; limits the annual appropriations and expenditures to be authorized by the general assembly to the total state tax provided or to be provided by law, and declares that the rate levied shall not exceed that allowed by section 11 of said article. Section 11 limits the rates of taxation for state purposes, and provides how the rate, for a specified period, may be increased. This section is as follows: "The rate of taxation on property, for state purposes, shall never exceed six mills on each dollar of valuation; and, whenever the taxable property within the state shall amount to one hundred million dollars, the rate shall not exceed four mills on each dollar of valuation; and, whenever the taxable property within the state shall amount to three hundred million dollars, the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the state as, in the year next preceding such election, shall have paid a property tax assessed to them within the state, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law." It will be seen that the language of this section is plain, clear, and unambiguous, and that no room is left for construction as to the limita-

tions therein imposed, unless it be in respect to the meaning intended to be conveyed by the clause "for state purposes."

Constitutions are adopted as a whole, and it is a rule of construction applicable to them, as well as to other instruments, that a clause or section, which, standing by itself, might seem of doubtful import, may be made plain, and its true meaning discovered, by comparison with other sections or clauses of the same instrument. The second section of the revenue article just summarized requires the general assembly to "provide by law for an annual tax, sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year." That this annual tax was designed to cover the entire expenses of the state, so far as necessary to provide therefor by taxation, is confirmed by the provision of section 16. This section prohibits the legislature from making any appropriations, or authorizing any expenditure, whereby the expenses of the state, during any fiscal year, shall exceed the total tax provided by law, and also prohibits the legislature from increasing the levy in excess of the rates allowed by section 11. If, then, any definition of the term "state purposes" is necessary to a decision of the questions presented by the defense of the respondent, it is to be found in the revenue article itself. Any legitimate expenditure of the state necessary to be provided for by a state tax is a state purpose, and the tax to be provided is a tax for a state purpose. It has been repeatedly stated in the decisions of this court, on evidence deemed by us sufficient to justify the statement, that a principal design of the framers of the constitution, and of the people in adopting the same, was to inaugurate an economical state government, and, in order to carry out this purpose, limitations against extravagance in the administration of it were inserted. Now, with such a purpose in view, how essentially unavailing it would be to limit the rate of taxation as to *certain* governmental purposes, and to leave it without restraint or limitation as to *all other* purposes for which revenue may be provided. The absurdity of such a proposition is patent on its face. In our judgment, a contrary intention is clearly expressed in section 11 of article 10, and the correctness of this judgment is amply sustained by the context.

The relator interposes, in behalf of the theory on which the case is prosecuted, the rule of *contemporaneous construction*. He reminds us that successive legislative assemblies, commencing with the adoption of the constitution, have construed this section as a limitation of the mill rate which may be levied to defray the expense of the state government proper, which is constituted, by article 8 of the constitution, of the *legislative, executive, and judicial* departments. He argues, in support of this interpretation, that a state purpose is that which is necessary for the support of the state, and that, since the three departments named constitute the state government, it is only the taxes necessary for the support of these departments that can be said to be included in this clause. He maintains that the state institutions form no part of the powers of the state, are not material to its existence, and, while they are entitled to be supported by the state, yet, being of secondary importance to the existence of the state government, it could not have been intended by the framers of the constitution that the taxes necessary for their support should be classed as taxes "for state purposes." This position is supplemented and fortified by the argument *ab inconvenienti*. It is alleged that if the rate to be levied for *all* state purposes, including the one and seventeen-thirtieths mills directed by prior laws to be levied for the support of the state institutions, be now limited to four mills on the dollar, it will result in a deficiency of revenue to meet the current expenses of the state government, as fully appears from the expenditures of the past year.

The construction placed by several legislative assemblies upon the constitutional provision, and the inconveniences which may be occasioned by adopting a different construction, are deserving of, and have received, respectful and

thoughtful consideration. We approve the doctrine laid down by jurists and writers on constitutional law, that great deference is due to a contemporaneous legislative exposition of a constitutional provision. This doctrine rests on sound reason. Legal presumptions are in favor of the correctness of such expositions. It is said that the question whether a law is void for repugnancy to the constitution is one of such delicacy that it is seldom, if ever, to be decided in the affirmative in a doubtful case; also that where a construction of a constitutional provision has occurred contemporaneously with the adoption of the constitution, been acquiesced in for a long period of time, and valuable rights are claimed under it, great weight is to be given it on account of the opportunities afforded the law-makers for ascertaining the intention of the instrument, and the inconveniences likely to result from a decision that such construction was erroneous. Cooley, Const. Lim. 81-86, 219; Sedg. St. & Const. Law, 412; Dwar. St. 65; *Fletcher v. Peck*, 6 Cranch, 128. But these, after all, are only suggestions to be considered and weighed by the judiciary when called upon to pass upon the correctness of legislative acts. The rule upon the subject is that the constitution is to be regarded as higher authority than any other law; that it is the true intent of this instrument that is to be enforced; and that, when its meaning is plain, it is the solemn duty of the courts to enforce it, regardless of incidental effects. It has been well said that "contemporary construction can never abrogate the text; it can never narrow its true limitations; it can never enlarge its natural boundaries." Story, Const. § 40.

After a careful examination of the subject under consideration, and giving due weight to all established rules and principles of construction applicable to a question of the nature and importance of that here presented, we are unable to interpret the limitation of the rate of taxation *for state purposes* otherwise than as already stated. In our judgment, there is no room for a reasonable doubt concerning the intention of the provision in question. The language employed is not ambiguous, and the intent to restrict the legislature to an annual rate of taxation for *all state purposes*, when the valuation of property should reach \$100,000,000, appears to us to be clear, plain, and palpable.

It may be true, as alleged by the attorney general, that a levy of four mills on the dollar will not, at the present time, support the state institutions, and also provide a sufficient revenue to defray the necessary expenses of the departments of state. But this consideration, however serious, cannot control the decision of the question. "A constitution," says Judge COOLEY, "is not to be made to mean one thing at one time, and another at some subsequent time, when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable." Const. Lim. 67.

It was foreseen by the framers of the constitution that such an emergency as the present might arise. Their determination to protect the people from the imposition of onerous taxes to support a state government is unmistakable. But to fix the proper limitations, such as would effectually restrain extravagance on the one hand, and at the same time make ample provision for the necessary expenses of a state government at different periods of its existence on the other hand, was, to a certain extent, experimental. To meet this difficulty it was provided, in the same section which limits the rate of taxation, that the rate might be increased, by submitting the proposed increase to a vote of the tax-payers of the state.

The last proposition of the relator is that, if section 11 is to be construed as restricting the legislature to a tax of four mills on the dollar for all state purposes and expenditures under the present valuation of the property within the state, then the act of April 7, 1885, repeals by implication the acts levying separate taxes for the state institutions. We cannot sustain this proposition. There is not such a repugnancy or conflict between the acts referred to as to justify the ruling contended for. The act of 1885, like the prior acts, levies a rate of tax for state purposes for the two fiscal years ensuing.

No reference is made therein to the acts prescribing the rates levied for the state institutions. As suggested by counsel for respondent, several of these institutions were in existence at the time of the adoption of the constitution. Section 5, art. 8, provided that these several territorial institutions should, upon the adoption of the constitution, become institutions of the state; and section 1 of the same article provides that "educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf, and mute, and such other institutions as the public good may require, shall be established and supported by the state in such manner as may be prescribed by law." The several acts in question were passed in conformity to, and in compliance with, the requirements of the constitution. Rates of taxation were fixed therein, supposed to be sufficient for the support of these several state institutions, and required to be levied annually. We have shown that the legislature was in error in supposing that a rate levied "for state purposes" could be properly construed as embracing a *portion*, and not *all*, state purposes. This construction being erroneous, it follows that the statutory direction to county clerks in making up the tax-lists, to "compute and carry out in the proper column a state tax at the rate aforesaid," was likewise erroneous. We perceive no constitutional objection to the statute requiring the taxes levied for state institutions to be separately extended. But, if both directions were carried out literally, it would result in a state tax in excess of the constitutional limit, to-wit, *five and seventeen-thirtieths* mills on the dollar. The latter error being in the direction to county clerks to extend the whole rate levied for state purposes in one column, this direction must be construed to conform to the interpretation placed upon the clause "for state purposes." Thus construed, the duty of the respondent is to extend, in the proper column of the tax-list, a state tax at the rate of four mills on the dollar, less the rates required by law to be extended in another column for the support of the state institutions.

The peremptory writ is denied.

(2 Ariz. 229)

ORDENSTEIN, as Ordenstein & Co., v. BONES and another, Partners, etc.

(*Supreme Court of Arizona. January 17, 1887.*)

ATTACHMENT—WHEN IT WILL ISSUE—ACCOUNT STATED—COMP. LAWS ARIZ. 2257.

The indorsement of the words, "The above balance, \$1,493.96, due O. & Co., is correct. B. & S."—made in Arizona on an open account of goods sold in California, though making an account stated, does not operate to create such a contract as will entitle O. & Co., in a suit on the account against B. & S., to a writ of attachment under Comp. Laws Ariz. 2257, providing for the issuance of that writ only where the plaintiff sues to recover an indebtedness upon a contract, express or implied, *made or payable in the territory*, for the direct payment of money.

Appeal from district court, Yavapai county.

Attachment.

Heindon & Hawkins and E. M. Sanford, for appellant. Rush, Wells & Howard, for appellees.

BARNES, J. The statute (Comp. Laws, 2257) authorizes the issuing of an attachment writ where plaintiff sues to recover "an indebtedness upon a contract, expressed or implied, for the direct payment of money, and that such contract was made or is payable in this territory." Plaintiff in this case was a merchant doing business in California, and sold goods to defendants, who were living in this territory. It is admitted that such sale of goods was made in California, and that such contract would not support an attachment writ. After the sale was made, however, defendants, when pressed for payment, and being unable to pay then, were asked to acknowledge the debt, and did so in the following words, in writing:

"PRESCOTT, November 16, 1885.

"The above balance, fourteen hundred and ninety-three 96-100 dollars, due
Ordenstein & Co., is correct.
BONES & SPENSER."

This was written on an account for goods sold, at the place of business of defendants, in Prescott, Arizona. This writing is made the basis of this suit, and an attachment writ was issued on the ground that this latter writing is a contract made in this territory, and payable here.

We have been referred to many cases tending to show that an account stated was a new contract at common law, and that the above writing creates an account stated. At common law, when an amount due on an open account was agreed upon, then the law implied a promise to pay that particular amount. So, when goods were sold and delivered, the law implies a contract to pay the price for them. It is insisted that, being an account stated, it became an implied contract to pay, and, made in this territory, brings the action within the attachment laws. While much has been said and written by way of argument which sustains this view, yet a careful analysis of an account stated at common law leads to the conclusion that it amounts to a solemn admission of the fact of indebtedness, which, if proved, makes unnecessary other evidence of the indebtedness, rather than that it is a new contract.

It is said in *Chace v. Trafford*, 116 Mass. 532: "An account stated is an acknowledgment of the existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due. It thereby becomes a new and unpaid cause of action, so far as that a recovery may be had upon it without setting forth or proving the separate items of liability from which the balance results." This case, therefore, treats it rather as an admission of a fact than as a contract, and the case decides that the statute of limitations begins to run from the date of the last item of the account. The account stated is not a new promise, to bring an account within the statute of limitations. To the same effect is *White v. Campbell*, 25 Mich. 463.

If an account stated is not a new promise, to bring an open account within the statute of limitations, *a fortiori*, it is not a contract made in this territory, for goods sold out of the territory, to sustain an attachment. This is a summary remedy, and a plaintiff must clearly come within its provisions to invoke its powers. *Eck v. Hoffman*, 55 Cal. 502; *Dulton v. Shelton*, 3 Cal. 206. By the paper sued on in this case the defendants simply say: "The above balance due is correct." This is a solemn admission of indebtedness, which could only be questioned for mistake or fraud; but it is simply an admission by defendants that they owe plaintiff a certain amount for the goods sold as stated in the account. The parties intended no more than that. *Gooding v. Hingston*, 20 Mich. 441. There is a broad distinction between an "admission" and a "contract." Nothing short of a contract made or payable in this territory gives the right to a writ of attachment. We do not think this paper is more than an admission of indebtedness. It does not change the nature of the old contract, or make a new one in this territory, but it dispenses with proof of the account.

The judgment of the district court dissolving the attachment is affirmed.

PORTER, J., concurs.

(71 Cal. 545)

MCCUE v. SUPERIOR COURT OF MARIN CO. (No. 11,802.)

(Supreme Court of California. January 14, 1887.)

REVIEW—WRIT OF—WHEN IT LIES.

A writ of review will not lie where an appeal lies which is not available because the time for taking it has elapsed.

In bank. Writ of review.

James S. McCue, in pro. per., for petitioner. *Joseph Kirk,* for respondent.

BY THE COURT. The writ must be dismissed. The writ will not lie where there is an appeal; and, if there is an appeal, but the time for taking it has elapsed, the writ will not lie. *In re Stuttmeister*, 12 Pac. Rep. 270; *Miliken v. Huber*, 21 Cal. 166; *Bennett v. Wallace*, 43 Cal. 25.

Writ dismissed.

McFARLAND, J., (concurring.) I concur in the judgment; but, in my opinion, there might be a case where, on account of unusual circumstances, a writ of review would lie, although there had been, at one time, a right of appeal, as intimated in *Kimple v. Superior Court of San Francisco*, 66 Cal. 136; S. C. 4 Pac. Rep. 1149.

(2 Cal. Unrep. 736)

PEOPLE v. FRINK. (No. 20,251.)

(*Supreme Court of California.* January 15, 1887.)

CRIMINAL LAW—APPEAL—DELAY IN PERFECTING—DISMISSAL.

Under Pen. Code Cal. § 1246, requiring the clerk with whom the notice of appeal is filed, within 10 days thereafter, or within 10 days after the settlement of the bill of exceptions, to transmit to the clerk of the appellate court a copy of the record, an appeal will be dismissed on a showing by certificate of the clerk below that four years have elapsed since the taking of the appeal; that defendant has never requested the clerk to make up a transcript; that the bill of exceptions has never been filed, though settled; and that no transcript has been sent to the supreme court.

In bank. Appeal from supreme court, Stanislaus county.

Defendant was adjudged guilty of libel, sentenced, and took an appeal from the judgment and order denying a new trial. Respondent moved, on certificate of the clerk of court below, for a dismissal, showing that more than four years had elapsed since appeal taken; that defendant had never requested the clerk to send up a transcript of the judgment and proceedings; that the bill of exceptions had never been filed by defendant, though settled, and no transcript had been sent to the supreme court by the clerk of the superior court.

Section 1246, Pen. Code Cal., requires the clerk with whom the notice of appeal is filed, within 10 days thereafter, or within 10 days after the settlement of the bill of exceptions, to transmit to the clerk of the appellate court a copy of the notice of appeal, record, bills of exception, and instructions given and refused; and section 1249, Pen. Code Cal., empowers the appellate court to dismiss the appeal, if section 1246 is not complied with.

P. J. Hazen and Wright & Hazen, for appellant. *T. A. Coldwell,* Dist. Atty., for the People.

BY THE COURT. Motion to dismiss appeal granted.

(71 Cal. 541)

LOVELAND v. GARNER and others. (No. 11,374.)

(*Supreme Court of California.* January 14, 1887.)

1. CORPORATIONS—MINING COMPANIES—REPORTS—LIABILITY OF DIRECTORS—ACTS CAL. 1880, PAGE 134.

The California statute (Acts 1880, p. 134) regulating the conduct of mining business, and requiring the directors of corporations organized for that purpose, under a joint and several penalty of \$1,000, recoverable by any stockholder, to post in a conspicuous place in the office of the company, on the first Monday of each month, a duly-verified and itemized account or balance-sheet for the preceding month, is penal in its character; and, as it does not specifically declare that the penalty may be recovered for *each* failure to comply with its requirements, there can be but one recovery for all such failures prior to the commencement of suit.

2. QUI TAM AND PENAL ACTIONS—PLEADING—STATUTORY DUTIES.

The joining in one action of several matters of fact which show as many failures to perform a duty enjoined by law, and claiming the legal right, as a conclusion of law, to recover a penalty for each, when the law itself allows the recovery of only one penalty for one and all of such violations, is not a joining of several distinct causes of action.

3. APPEAL—WAIVER—PLEADING—AMENDMENT AFTER DEMURRER SUSTAINED.

Where a demurrer to a complaint has been sustained, if the plaintiff files an amended complaint, in which he unites and pleads anew in one count all the causes of action which he had pleaded in his first complaint in separate counts, he waives his right, on appeal from an order sustaining a demurrer to the amended complaint, to object to the ruling on the demurrer to the original complaint.

Commissioners' decision.

In bank. Appeal from superior court, San Bernardino county.

Hargrave & Gray, for appellant. *Byron Waters* and *Harris & Allen*, for respondents.

Foote, C. The plaintiff brought his action to recover from the defendants \$7,000, as liquidated demands, for their seven distinct failures to comply with the provisions of a certain act of the California legislature in reference to the carrying on and conducting the business of mining. The act referred to is to be found in St. 1880, p. 134.

The complaint first filed in the action contained seven distinct counts upon as many alleged causes of action, each claiming the right to recover of the defendants a penalty of \$1,000 for their separate failures, on the first Mondays of seven different months, "to have the reports and accounts current made and posted," as in the first section of the act provided. The defendants demurred to that complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and because the causes of action as set out were improperly united with each other. The demurrer was sustained.

The plaintiff then filed an amended complaint, in which was charged in one count seven distinct failures on the part of the defendants, on the first Mondays of as many different months, "to have the reports and accounts current made and posted," as required by the statute heretofore mentioned; and demand was made for the recovery of a penalty of \$1,000 for each failure on the part of the defendants to comply with their alleged obligations under that statute. That pleading also was demurred to, on the ground that it did not state facts sufficient to constitute a cause of action, and that several causes of action were improperly united, and the court sustained the demurrer.

The plaintiff declining to amend his pleading, judgment for costs was rendered for the defendants, and from that this appeal was taken.

The ruling sustaining the first demurrer cannot now be attacked, for the reason that afterwards the plaintiff filed an amended complaint, in which he united and pleaded anew in one count all the causes of action which he had in his first complaint pleaded in separate counts, and thus waived his right to object to such action of the court. *Hagely v. Hagely*, 9 Pac. Rep. 305.

The further contention of the defendants is that, upon a fair construction of the statute upon which the action was predicated, it will be found to contain no warrant for a recovery of more than one penalty of \$1,000, even if they should have neglected for any number of months to comply with its requirements, and that the amended complaint is demurrable because it states, joined together, several instances of their violation of that statute, and demands judgment for \$1,000 for each violation.

So much of that act as is necessary to be considered for the purposes of this controversy reads as follows:

"Section 1. It shall be the duty of the directors, on the first Monday of each and every month, to cause to be made an itemized account or balance-sheet for the previous month. * * * Such account or balance-sheet shall be

verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company. * * *

"Sec. 3. In case of the failure of the directors to have the reports and accounts current made and posted as in the first section of this act provided, they shall be liable, either severally or jointly, to an action by any stockholder, in any court of competent jurisdiction, complaining thereof, and, on proof of such refusal or failure, such complaining stockholder shall recover judgment for one thousand dollars liquidated damages, with costs of suit."

It will be perceived that this act is, in its nature, penal, and does not specifically declare that for *each* failure to comply with its requirements a penalty may be recovered. Nor does it declare that each refusal or neglect of that kind shall render the directors liable for a penalty. It would therefore seem that, under its provisions, the stockholder or stockholders might, at their election, either proceed against the directors for a single delinquency, or might forbear to do so until more than one dereliction of duty on the part of their trustees (so to speak) had occurred; but in neither event could more than one penalty be recovered.

But, while this is the reasonable and unrestrained view to be taken of the law relative to the extent of the liability of the directors, it does not follow that the amended complaint did not contain a sufficient statement of facts to constitute a cause of action, or that the demurral should have been sustained on the alleged ground that several causes of action were in that pleading improperly joined. The joining of several matters of fact together which show as many failures to perform a duty enjoined by law, and claiming the legal right (which is but a conclusion of law) to recover a penalty for each, when the law itself only allows the recovery of one penalty for one and all of such violations, is not a joining of several distinct causes of action.

The plaintiff is entitled to recover if he has alleged, and can prove, the defendants to have been guilty of failure, on the first Monday of any one month, "to have the reports and accounts current made and posted as in the first section of this act provided," or if they have so failed on the first Monday of any other or all other months; and hence the statement of seven violations of the statute of the same kind, although he may join them together in his complaint, and claim to recover a penalty for each, is, under the statute, a statement of but one cause of action. In other words, as the statute in terms provides for but a single penalty of \$1,000, no other or greater sum can be recovered, although violations of the statute may have been frequent. But it does not follow from this that the plaintiff may not join together in one count several of such alleged violations, and prove any one of them in his power, as they constitute separately or together but one cause of action.

We are therefore of opinion that the judgment should be reversed, and the cause remanded; the defendants to be allowed, if so advised, to answer the amended complaint.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with leave to defendants to answer the amended complaint.

(71 Cal. 537)

HANCOCK v. HUBBELL. (No. 11,501.)

(Supreme Court of California. January 14, 1887.)

1. DAMAGES—BREACH OF CONTRACT—PLEADING—EVIDENCE.

In an action for a breach of contract by defendant, to give plaintiff a certain time in which to take up tax certificates, by reason of which breach a third person has obtained tax deeds of the land, and caused the same to be recorded, and has brought an action against plaintiff to quiet the title to said land, in the absence of an

allegation in the complaint that plaintiff has lost possession of it, it is incompetent to introduce proof tending to show the value of the rents and profits of such land, as a foundation for a judgment against the defendant for the loss of its possession.

2. SAME—PROXIMATE CAUSE—SPECIAL DAMAGE.

The action to quiet title was not a proximate or necessary result of the breach, and, no special damages being pleaded, evidence of expenses and attorney's fees in that cause is inadmissible.

3. TRUSTS—EVIDENCE TO ESTABLISH.

A trust to purchase lands at tax-sale, and restore them to their owner, is not established by an agreement just before the time of redemption expired, to extend the period of redemption a month beyond the statutory limit.

4. PLEADING—AMENDMENT DURING TRIAL NECESSITATING CONTINUANCE.

After a trial has been in progress several days, and the plaintiff had been fully advised early in the proceedings that the defendant considered the complaint defective, it is not an abuse of the court's discretion to refuse the plaintiff an amendment which, if granted, would have necessitated a continuance.

5. NONSUIT—PLAINTIFF ENTITLED TO NOMINAL DAMAGES.

Where, in an action to recover damages for breach of contract, no damages are proven, but a breach is established, the plaintiff is entitled to a judgment for nominal damages and costs, and it is error to order a nonsuit.

In bank. Appeal from superior court, Los Angeles county.

Plaintiff alleges that, February 21, 1880, he was the owner and in the possession of certain real estate; that, about the time it was to be sold for delinquent taxes, plaintiff agreed to let it be sold therefor, and that defendant should buy it in, and hold the title in trust for plaintiff; that it was accordingly sold February 24, 1880, to defendant; that on February 21, 1880, defendant agreed to give plaintiff till March 24, 1880, to redeem; that March 23, 1880, plaintiff delivered the amount due, but defendant refused to accept the tender, and had in fact assigned the certificate to John Anderson, in violation of his contract; that Anderson obtained the tax deeds, which were recorded; that the title of record still stands in Anderson, who has brought suit to quiet title; and that the value of the land is \$50,000; and prays for damages in the sum of \$50,000. The instrument on which the trust was supported is as follows:

“LOS ANGELES, February 21, 1880.

“It is understood and agreed that Henry Hancock may redeem the land assessed to Sylvester Bryant, [estate of,] and that assessed to John Hancock, for the fiscal year ending June 30, 1880, in San Bernardino county, purchased at the last tax sale, on or before March 24, 1880, by paying the amount paid out, and 20 per cent. thereon; but the said time shall not extend beyond said date, to-wit, March 24, 1880, time being the essence of this agreement.

“S. C. HUBBELL.”

On the third day of the trial plaintiff asked leave to amend his complaint so as to set forth special damages, money paid out for counsel fees, and costs in suit to quiet title. The defendants objected, on the ground that, if they are allowed to amend, it necessitates a continuance. Motion denied.

L. Quint and Barclay & Wilson, for appellant. *Chapman & Hendrick*, for respondent.

FOOTE, C. This is an appeal from a judgment of nonsuit and an order refusing a new trial. We have carefully examined the record and all the authorities cited by counsel. The complaint alleged that the plaintiff was in possession of certain lands involved in this controversy, but did not aver that he had ever lost possession thereof, therefore it was not competent to introduce proof tending to show the value of the rents and profits of such land, as a foundation for a judgment against the defendant for the loss of its possession.

No special damages were pleaded; hence the evidence offered of expenses, attorney fees, etc., which were not the proximate result of the violation of

the contract, or which, in the ordinary course of things, would not have been likely to result therefrom, was properly excluded.

The trust alleged was not proved by competent and legal evidence, as the written agreement, which was the only legal proof of its existence offered, did not tend to establish it.

The court did not abuse the discretion vested in it by law in refusing the plaintiff's application to amend his complaint. The trial had been in progress for several days, the plaintiff was fully advised early in the course of the proceedings that the defendant considered the complaint defective, and the latter made that fact evident by repeated objections to the introduction of evidence tending to prove damages claimed to have been suffered by the former. It is plain that a continuance would have been the result had leave been granted to amend, which result would not have been caused by any fault of the defendant. *Graham v. Stewart*, 9 Pac. Rep. 555.

But the plaintiff claims that it was his right to have the jury pass upon the question whether or not, upon the evidence before them of a breach of contract, he was entitled to a verdict for nominal damages. We think the evidence did show a violation by the defendant of his contract with the plaintiff to permit the latter to redeem certain lands sold at tax sale; the former having possession of the certificates of such sale at the time the contract was entered into, such redemption to take place within a certain specified time. Although the record does not show that any proof was offered, which was admissible under the pleadings, that any actual damages were suffered by the plaintiff from the breach of the contract on the part of the defendant, yet, as the contract was proved to have been violated, the former was entitled to have the jury determine, upon a proper charge of the law by the court, whether or not they would render a verdict for nominal damages in his favor. And, if they had returned a verdict for the plaintiff for nominal damages, a judgment therefor would have been proper. *Brown v. Davis*, 15 Cal. 9-11; Sedg. Dam. (7th Ed.) 71, 72, note B, and cases cited. The judgment of nonsuit was therefore wrong, and the court should have granted a new trial upon the plaintiff's motion.

The judgment carried with it the right of the defendant by legal process to enforce payment from the plaintiff, or satisfaction by sale of his property, of the sum of \$232.90, recovered by the former against the latter for costs. To that extent the plaintiff's rights were prejudiced; but it is apparent from the record that the plaintiff, upon a new trial, would not be entitled to anything more than a judgment for nominal damages, which, while it would relieve him of the payment of costs to the defendant, would not give him the right to enforce the payment of his own costs from the latter.

For these reasons we are of the opinion that the order denying a new trial should be reversed, unless the defendant will remit the sum of \$232.90, which he has recovered for his costs, etc., against the plaintiff; but, upon that being done by the defendant, the order should be affirmed.

The appeal from the judgment, not having been taken within the statutory period of time, cannot be considered.

We concur: SEARLS, C.; BELCHER, C. C.

BY THE COURT. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed. Order reversed, unless defendant, within 30 days, remits the sum of \$232.90, which being done, the order should stand affirmed. Said remittance to be filed with the clerk of this court.

(4 N. M. [Gild.] 8)

SAN MARCIAL LAND & IMP. CO. and others v. STAPLETON.*(Supreme Court of New Mexico. January 6, 1887.)***APPEAL—EQUITY—DECREE NOT WARRANTED BY BILL—REMAND FOR AMENDMENT.**

Where complainants have filed a bill, relying for relief upon certain grounds alleged therein, and have obtained a decree in their favor upon such grounds, which cannot be sustained upon the grounds on which it was granted, they cannot have such decree sustained on appeal on other grounds than those relied upon in their bill, although the same may show a cause for relief, but the cause will be remanded, with leave to amend; otherwise to dismiss.

Appeal from district court, Socorro county.

Bill to enjoin sale under a mortgage. Judgment for complainants. Defendant appeals.

Fiske & Warren and *R. T. Posey*, for appellant, Stapleton. *Bell & Field*, for appellees, San Marcial Land & Imp. Co. and others.

HENDERSON, J. Complainants filed their bill in the district court for Socorro county on the ninth day of November, 1883, in which they make the following allegations, in substance: That on the twenty-fifth day of July, 1882, appellant, Stapleton, by deed of that date, conveyed the lands described in the bill to appellee Zimmerman, taking a note for \$2,000 for the deferred payment of the purchase money on the sale,—the execution by Zimmerman of a mortgage of that date as security therefor; that Zimmerman afterwards sold and conveyed the same lands to appellee corporation by deed of general warranty, and that Zimmerman was the holder of a large majority of the capital stock of the corporation; that appellant, by his deed to Zimmerman, covenanted and guarantied that he, the appellant, had not himself committed, or permitted others to commit, any act in anywise impairing or affecting the title to said land, or any portion thereof; that appellant is insolvent; that he had executed a certain mortgage of the same land, dated October 24, 1866, to one Charles P Clever, to secure the payment of certain notes therein described, aggregating the sum of \$4,950, and which mortgage was recorded in the recorder's office of Socorro county, and remains unsatisfied and a cloud upon appellees' title, and a breach of the above alleged warranty of appellant; that appellant was advertising and threatening to sell the mortgaged lands on November 16, 1883, under the power of sale contained in the mortgage to him from Zimmerman, and the prayer of the bill is for injunction restraining the sale, and for general relief.

On January 2, 1884, appellant filed his plea and answer. The plea set up the territorial statute of limitations of February 1, 1858, against the Clever mortgage. The answer admits the conveyance by appellant to Zimmerman, and the note and mortgage from Zimmerman to him, but avers that the deed from him to Zimmerman was a quitclaim conveying only the title he then had, and denied that the alleged guaranty enlarged the title conveyed. He also denied that the alleged breach of the guaranty impaired or affected the title conveyed by the deed, or that he was insolvent. It is admitted that the appellant had advertised and was about to offer the lands for sale under the power contained in the mortgage, and prayed for the dissolution of the temporary injunction, and the dismissal of the bill.

The cause was submitted on the pleadings, and thereupon the court rendered a final decree making the injunction perpetual restraining appellant from selling the lands under the Zimmerman mortgage. From this decree an appeal was taken to this court.

The chancellor, in deciding the cause, reduced his findings to writing, which have been copied into the transcript, and constitute a portion of the record before us. From this opinion it seems that the sole ground for the decree per-

petually restraining a sale under the Zimmerman mortgage was the alleged breach of the covenant of warranty or guaranty against incumbrance contained in the deed from appellant to Zimmerman on account of the Clever mortgage. Counsel for appellees, in a commendable spirit of fairness, in open court, concedes that the court below was in error in enjoining the sale for the reasons stated in the opinion, but insists that the decree is nevertheless correct, although a wrong reason was given in making it. He now urges upon our consideration that, although the bill does not, in specific terms, allege the power in the mortgage to have been so loosely and indefinitely framed that it could not have been enforced, still that it is our duty, in the absence of any allegation whatever of oppression, fraud, injustice, or injury to complainants in any way so far as their equities are concerned arising out of the power conferred by Zimmerman, to uphold the decree, if, in our judgment, such power was incapable of enforcement in the manner threatened by appellant.

Without further inquiry into the terms employed in the mortgage to create the power, we think it sufficient to say that the pleadings, taken as a whole, and the judgment of the court below, do not furnish the slightest ground for supposing that the complainants sought the injunction and relief prayed for and granted on account of the insufficiency of the power to warrant a sale by the trustee. It is not alleged that the mortgagee is about to proceed in an improper or oppressive manner to execute the power, or that the sale threatened would not be authorized by the terms employed in the mortgage. The oppression and injury alleged as impending grew out of the facts stated as grounds of equitable interposition on account of the breach of the covenant contained in the deed against incumbrance.

"The court will enjoin a sale only when the petitioner's rights are clear or free from reasonable doubt. He must also show a good reason for the interference of the court. He must show that the mortgagee is about to proceed in an improper or oppressive manner, and not that he might adopt a different remedy. In general, a stronger case must be presented to the court to obtain an injunction against a proposed sale under a power than to obtain a decree setting it aside, after it is made." 1 Jones, Mortg. § 1805.

If it be true, as stated by the learned author of the text above quoted, that it is necessary, in order to enjoin a sale under a power, to "show a good reason for the interference of the court," complainants have wholly failed, as the only reason shown by the bill is confessed by counsel for appellees to be insufficient. To affirm the decree below on the ground contended for here would be in violation of fundamental principles in the law of equity pleadings.

"An original bill praying the decree of the court touching rights claimed by the person exhibiting the bill, in opposition to the rights claimed by the person against whom the bill is exhibited, must show the rights of the plaintiff or person exhibiting the bill, by whom and in *what manner* he is injured, or in what he wants the assistance of the court." Mitf. Ch. Pl. 65.

Although in bills in equity the same precision of statement that is required in the pleadings at law is not attainable, yet it is *absolutely necessary* that such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer. 1 Daniell, Pl. & Pr. 421.

"The stating part of a bill ought fully to unfold and expound the plaintiff's case." Story, Pl. § 33. See, also, section 253.

Had the pleader, in drawing the bill, relied in any respect upon the insufficiency of the power to warrant the mortgagee in carrying it into effect by a sale as threatened, and had defectively or insufficiently set out the particular reasons or grounds, and the defendant had answered or filed pleas, it would have been too late to make the objection here; but in the record before us the power was not assailed, and constituted no part of the equitable grounds alleged for relief.

"The supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as to them shall seem agreeable to law." Section 2190, Comp. Laws N. M.

"No exception shall be taken, in an appeal, to any proceeding in the district court, except such as shall have been expressly decided in that court." Section 2188, Comp. Laws.

There is nothing in section 2190, above quoted, authorizing the court to hear the case brought by appeal or writ of error, or upon grounds other than such as appear to have been made in the court below and considered there, or to create, by construction or intendment, new and distinct issues. While it is true that section 2188 applies to appellants, and denies to them the right to assign errors and insist upon them, unless expressly decided in the district court, it will apply with equal force, by inference and analogy, to appellees who seek to shift the ground on which the bill and decree stand, in order to lay hold of a surer footing in equity, when that ground was not covered in the cause as it stood in the lower court.

The decree is reversed, with costs against appellees, and the cause remanded for further proceedings, with leave to complainants, if they so elect, to amend their bill, otherwise to dismiss the cause.

LONG, C. J., and BRINKER, J., concur.

(71 Cal. 481)

BRALY v. HENRY. (No. 11,521.)

(Supreme Court of California. December 29, 1886.)

PROMISSORY NOTES—PROOF OF PAROL CONTEMPORANEOUS AGREEMENT—CONSIDERATION.

In an action on a promissory note, by the payee, or by one taking it with full knowledge of the facts, the maker may, by way of defense, prove a parol contemporaneous agreement that, though the face of the note showed a sum certain, the note having been given for the price of a stack of hay, if the value of such hay at a fixed price per ton did not amount to the face of the note, a rebate and credit was to be made in the maker's favor of the difference between the actual value of the hay and the face of the note, and that, under such agreement, a less sum is due than that sued for; following former decision, 11 Pac. Rep. 385.¹

In bank. Appeal from superior court, Fresno county.

On rehearing. Action on promissory note. See 11 Pac. Rep. 385.

Grady & Merriam and *E. E. Calhoun*, for appellant. *Nourse & Church*, for respondent.

SEARLS, C. This is an action upon a joint and several promissory note, made by defendant and one W. E. Henry, on the twenty-sixth day of October, 1883, for \$1,364, and interest at 12 per cent. per annum, payable four months after date, to T. E. Hughes or order, and averred to have been indorsed to plaintiff before maturity, and upon which there is claimed to be due the sum of \$321.15, and interest thereon at 12 per cent. per annum from November 24, 1884. Plaintiff had a verdict and judgment as prayed for in his complaint; from which judgment, and from an order denying a new trial, defendant appeals. The cause was decided by department 1 of this court, in an opinion reversing the judgment and order appealed from. 11 Pac. Rep. 385. On petition of respondent, a reargument was ordered in bank, and the cause again comes up for consideration. The facts essential to an understanding of the question involved are set out in the former opinion, and need not be reproduced here.

Upon a review of the record, in the light of the scrutiny invoked ~~as~~ the proceedings had in the cause subsequent to the decision referred to, we see no just cause to doubt the soundness of the views expressed in the opinion, or

¹See note at end of case.

for changing the conclusion reached therein. It is true that, as a general rule, parol evidence is not admissible to control, contradict, or vary a written instrument. It is equally true that there are certain legal presumptions indulged in favor of negotiable paper, with a view to facilitate its use and negotiation in commercial transactions, among which are: (1) That, until the contrary appears, every negotiable bill or note is presumed to be founded upon sufficient legal consideration; (2) that the holder and possessor of a bill or note is the true owner; (3) that paper, properly indorsed, was so indorsed before due; (4) that the holder of a bill or note took it in the usual course of business, before maturity, for value; (5) that the maker of the note is the primary debtor, and that the acceptor of a bill of exchange is primarily liable thereon.

These and other presumptions, indulged by the process of artificial reasoning known as conclusions of law, and formulated for the advantage of commercial interests and intercourse, are not conclusive, but are liable to be rebutted by parol evidence that the facts are different from what the law in their absence presumes. The burden of proof in such cases is upon the party who wishes to rebut the presumption. It is not received to contradict or vary the instrument, but to repel the presumptions of law which, in the absence of such proof, arise in its favor.

As between the original parties to a promissory note, or as to one taking it with notice of the facts or after maturity, a consideration is as essential to its validity as in case of other contracts. The maker may, as to such parties, defeat the note *in toto*, by showing there was no consideration whatever, or, by showing that there was only a partial consideration, may *pro tanto* defeat a recovery. Story, Prom. N. § 187.

In making proof of the want of consideration in such cases, the maker of the instrument, in effect, says that he made the instrument, but that the presumed legal effect does not follow, because it lacked the consideration essential to uphold all contracts, whether verbal or in writing. It no more changes the contract than does proof of payment or any other defense, which admits its execution and avoids its legal effect. A want of consideration must not be confounded with mere *inadequacy* of consideration. The latter cannot be set up to defeat a note. To illustrate: A. sells to B. 10 horses, at \$100 each, and takes his note. B. cannot, in an action on the note by the payee, in the absence of fraud, show the horses to have been worth less than the agreed price, and thus abridge the recovery, as it would only establish an inadequacy of consideration, but he may show that none of the horses were delivered, and thus defeat the recovery; or he may show that five only of ten horses were delivered, and defeat a recovery *pro tanto*.

Apply the doctrine to the present case. Defendant, according to the testimony offered, purchased a given number of tons of hay, at a given price per ton, and gave his note for the amount. The quantity when weighed proved to be less by a number of tons, which multiplied by the price per ton, equaled \$321.15. If the proffered evidence stopped here, defendant, as against the plaintiff, if the latter took with notice, would have been entitled to a proportionate reduction upon the sum called for by the note; and we are unable to see how defendant's rights are abridged by the fact that the parties, not knowing the quantity of hay, agreed that, if it fell short of the estimated or supposed quantity, a corresponding credit should be given on the note.

We are of opinion the judgment of reversal heretofore entered should stand as the judgment in the case.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion, and in the opinion of department 1, (11 Pac. Rep. 385,) the judgment and order are reversed, and cause remanded for a new trial.

NOTE.

PROMISSORY NOTES. FAILURE OF CONSIDERATION, total or partial, or the want of consideration, constitute a good defense to an action on a promissory note between the original parties to it. Lancaster Co. Nat. Bank v. Huver, (Pa.) 6 Atl. Rep. 141; Fleetwood v. Brown, (Ind.) 9 N. E. Rep. 352; Blacker v. Dunbar, Id. 104; Fritzler v. Robinson, (Iowa,) 31 N. W. Rep. 61; Security Bank v. Bell, (Minn.) 21 N. W. Rep. 470; Malz v. Fletcher, (Mich.) 18 N. W. Rep. 228; Kennedy v. Goodman, (Neb.) 16 N. W. Rep. 834; Brooks v. Hiatt, (Neb.) 14 N. W. Rep. 480; Torinus v. Buckham, (Minn.) 12 N. W. Rep. 348; Kansas Manufg Co. v. Gandy, (Neb.) 9 N. W. Rep. 569; Dicken v. Morgan, (Iowa,) 7 N. W. Rep. 145; Search v. Miller, (Mich.) 1 N. W. Rep. 975; State Sav. Ass'n v. Barber, (Cal.) 11 Pac. Rep. 330; Davis v. Wait, (Or.) 8 Pac. Rep. 356; Estudillo v. Aguirre, (Cal.) 5 Pac. Rep. 109; Staab v. Ortiz, (N. M.) 1 Pac. Rep. 857; and parol evidence is admissible to show the true consideration, Buscher v. Knapp, (Ind.) 8 N. E. Rep. 263; Maltz v. Fletcher, (Mich.) 18 N. W. Rep. 228; Dicken v. Morgan, (Iowa,) 7 N. W. Rep. 45; Talmadge v. Stretch, (Cal.) 4 Pac. Rep. 15.

(4 N. M. [Gild.] 14)

WHEELER v. FICK.

(Supreme Court of New Mexico. January 8, 1887.)

APPEAL—BILL OF EXCEPTIONS AND RECORD—TRIAL JUDGE TO SETTLE—SUCCESSOR NOT AUTHORIZED.

The record and bill of exceptions must be settled by the judge who heard the case, and a judge who succeeds the trial judge, and has not heard the case, has no authority, under the rules of the supreme court of New Mexico, to settle or sign the same.

Error to district court, Colfax county.

Frank Springer, for defendant in error, Fick.

It is the universal practice, both at common law and under codes, that the *memoranda* of matters excepted to be taken at the time of the occurrence, and that these be formally embodied in a bill signed by the presiding judge during the term, or within some short time thereafter, while the recollection is yet fresh. The New Mexico statute requires the bill to be signed within 30 days after judgment, unless the time is enlarged by the court or judge. Comp. Laws, § 2198. This court has limited the time to 10 days after entry of judgment, unless the time is extended by the court. Rule 24. It was never intended to authorize a practice so vicious as has been attempted by the plaintiff in error in this case. The remarks of Chief Justice MARSHALL on this point are very appropriate: "The court will observe that there is something in this proceeding which they cannot, and which they ought not to, sanction. A bill of exceptions is handed to the judge several weeks after the trial of the cause, and he is asked to correct it from memory. The law requires that a bill of exceptions should be tendered at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous to allow a bill of exceptions of matters dependent on memory, at a distant period, when he may not accurately recollect them, and the judge ought not to allow it." *Insurance Co. v. Lanier*, 95 U. S. 171. See, also, *Consaul v. Liddell*, 7 Mo. 250; *Williams v. Ramsey*, 52 Miss. 859; *Rankin Co. Sav. Bank v. Johnson*, 56 Miss. 125; *Myer v. Binkelman*, 5 Colo. 133.

The authorities as to the relative duties and powers of the ex-judge and the incumbent judge, in cases of this kind, are considerably at variance. In Michigan it has been held that where a party has lost his exceptions by death, resignation, or removal of the judge, he shall have a new trial. *Scribner v. Guy*, 5 Mich. 512; followed in *Van Valkenburg v. Rogers*, 17 Mich. 322; *Tefft v. Windsor*, Id. 425; *Tucker v. Tucker*, 26 Mich. 443; *Crittenden v. Schermerhorn*, 35 Mich. 370.

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In Indiana, under the provision of the statute, several cases decide that an ex-judge cannot sign a bill of exceptions. *Smith v. Baugh*, 32 Ind. 163, also *Ketcham v. Hill*, 42 Ind. 64; *Toledo, etc., Ry. Co. v. Rogers*, 48 Ind. 427; *McKeen v. Boord*, 60 Ind. 280. But these cases lose sight of the distinction which exists between "settling" the facts, and formally signing and sealing the bill; and their reasoning is somewhat shaken by the later case of *Lee v. Hills*, 66 Ind. 474-482.

The supreme court of Wisconsin has held just as positively that it is for the judge who tried the case to settle the bill of exceptions, though out of office. *Fellows v. Tait*, 14 Wis. 156; *Davis v. Menasha*, 20 Wis. 205; *Hale v. Haselton*, 21 Wis. 325.

In Pennsylvania a judge out of office may be compelled by *certiorari* to sign and seal a bill of exceptions. *Galbraith v. Green*, 18 Serg. & R. 86.

In Arkansas, where a case is tried before a special judge, he is the proper one to sign a bill of exceptions, and not the regular judge; and, if signed by the latter, it is a nullity. *Watkins v. State*, 37 Ark. 370. So in Illinois. *David v. Bradley*, 79 Ill. 316.

These last authorities are in harmony with the principle laid down in Tidd's Practice, (page 863,) that bills of exception must be signed by the judge before whom the case was tried. See, also, *Law v. Jackson*, 8 Cow. 746.

In New Mexico the practice is governed by the rule of the supreme court. There is no authority, either in the statutes or rules, for settling a bill of exceptions upon affidavits. When rule 24 declares that the record and bill of exceptions shall be submitted, etc., "to the district judge, *before whom the judgment was obtained, for settlement*," it does not mean that some other judge, before whom the judgment was not obtained, and who has no personal knowledge of what occurred upon the trial, shall try and determine, for purposes of review, upon *ex parte* statements, what was the true history of the trial outside of the record. Our rule adopts the Wisconsin and Pennsylvania practice in preference to that of Michigan and Indiana, and that is the end of discussion on the subject.

Fiske & Warren, for plaintiff in error, Wheeler.

BRINKER, J. This is a motion to strike out the record and bill of exceptions. On the thirtieth day of April, 1885, plaintiff recovered a judgment in the district court of Colfax county against defendant, in an action of *assumpsit*, for the sum of \$1,800. On the same day defendant filed his motion for a new trial, which was then overruled, and leave was given him until the first day of the next term to prepare his proposed record and bill of exceptions. On May 25th, Hon. S. B. AXTELL, the judge of the district court, resigned. On June 10th, Hon. WILLIAM A. VINCENT qualified as Judge AXTELL's successor. On December 9th, Hon. E. V. LONG qualified as judge of said court, succeeding Judge VINCENT.

The regular terms of the district court for Colfax county commence on the third Mondays of April and September in each year. Comp. Laws 1884, § 548; Acts 1884, p. 54, § 1. The defendant failed to prepare his proposed record and bill of exceptions on the first day of the September term. 'At all events he submitted none for settlement on that day, or during that term.'

On December 24, 1885, the following stipulation was filed: "It is hereby stipulated and agreed by and between the parties to the above-entitled cause — *First*, that the plaintiff, Henry Fick, and defendant in error on review, by writ of error sued out in said cause from the supreme court of the territory of New Mexico, will enter his appearance in said cause in the said supreme court, and make no objection to the hearing of said cause and a decision thereon in said supreme court, because of the fact that the record and bill of exceptions, assignment of errors, and briefs of plaintiff in error in said cause

shall not be filed in said supreme court within the time provided by statute of the territory of New Mexico, and the rules of said supreme court; all objection to any such hearing and decision because said record, assignment, and brief on review shall not be filed in said supreme court within the time as now provided by law, and the rules of said supreme court, being hereby expressly waived, provided said record, assignment, and brief be printed and filed in the said supreme court on or before the tenth day of January, A. D. 1886."

On the same day Judge LONG ordered that the hearing for the settlement of the proposed record and bill of exceptions, and the proposed amendments thereto, be had before him at chambers in Santa Fé on the thirtieth day of December, 1885, and that until that day both parties should have leave to file with the clerk affidavits in support of or against the correctness of such proposed record and bill of exceptions, and the proposed amendments thereto, and that, in accordance with the stipulation of the parties that day filed, all exceptions or objections to the time within which the record, assignment of errors, and brief of counsel for plaintiff in error should be filed in the supreme court were waived, and that that order and the stipulation should be made a part of the record. The plaintiff then and there objected to Judge LONG settling the record and bill of exceptions, for the reason that he had no authority to do so, the cause not having been tried before him, and he having no personal knowledge of what took place upon the trial. Judge LONG overruled these objections, and stated that he would settle the bill of exceptions upon such affidavits as the parties should present. In pursuance of this order, the parties again appeared before him on December 30, 1885. The defendant submitted affidavits in support of his bill; plaintiff protesting against the regularity of the proceeding, and expressly stating that he waived no objections thereto; also submitted affidavits against said bill, and in support of his proposed amendments. The judge then settled and signed the record and bill of exceptions upon information derived solely from the affidavits and papers produced before him, and without any personal knowledge of the proceedings had upon the trial, notwithstanding the continued objections of plaintiff.

In support of the motion it is contended that Judge LONG had no authority to settle and sign the proposed record and bill of exceptions, because he did not preside at the trial, nor render the judgment. It is also insisted that the motion should be granted because the time allowed to defendant to prepare and submit the proposed bill had expired before the same was submitted, and before any application was made for an enlargement of the time. The stipulation does not affect this motion, and it will not be considered. If the first point be sustained, it will be decisive of this case, and render the examination and determination of the other unnecessary.

The authorities upon the question whether the retiring judge who presided at the trial, or his successor, should sign the bill of exceptions, are in irreconcilable conflict; many courts of high distinction holding that the ex-judge should sign the bill, and many others of equal distinction and respectability holding that the incumbent should perform that duty. Any attempt to deduce from these varying decisions a uniform rule must meet with disaster. Happily, we are relieved from this unwelcome task by the terms of our own rules. Rule 24, § 1, provides that "whenever it shall be intended to review, by appeal or writ of error, a judgment of the district court, a record of the pleadings and proceedings in the case containing a proposed bill of exceptions shall be proposed by the appellant, and a copy thereof served on the opposite party, or his attorney, within ten days after entry of judgment, unless the time is extended by the court; and the party served may, within ten days after such service, propose amendments to the proposed record and bill of exceptions, and serve a copy of such amendments on the appellant, who may

then, within five days thereafter, serve the appellee with a notice that the proposed record and exceptions, with the proposed amendments, will be submitted, at a time and place to be specified in the notice, to the district judge before whom judgment was obtained for settlement. *The said judge* shall thereupon correct and settle the proposed exceptions, and determine what portion of the record of proceedings in the case shall be transmitted to the supreme court." The seventh section of this rule requires the appellant, after the proposed record and bill of exceptions shall have been settled and signed by the district judge, to file the same in the office of the clerk of the court.

This rule is founded upon the practice of the courts of New York, and is in harmony with their decisions. *Law v. Jackson*, 8 Cow. 746. And its requirement that the bill shall be settled and signed by "the judge before whom the judgment was obtained" is consonant with reason, and in line with the statute to which such bills owe their origin. 31 Westm. St. 2, (13 Edw. I.) "It will be observed," says Mr. Raymond in discussing this statute, "that the legislature did not direct that the court itself should enter the motion on record, * * * but they directed the party who dissented from the opinion expressed by the court himself to state the ground of his complaint, and the judges to attest its truth and correctness,—a proceeding necessary to secure its authenticity; and this statement was to be taken by the court above as part of the record." Raym. Bills Ex. 9, (46 Law Lib.) "Whenever and wherever a judge can overrule any pleading, or disallow any matter of exception within the scope of the act, and by such overruling or disallowance exclude it from the record, then and there a bill of exceptions may be tendered to him; and, if is true, he is bound to seal it." Id. 18. "If the exception is truly and correctly stated, the judge is bound to seal it." Id. 34; 3 Bl. Comm. 372; 2 Inst. 427. "If untruly stated, he may refuse to do so." Raym. Bills Ex. 34; *Duchess of Grafton v. Holt*, Skin. 354; S. C. Show. P. C. 126.

From these authorities, which announce no more than the familiar rule observed by the great majority of trial courts in this country, as well as in England, it is very clear that the judge, before he can sign and seal a bill of exceptions, must know it to be true, and certify by the act of signing and sealing to its truth. How can he conscientiously do this unless the proceedings set forth in it took place in his presence, as judge of the court, when they occurred? From these considerations, we cannot escape the conviction that Judge LONG could not legally know whether the proposed record and bill of exceptions were true or not, and that, therefore, he was not authorized to settle and sign the same. It follows that the motion must be sustained, and the said record and bill of exceptions be stricken from the files; and it is so ordered.

HENDERSON, J., concurs.

LONG, C. J. The bill of exceptions in this case was signed under great doubt as to the legal power to do so, in the belief that it was better to resolve uncertainties in favor of the bill, and thus present the question—an important one in practice—to the whole bench. Upon careful examination, I fully concur in the foregoing opinion.

(4 N. M. [Gild.] 51)

LADY FRANKLIN MIN. CO. v. DELANEY.

(*Supreme Court of New Mexico. January 8, 1887.*)

ACTION OR SUIT—CHANGE OF VENUE—GROUNDS FOR—ORGANIZED COMBINATION.

An application for a change of venue, under Code N. M. § 1833, will not be granted on the ground that a fair trial cannot be had within the county where the action is brought, if the affidavits do not set forth facts sufficient to sustain the application;

and where the plaintiffs in an action of replevin own a mine from which the ore in controversy came, and the application is made on the ground that an organized combination was continually stealing ore from the mine, it ought to be shown of what persons this combination was composed, and in what manner they were trying to influence the action of the jury.

Appeal from district court, Sierra county.

Replevin. Judgment for defendant. Plaintiffs appeal.

J. Morris Young and Masterson & Woodward, for appellants. *Elliott, Pickett & Elliott*, for appellee.

LONG, C. J. This cause is submitted on a motion by the appellee to strike from the files the record, and also on the merits. As the assignment of error is properly made, the motion to strike out must be overruled, and the cause considered on the error assigned.

The single point argued by the appellant in its brief, and therefore the only one necessary to be considered, is the action of the court in overruling the appellant's motion in the court below for a change of venue from the county. The proceeding taken on the application for change of venue is shown by the following from the record:

"THIRD JUDICIAL DISTRICT COURT, SIERRA COUNTY, NEW MEXICO.—
November Term, A. D. 1886.

"*Moses Thompson and Trueman F. Chapman, doing Business under the Firm Name and Style of the Lady Franklin Mining Company, Plaintiffs, vs. James Delaney, Defendant.*

"Replevin. Damages \$2,000.

"Come now the plaintiffs, by their attorney *J. Morris Young*, and petition this honorable court to grant a change of venue in the above-entitled cause to some other county, and for cause allege as follows, to-wit: (1) That plaintiffs are the owners in charge of the Lady Franklin mine, from which they alleged that the mineral in contest in this cause was originally and wrongfully taken; (2) that a large quantity of the ores produced by said mine, and of great value, to-wit, of the value of many thousands of dollars, has been, and is being continually, stolen from plaintiffs by organized combinations of persons, who are in sympathy with, and directly and indirectly interested or benefited thereby, whose influence, though secret, is extended and constantly realized, and has been thus far efficient in promoting such losses; (3) that the question of such losses to the plaintiffs, and their continuances, has been the subject of extended public comment; that the attempts of plaintiffs to arrest such losses has been earnest and determined, and met with defiance and personal menace.

"Wherefore, and that justice may be done, plaintiffs pray that a change of venue may be granted, and ordered to some other county free from secret influence, interests, and prejudice.

"*J. MORRIS YOUNG, Attorney for plaintiffs.*"

"County of Sierra, Territory of New Mexico,—ss.: The undersigned, Moses Thompson, one of the members of the above-entitled Lady Franklin Mining Company, for himself, and for and in behalf of said company, and Willard S. Hopewell and Jesse Thompson, being first duly sworn, on their oath, declare and state that they have good reason to believe, and do verily believe, that the allegations in the above and foregoing petition are each and severally true, and that plaintiffs cannot have a fair and impartial trial in this cause in said county of Sierra.

MOSSES THOMPSON,

"One of the partners of the Lady Franklin Mining Company,

"WILLARD S. HOPEWELL, and

"JESSE E. THOMPSON.

"Subscribed and sworn to before me this ninth day of November, A. D. 1886.

"G. M. FULLER,
"Justice of the Peace, Precinct No. 2, Sierra County, New Mexico."

Upon which petition for change of venue is indorsed to-wit:
"Filed in my office this ninth day of November, A. D. 1886.

"W. J. JOBLIN, Clerk."

Which motion, being taken up by the court, was by the court duly overruled, to which ruling of the court the plaintiffs then and there duly excepted.

The declaration was filed during the April term, A. D. 1886, of the district court, and the writ made returnable at the next ensuing November term, at which time the foregoing action was taken. Two sections of the Compiled Laws must control this question:

"Sec. 1833. The venue, in all cases, both civil and criminal, shall be changed to some county, free from exceptions, whenever the judge is interested in the result of such cause; and may be changed in any case in which it shall appear that either party cannot have justice done him at a trial in a county in which such case is then pending, or for any other proper cause satisfactory to the judge before whom the motion was made.

"Sec. 1834. A second change of venue shall not be allowed in any civil or criminal case as a matter of right, but shall be within the discretion of the court."

Under the second clause of section 1833, which is the one applicable here, when it is made to appear by sufficient showing, that the applicant cannot have a fair and impartial trial in the county where the cause is pending, it is the duty of the trial court, on motion, to change the venue. Is it a proper construction of this statute that the venue shall be changed on the sworn statement of a party that he believes he cannot have a fair trial within the county, without a showing of facts to sustain such belief? If so, it will become easy to procure changes of venue. It would be difficult, if not impossible, to establish perjury on such an affidavit, even in the most reckless cases. The better construction is that the applicant shall show facts and circumstances by affidavit, that the court may examine them, and in that way determine whether he can have justice done him within the county.

In applications for continuance, where it is necessary to establish that diligence has been used to procure the attendance of an absent witness, it is not sufficient that the applicant swear that he has used due diligence, but he must specifically set out the facts, that the court may from them determine the question of diligence. So, in applications for change of venue, it is not sufficient to aver in the affidavit that affiant cannot have a fair trial within the county. Whether he can or cannot have such a trial is to be determined by the court from the existing circumstances, and they must be fully and clearly set forth.

Where a party asking for a change of venue shows to the court, by affidavit, such a state of feeling or prejudice against him in the county, or any other facts, making it clear and apparent that he cannot have a just trial, and a change of venue is denied, the cause should be reversed, and the venue changed.

It appears from the proofs in this case that the plaintiffs own a mine, from which the ore in controversy came; that an organized combination of persons was continually stealing ore from the mine. Who or how many persons were in this combination does not appear. Whether they lived in Sierra or some other county is not shown. It is not stated that the defendant was a member of the combination, or that the persons composing the same were taking any interest in this case, or were trying to create a public opinion

against the plaintiffs, or to arouse opposition to it, or were in any way trying to influence the action of the jury, or might do so. If there was an organized combination to steal ore from plaintiffs, it cannot be presumed, without undue reflection upon the citizens of Sierra, that such combination could have large influence. An organized body of thieves, operating in secret, is not likely to so influence public opinion as to obstruct justice in the courts. The fact that ore was being stolen from the plaintiffs would probably create a sympathy favorable to plaintiffs, rather than prejudice. Upon a careful consideration of the facts shown in the affidavit, it does not appear that any cause existed for the motion to change the venue.

It was the duty of the trial court to reject the application, because of an entire absence of facts sufficient to sustain it. This view of the case renders it unnecessary to consider whether the affidavit was or was not filed in time. If the motion must be overruled because no facts are shown to support it, then the matter of time becomes wholly immaterial.

There is no error in the record. The judgment below is affirmed, and the costs taxed against the appellant.

BRINKER, J., concurs.

(71 Cal. 546)

PEOPLE v. MORE. (No. 20,267.)

(Supreme Court of California. January 17, 1887.)

CRIMINAL LAW—APPEAL—DISMISSAL BY COURT OF ITS OWN MOTION—PEN. CODE CAL. § 1385.

The court, in directing, of its own motion, the dismissal of a criminal prosecution, as it is authorized to do under Pen. Code Cal. § 1385, performs the office of the attorney general of England, and the state attorneys in many of the United States, in entering a *nol. pros.*; and there is no appeal from such dismissal under the California constitution, giving the supreme court appellate jurisdiction in all criminal cases.

In bank. Appeal from superior court, Santa Barbara county.

Information for manslaughter. For the facts in this case, see 9 Pac. Rep. 461.

J. J. Boyce and W. T. Williams, for the People. McNulta & Oglesby, Geo. Flournoy, and R. B. Canfield, for respondent.

McFARLAND, J. This is an appeal taken in the name of the people from an order made by the superior court of the county of Santa Barbara, of its own motion, dismissing a criminal action in which respondent herein was defendant. The order was made under the power granted in section 1385 of the Penal Code, which is as follows:

"Sec. 1385. The court may, either of its own motion, or upon the application of the district attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

The respondent moves to dismiss the appeal, upon the ground that the order is one from which no statutory right of appeal is given to the people. It is certainly not one of the enumerated cases in which a right of appeal is given by section 1238 of the Code, and there is no other statutory provision giving such right.

It is contended, however, by appellant that, as the constitution gives this court appellate jurisdiction of questions of law arising "in all criminal cases prosecuted, by indictment or information, in a court of record," therefore there is jurisdiction here, although no statutory machinery for the appeal has been provided, as held in *People v. Jordan*, 65 Cal. 644; S. C. 4 Pac. Rep. 683. But the order in question is, in its nature and character, one from which the people cannot appeal. The power under which the order was

made is substantially the same as that held by the attorney general in England, and by the prosecuting officer in many of the American states, to enter a *nolle prosequi*. The court, for the purposes of the order of dismissal, takes charge of the prosecution, and acts for the people. It holds the power to dismiss, as the attorney general in England holds the power to enter a *nolle prosequi*, by virtue of the office and the law; and it is exercised upon official responsibility. The court, having acted for the people, and under express power granted by them to so act in their criminal prosecutions, there is no appeal on their part from such action. Of course, if a defendant should appeal from such an order, as he well might if it were made after the impaneling of a jury, a different case would be presented. *Com. v. Tuck*, 20 Pick. 365.

Appeal dismissed.

We concur: THORNTON, J.; TEMPLE, J.; SHARPSTEIN, J.; PATERSON, J.; MCKINSTRY, J.

PEOPLE v. MORE. (No. 20,266.)

(*Supreme Court of California. January 17, 1887.*)

In bank. Appeal from superior court, Santa Barbara county.

Information for manslaughter.

J. J. Boyce and W. T. Williams, for the People. *McNulta & Oglesby, George Flounoy, and R. B. Canfield*, for respondent.

By THE COURT. In accordance with the views expressed in the opinion in *People v. More*, *ante*, 631, (No. 20,267,) this day decided, the appeal herein is dismissed.

(*Colo. 415*)

CITY OF BOULDER v. NILES.

(*Supreme Court of Colorado. December 24, 1886.*)

1. MUNICIPAL CORPORATIONS—DEFECTIVE WAYS—EXCLUSIVE CONTROL OF STREETS—GEN. ST. COLO. CH. 109, PAGE 958.

Cities and towns incorporated under Gen. St. Colo. c. 109, p. 958, are invested with exclusive control over their streets, and come within the rule which holds such cities and towns liable for damages caused by a failure to keep their streets in a safe condition for travel, whether such liability is specifically imposed by the act of incorporation or not.¹

2. SAME—ICE ON SIDEWALK—NOTICE—QUESTION FOR JURY.

In an action against a city to recover damages for a personal injury received by the plaintiff by falling on the defendant's sidewalk, owing to the negligence of defendant in not removing ice and snow which had formed a ridge thereon, the question whether the defendant should have known of such obstruction, and removed it, is one for the jury to determine from all the circumstances,—the extent of the snow-fall, condition of the weather thereafter, amount of travel on the street, and the lapse of time between the snow-fall and the accident.²

3. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In such a case, an instruction which states that, if the jury believe that plaintiff was injured owing to the negligence of the defendant in not removing an obstruction

¹ As to the duty of municipal corporations to keep their streets and sidewalks in good repair and safe condition, and their liability in damages for injuries caused by the failure to perform such duties, see *Day v. City of Mount Pleasant*, (Iowa,) 30 N. W. Rep. 853; *Fulliam v. City of Muscatine*, Id. 861; *City of Plattsburgh v. Mitchell*, (Neb.) 29 N. W. Rep. 593, and note; *Davis v. City of Jackson*, (Mich.) 28 N. W. Rep. 526; *City of Lincoln v. Woodward*, (Neb.) 27 N. W. Rep. 110, and note; *Carter v. Town of Monticello*, (Iowa,) 26 N. W. Rep. 129, and note; *McGiuity v. City of Keokuk*, (Iowa,) 24 N. W. Rep. 506, and note; *Hanscom v. City of Boston*, (Mass.) 5 N. E. Rep. 251; *Grogan v. City of Worcester*, (Mass.) 4 N. E. Rep. 230; *Veeder v. Village of Little Falls*, (N. Y.) 3 N. E. Rep. 306, and note; *City of Chicago v. Keefe*, (Ill.) 2 N. E. Rep. 267; *Bullock v. City of New York*, (N. Y.) 2 N. E. Rep. 1, and note.

² See *Nebraska City v. Rathbone*, (Neb.) 28 N. W. Rep. 920, and note; *Chase v. City of Cleveland*, (Ohio,) 9 N. E. Rep. 225.

on its sidewalk which plaintiff may have proven was there, they may find for plaintiff, is erroneous, in that it does not require them to find that plaintiff was using ordinary care in walking on such sidewalk; and the fact that the law on the subject was correctly given in another instruction is not material, as it cannot be known by which instruction the jury was governed.

4. SAME—DILIGENCE IN REMOVING DEFECT.

In order to hold a city liable for an injury received by falling over an obstruction on its sidewalk, it must be shown, not only that there was such an obstruction, and that plaintiff was injured thereby, as alleged, without negligence on his part, but also that defendant had notice of such obstruction, or that it had existed for such a length of time as to import notice; and that defendant had not used reasonable diligence in removing such obstruction.¹

Appeal from district court, Boulder county.

This action was brought in the court below by the appellee, Niles, against the defendant city to recover damages for injuries resulting from a fall upon snow and ice accumulated upon defendant's sidewalk. The accident happened to the plaintiff upon the evening of the sixth of February, while walking, after dark, upon Pine street. The obstruction upon which the plaintiff slipped and fell was an accumulation of snow and ice forming a ridge near the center of the sidewalk, according to the testimony of the plaintiff, nearly a foot in height, oval in shape, and about two feet wide at the base, and extended for quite a distance along the center of the sidewalk. Upon either side of the ridge the sidewalk had been cleared from the snow and ice by the witness Temple, the owner of the abutting premises. According to the testimony of a number of other witnesses, the ridge was not more than three or four inches in height. It was the bottom of an original path trodden in the snow after the storm, and took the shape of a ridge, or, as some witnesses call it, "a core," after the snow on either side had been removed. While the plaintiff knew generally of the slippery and unsafe condition of the streets and sidewalks resulting from the snow-storm, he denied all knowledge of the particular obstruction on which he slipped and fell. He appears to have been walking at an ordinary pace, and says he was looking ahead of him at the sidewalk, but did not see the obstruction. His injuries were such as to incapacitate him for work for several months, and to cause him great suffering and pain. The snow-storm commenced on the thirtieth of January, and lasted three days. The snow fell to a depth of about two and one-half feet. The testimony of the street commissioner of the defendant city, showing the heavy snow-fall, and the general condition of the streets and sidewalks, and want of notice of the obstruction which caused the injury, is given in the opinion of the court.

The fourth and fifth instructions, to which the opinion of the court refers, are as follows:

"*Fourth.* The court instructs you that, if the jury believe from the evidence that on or about the sixth or seventh of February, 1883, there was an obstruction on the sidewalk on Pine street, at or near the place alleged by plaintiff, and that the plaintiff, in walking on said sidewalk, stumbled over said obstruction, and fell, without fault or negligence on his part, and was injured by reason thereof, and was thereby crippled or injured, not knowing that said obstruction was there at the time, the defendant is liable to the plaintiff in damages for the full amount of all the injuries plaintiff has proven he has sustained thereby.

"*Fifth.* That, if the jury believe from the evidence, the plaintiff has been injured in person, arising from the negligence of defendant, by not removing any obstruction on the sidewalk which plaintiff may have proven was on it at the time the injury was sustained, the jury have the right to take into consideration, as compensation therefor, the loss of time plaintiff has sus-

¹See City of Plattsburgh v. Mitchell, (Neb.) 29 N. W. Rep. 593, and note; Tabor v. City of St. Paul, (Minn.) 30 N. W. Rep. 765, and note.

tained by his inability to labor, his doctor bills, expenses for medicines, and expenses incurred, if any, for services for nursing and attention, and for the pain and suffering in mind and body which the plaintiff may have proven he endured. It is also the duty of the jury to take into consideration any permanent disability the plaintiff may have proven he received, and his diminution of power to earn money in the future."

The jury found for the plaintiff, and assessed his damages at \$650.

O. F. A. Greene, for appellant. *G. Berkley, M. B. Camplin*, and *E. B. Kellogg*, for appellee.

ELBERT, J. The subject of the implied liability of municipal corporations, in civil actions, for misconduct or negligence on their part, or on the part of their officers, in respect to corporate duties resulting in injuries to individuals, is very fully and ably discussed by Chief Justice BECK in the case of *City of Denver v. Dunsmore*, 7 Colo. 339; S. C. 3 Pac. Rep. 705. The conclusion reached is as follows: "The general current of authority supports the view that when municipal corporations are invested with exclusive authority and control over the streets and bridges within their corporate limits, with ample power of raising money for their construction, improvement, and repair, a duty arises to the public, from the nature of the powers granted, to keep the avenues of travel within such jurisdiction in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon the corporation to respond in damages to those injured by neglect to perform the duty; that the same rule obtains in such case whether the duty is specifically imposed by the act of incorporation or not. This duty is municipal or ministerial, and not governmental."

The powers granted to cities and towns incorporated, as was the defendant city, under chapter 109, Gen. St. p. 958, bring them, as municipal corporations, within the rule announced. This disposes of the leading question discussed by counsel for the appellant.

The claim in this case is that the neglect of the defendant city to remove from the sidewalk on one of its streets the accumulations of snow and ice upon which the plaintiff slipped and fell, renders it liable in damages for the injuries to the plaintiff resulting from the fall. It may be said, generally, that the duty imposed upon municipal corporations in respect to its sidewalks is a duty to keep them in a reasonably safe condition. Upon persons using the sidewalks the duty imposed is that of ordinary care. Under conditions of increased danger, there is imposed a duty of increased care. These are general principles to be understood and applied in the light of the circumstances of each particular case.

Mr. Dillon, in his work on Municipal Corporations, (section 1006,) sums up the law applicable to this class of cases as follows: "The law does not require a municipal corporation to respond in damages for every injury that may be received on a public street. Before a recovery can be had, it must appear, upon the whole testimony, that the person injured used, under all the circumstances, ordinary care to avoid danger; nor is the corporation required to have its sidewalks so constructed as to secure absolute immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, generally stated, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and prudence. *The mere slipperiness of a sidewalk*, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not ordinarily such a defect as will make the city liable for damages occasioned thereby. Where there is snow upon a sidewalk, and it is rendered slippery, there is danger of injury from slipping and falling even on the best constructed walks. At such times there is imposed upon foot travelers the necessity of exercising increased care; and, where the city uses reasonable diligence, it will not be liable. But in case

no attempt is made to remedy an unsafe sidewalk, and the weather is such that it could easily have been done, liability may attach."

It is also to be borne in mind that where the action, as in this case, is based on neglect or omission to keep the sidewalk in a safe condition, that the question of notice becomes of importance. The rule is that notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability. The corporation is responsible only for reasonable diligence to repair the defect, or prevent accidents after the unsafe condition of the streets is known, or ought to have been known to it, or to its officers having authority to act respecting it. 2 Dill. Mun. Corp. § 1020 *et seq.*

After a careful examination of the record, we are unable to say that the law applicable to the facts of this case was fully and fairly given to the jury by the instructions of the court. The fourth instruction given for the plaintiff is defective in this: that it ignores the question as to whether or not the defendant city used reasonable diligence in the care of its sidewalks. Notice of the obstruction, or such lapse of time as imports notice, and failure to use reasonable diligence in its removal, were essential conditions of the defendant's liability. The instruction we are considering left the jury at liberty to find the defendant liable without reference to these leading questions.

The snow-storm continued for three days from the thirtieth day of January. The snow fell about two feet. The accident was on the evening of the sixth of February. There is no evidence that the defendant had actual notice of the obstruction. On the other hand, Mr. Newton testifies as follows: "I have been street commissioner of the city of Boulder for the last year and a half, and, as such street commissioner, I have had control of the streets of Boulder. I recollect that stormy weather that has been testified to,—the last of January and the first of February. Those storms left the sidewalks in a bad condition. The snow was deep on those sidewalks. At that time it was not possible, with ordinary effort or care, to have kept the walks clean throughout the city,—the snow was so deep. It was unusually stormy weather for Colorado. *I never had any notice of any obstruction in front of Mr. Temple's.*"

Whether or not, under all the circumstances, the defendant, through its officers, should have known of the obstruction, and removed it, was a question for the jury. In determining this question, the extent of the snow-fall, the condition of the weather thereafter, the location of the street where the obstruction was, as a public way, more or less frequented, the lapse of time between the snow-fall and the accident, were all matters to be considered by them. If, in point of fact, the proper officers of the defendant city did not know of such obstruction when, by ordinary and due diligence and care, they ought to have known of it and removed it, the defendant must be held responsible as in case of actual notice.

The fifth instruction is also objectionable, in that it ignores the essential element of ordinary care on the part of the plaintiff, and assumes his right to recover without reference to it.

That other instructions given on behalf of the defendant to some extent laid down the law correctly is not material. We cannot determine by which instruction the jury was governed. It is enough for us to know that error may have intervened. *City of Denver v. Capelli*, 4 Colo. 28; *Claire v. People*, 9 Colo. ——; S. C. 10 Pac. Rep. 799.

The other assignments need not be noticed. For the reasons above given the judgment of the court below must be reversed, and the cause remanded for a new trial.

(14 Or. 342)

SNOW v. REED.*(Supreme Court of Oregon. January 4, 1887.)***PILOTS—PILOT COMMISSIONERS IN OREGON—JURISDICTION—PROCEEDINGS—EMPLOYING COUNSEL.**

The board of pilot commissioners of the Columbia and Willamette rivers, in Oregon, are not bound by the technical rules in their proceedings which govern courts of justice; and where, on an appeal from an order of such board revoking the license of a pilot, the authority of the board is not questioned, nor the sufficiency of the cause for revocation, their action will not be set aside because they did not meet on the day the pilot was notified they would consider the charges filed against him, it appearing that he was present and had ample opportunity to make his defense when such charges were considered. The board may take the advice of counsel on the steps to be taken in such an investigation.

Appeal from circuit court, Clatsop county.

Noland & Dorris and *C. W. Fulton*, for appellant, Snow. *C. H. Page*, for respondent, Reed.

THAYER, J. This case involves the regularity of proceedings of the board of pilot commissioners for the Columbia and Willamette rivers, in revoking the license of the appellant as pilot on said rivers. He was charged with drunkenness and carelessness while in charge as pilot of the ship W. H. Starbuck, and with running said ship aground. It was heard before a majority of the members of the board, was sustained, and the decision thereon rendered, which is the subject of complaint. The circuit court, upon writ of review, sustained it, and this appeal was taken therefrom. The authority of the board is not questioned, nor the sufficiency of the cause for revocation. Neither is it pretended that the appellant has been deprived of any opportunity to make his defense to said charge; but it is claimed that said proceedings were not conducted in conformity with the statute under which said board was created.

The several matters of alleged irregularity in the proceedings of the board have been considered by the court, but are not deemed sufficient to authorize the annulment of the decision made in the premises. The law does not require the same strictness in the proceedings of such a body in administering the affairs committed to its charge as it does in the proceedings of courts of justice. The latter must not only have jurisdiction of the subject-matter, but must acquire jurisdiction of the person, before they proceed to hear and determine. And they can only acquire jurisdiction of the person in the mode pointed out by law; while the former has jurisdiction in the outset of both the subject-matter and the person.

The board of pilot commissioners had control over the appellant as a pilot. They appointed him pilot because they supposed him suitable for the position; and it was their duty to observe his conduct, and, if he failed to discharge his duties, to revoke his license. Their jurisdiction over the pilots they appoint is constant and continuous. No notice has to be served on a pilot charged with neglect of duty in order to give the board jurisdiction. The statute may require notice to be given to the pilot in certain cases, where a charge for dereliction of duty has been made against him, and require the board to observe certain forms in the investigation thereof; but that is for the benefit of the pilot. It is to give him an opportunity to explain and disprove the charge. Such requirements should be substantially complied with. The board would have no right to proceed unless they were. It is no more, however, than the superior saying to the inferior, to whom it has intrusted the administration of a certain affair, that the inferior must not act hastily and upon mere hearsay in the particular case. The proceedings of the board of pilot commissioners in such affairs are not summary proceedings to divest or affect rights of property, in the sense in which the latter are understood when required to be strictly construed. The courts would have no right to interfere in the former

case except to prevent an injustice. If the board were to act arbitrarily, and absolutely disregard the restrictions which the statute had imposed upon it, the act should be annulled. The several circuit courts of the state have, under the constitution, supervisory control over officers and tribunals of that character, (section 9, art. 7, Const.,) and should exercise it whenever necessary to keep them within the line of their duty, or to correct such acts done outside thereof as substantially injure parties; but to attempt to control their discretion, or to require them to observe all the niceties, in the ordinary administration of their duties, that are required of officers and tribunals proceeding under statutory authority to divest parties of general property rights, would be absurd. There is no analogy whatever between the two characters of cases.

In the case under consideration a complaint was made in writing against the appellant, and filed with the secretary of the board. He was notified of the fact, and required to appear and answer it. He appeared at the time, but none of the members of the board were present. The secretary informed the appellant that the hearing was postponed until a subsequent day, at which time he again appeared. But two of the members of the board were then present, and they proceeded to investigate the charge. The appellant, however, moved to dismiss the complaint, upon the grounds that the board had lost jurisdiction. This is one of the principal grounds of error relied on. Such a ground might be tenable in a justice's court proceeding, where jurisdiction is obtained by the personal service and return of a summons, and may be lost by the failure of the justice to be present at the time the defendant is required to appear and answer; but in this proceeding the board had jurisdiction by reason of the relation existing between it and the appellant. The latter was at all times amenable to the former for his conduct; and it only had to say to him that a complaint had been made against him for certain misconduct, and to come forward and explain it. The proceeding is necessarily summary, and was designed and intended to insure efficient service in the promotion of navigation and commerce.

Another ground of error is that the commissioners, while investigating the charge against the appellant, employed and had present an attorney to instruct and advise them with reference thereto, which attorney, appellant's counsel claim, was also acting as attorney for the respondent in the proceeding. It does not appear that the attorney did instruct or advise the commissioners, nor that he was attorney for the respondent. The commissioners had a right to employ an attorney to acquaint them as to the manner of conducting the investigation. It is not supposed that the board, where two of its number are required by the law creating it to have been engaged as masters or mates on seagoing vessels or steam-boats for at least two years prior to their election, and the third liable to be selected on account of his practical knowledge of navigation, would have much idea about the form of such a proceeding; and their engagement of a suitable person to advise them regarding such matters, especially, when the appellant appeared with a force of attorneys, as he did in this affair, and interposed technical demurrers and motions, was very proper. They could not, of course, delegate to their attorney the decision of any question which the law required them to determine, nor determine it themselves through his advice; but to receive advice from him as to the various steps to be taken in the progress of the investigation was legitimate. There would not, in any case, be grounds for the court's interference with the decision of the commissioners, unless it appeared that they had abused the trust reposed in them to the prejudice of the appellant.

I have not been able to discover but that the appellant had a fair hearing in the matter, and, although the determination against him may have been severe and injurious in its consequences, still the interests of navigation and commerce must be consulted and regarded as paramount to his loss. No

person should be trusted with a pilot's license who is under any taint of suspicion of intemperance. An assurance upon the part of the board of pilot commissioners that a person addicted to drunkenness was competent to take charge of a vessel, and conduct her safely to port, would be criminal. The necessity of prudence, skill, and sobriety in the discharge of so important a duty is too great to justify the board in accrediting any one as competent to perform it unless absolutely known to possess those requisites.

The appellant's counsel also claimed that the president of the board called the meeting at which the said charge was investigated without notifying Commissioner Brown thereof. Whether this is so or not does not appear from the record, and I do not think that we should presume that such was the fact. It is the duty of the president of the board, when he calls a meeting thereof, to give reasonable notice to the other commissioners; and we have the right to presume that he performed that duty, I think, unless it is shown to the contrary.

The decision of the circuit court appealed from should be affirmed.

STRAHAN, J., concurs in the result upon the principles announced in *Wood v. Riddle*, ante, 385, decided at this term.

(5 Utah, 87)

PEOPLE v. OLESEN.

(*Supreme Court of Utah. January 14, 1887.*)

HOMICIDE—REHEARING DENIED.

Motion for rehearing. For original opinion, see 11 Pac. Rep. 577.
W. H. Dickson, for the People. *Hoge & Burnester*, for defendant.

ZANE, C. J. The reasons alleged by appellant in his petition for a rehearing in this case are that the court in its opinion failed to consider certain errors assigned, and erred in some of its conclusions. The points relied upon in the argument were distinctly stated in the opinion, and the reasons given for holding that they were not well assigned. While the court considered the other errors, it did not separately mention and particularly consider them in the opinion, for the reason that there did not appear to be sufficient room for controversy with respect to them. All the errors assigned were considered by the court on the hearing of this cause, and we are not convinced that any erroneous conclusion was reached. A rehearing is denied.

BOREMAN and HENDERSON, JJ., concur.

(5 Utah, 88)

PEOPLE v. TIDWELL and another, impleaded, etc.

(*Supreme Court of Utah. January 17, 1887.*)

1. APPEAL—REHEARING.

A rehearing should not be granted merely upon an appeal to the court to go over the argument and authorities again.

2. SAME—TITLE OF JUDGE TO OFFICE.

The question whether one of the judges who sat in the hearing of a case upon appeal, but who dissented from the decision, was legally a member of the court at the time, will not be examined into upon a motion for a rehearing; no such question having been raised before, and no facts being shown to warrant the inquiry.

Petition for rehearing. For former opinion, see 12 Pac. Rep. 61.
W. H. Dickson, for the People. *Arthur Brown*, for defendants.

BOREMAN, J. This matter comes before us upon a petition for a rehearing filed after the adjournment of the last term of this court, but within the 10

days allowed by a rule of the court. The rehearing is asked upon three grounds.

The first two grounds have reference to a supposed failure of the court to give due consideration to the questions involved in the case. They are simply an appeal to the court to go over the arguments and authorities again, and neither of these two grounds has reference to any law or fact to which our attention was not called upon the hearing of the case. They are not new matters. We see nothing in either to warrant the court in granting a rehearing.

The third ground urged is that Judge POWERS, who sat in the hearing of the case in this court, was not, at the time, a member of this court. The question as to whether Judge POWERS was a legal member of this court is one that the court would not examine into upon a motion for a rehearing, where no facts are shown to warrant it, and where one side only is heard. He was a *de facto* officer most certainly, and the attention of the court was not at the time called to any irregularity in his so doing, nor was any doubt cast upon his authority to act. Besides, Judge POWERS did not agree with the majority of the court, but dissented.

We see no good reason for granting the prayer of the petitioner, and the rehearing is denied.

ZANE, C. J., and HENDERSON, J., concurring.

(6 Mont. 271)

UNITED STATES v. POWER.

(*Supreme Court of Montana. January 13, 1887.*)

BAILMENT—CONTRACT TO TRANSPORT INDIAN SUPPLIES—RIVER RISKS—NEGLIGENCE—LOSS BY FIRE.

P. made a contract with the United States, through the commissioner of Indian affairs, to transport certain supplies from several eastern cities to points within the territory of Montana. The contract was in the usual form of government transportation contracts, except that there was noted on the tabular statement appended thereto a memorandum in the following words: "All rail to the Missouri river. During navigation, on Missouri river. No river risk on the part of the contractor for unavoidable accidents. Land haul only when ground is frozen." In pursuance of this contract P. received certain goods, which were loaded on a steamer, and were being transported up the Missouri river to the point of destination when the steamer took fire, and was burned, and the cargo, including the goods, was totally destroyed. *Held*, that P. was not liable for the loss.

Appeal from district court, Lewis and Clarke county.

Action to recover for a loss in the negligent transportation of government supplies. Judgment for defendant. Plaintiff appealed.

Robert B. Smith, U. S. Dist. Atty., for the United States. *B. P. Carpenter*, for respondent, Power.

MCLEARY, J. The facts of this case may be briefly summarized as follows: On the twenty-eighth day of April, 1883, Thomas C. Power entered into a contract with the United States, through H. Price, commissioner of Indian affairs, to transport certain supplies from Bismarck, Dakota, and other eastern cities, to points within the territory of Montana, during the fiscal year ending the thirtieth June, 1884. The contract was in the usual form of government transportation contracts, except that there was noted on the tabular statement appended thereto a memorandum in the following words: "All rail to the Missouri river. During navigation, on Missouri river. *No river risk on the part of the contractor for unavoidable accidents.* Land haul only when ground is frozen."

In pursuance of this contract, Power received from the United States, for transportation from Bismarck to certain points in Montana, certain goods.

consisting of 79 sacks of coffee, 400 pairs of blankets, 500 yards of cloth, 1,000 pounds of lard, and 200 men's caps, valued at \$8,485.98; which goods were loaded on the steamer Butte, and were being transported up the Missouri river towards their destination, when, during the night, on the first day of August, 1883, at a point above Fort Peck, the steamer took fire and was burned, and the cargo, including the goods being transported for the United States, was a total loss. The steamer Butte belonged to a stock company, of which Power was a stockholder to the amount of one-fourth or one-third of the stock; and the said company was not interested in any way in the contract sued upon. It is admitted that the goods were received for transportation as alleged, and were lost on the steamer Butte by fire, and never delivered to the officers of the United States at their places of destination. It is also conceded that Power was a private carrier only, and not a common carrier, and was liable, if at all, only under the terms of the contract and the general laws applicable to private carriers. It was further agreed "that the best care and precautions were used by the defendant and all of his agents and employes, and that defendant, Power, gave orders to use the very greatest degree of care and diligence," and that defendant was not personally present. Upon this state of facts the case was submitted to the court below without a jury, and judgment rendered for the defendant. A motion for a new trial was made and overruled; and from the judgment and orders an appeal was taken to this court.

It is claimed by the attorney for the United States that, on account of the memorandum attached to the contract, in the words "*no river risk on the part of the contractor for unavoidable accidents,*" that respondent became liable for the loss by fire; that such a risk was not a "*river risk,*" or one of the *perils of navigation*, which are synonymous terms; that this expression is equivalent to saying "*unavoidable accidents on account of river risks excepted;*" and that such unavoidable accidents as arose from *river risks* being alone excepted, all other unavoidable accidents were included; and that thus the respondent was liable for a loss by fire occurring on the river Missouri, although it was entirely unavoidable.

There is no pretense or claim that the respondent was a common carrier, or that the law governing common carriers applies to this case. He was only a private carrier, and was to be governed by the law applicable to that class of persons, and was subject to all the liabilities of a private carrier. As a private carrier the respondent was bound to use ordinary care,—such care and diligence as a reasonably prudent man would exercise in the conduct of his own business, or in the preservation of his own property. Ang. Carr. § 47; Story, Bailm. § 399; 2 Greenl. Ev. § 219; *Ames v. Belden*, 17 Barb. 515; *Somms v. Stewart*, 20 Ohio, 73.

According to the statement of facts, it was admitted that respondent used the "best care and precautions." Then he would not be liable generally in this action. If, then, the appellants should recover a judgment herein, it would be on account of the terms of the contract which were made in this case. Do the terms of the memorandum quoted fix the liability of the respondent for the goods lost by the burning of the boat? The counsel for the appellants construe the term, "No river risks for unavoidable accidents," to be a negative pregnant; and, on the maxim "*expressio unius est exclusio alterius*," to make the respondent liable for all other unavoidable accidents, except those which are classed in maritime law as "*river risks*" or "*perils of navigation*." And authorities are cited to show that fire does not fall within that class of risks or perils. In order to maintain this construction, the terms of the memorandum are transposed, and the words "*river risks*" are made to limit the words "*unavoidable accidents*," instead of the converse, as it is expressed by the parties in the contract itself. All persons are presumed to use language in its ordinary signification, and to express themselves accord-

ing to grammatical and logical rules. No fair rule of grammatical construction or legal interpretation would permit such a transposition and exchange of the substantive and adjective clauses. We must take the words as we find them, and derive the intention of the parties, when it can be done, from the exact language used by the parties themselves. To do this we must, as far as possible, assume their surroundings and circumstances. Rev. St. Mont. 1st Div. § 614, p. 154; *Donnell v. Humphreys*, 1 Mont. 526; *Taylor v. Holter*, Id. 694.

Independently of the memorandum quoted, what were the obligations of the contractor undertaking to transport these goods? Those of a private carrier only. As such he was not responsible for river risks arising from unavoidable accidents. Then, either this memorandum, appended to the tabular statement attached to his contract, did not enlarge this liability, or, if it was intended to make him assume any risks arising from unavoidable accidents, they were *land risks*. And this was probably the intention, inasmuch as the transportation routes covered railroads and wagon roads as well as water-ways; and, in another note, added just after the one quoted, it is provided that, between certain points, the contractor would make the "land hauls only when the ground is frozen." At any rate, by no fair rule of interpretation, can the respondent be made liable for any river risks arising from unavoidable accidents. Then the only river risks for which he would be liable are such as arise from unavoidable accidents. Was this fire one of those? Abstractly considered, it may well be said that there is no such thing as an accident; that every result has a cause, or, rather, numerous causes, which, acting together, produce the result. But the law, which is intended to regulate the practical affairs of life, does not indulge in these abstractions of philosophy, and, according to the evidence, this fire was, as far as the respondent is concerned, an unavoidable accident, for which he would not be responsible.

But the appellant's counsel contends that this fire was not a "*river risk*." That may be conceded, and, if it is not a river risk, it is not provided for at all, in this memorandum or in this contract, and the law generally must be relied on to fix the liability of the respondent. Under this view, as has been already stated, he is only liable as a private carrier for ordinary care; while, according to the evidence in the record, he used "the best of care and precautions."

Then, under the general law applicable to carriers, and under the terms of his contract, in any way which it is possible to construe it, the respondent is not liable for the loss which occurred to the appellants by the burning of the steamer Butte. Such being the case, we find no error in the judgment of the court below, and it is affirmed.

(6 Mont. 275)

MONTANA RY. CO. v. WARREN and others.

(*Supreme Court of Montana*. January 5, 1887.)

1. RAILROAD COMPANIES—PROCEEDINGS TO CONDEMN LANDS—TESTIMONY AS TO VALUE.

In proceedings for condemnation of land for a railroad right of way, it is not essential to the competency of witnesses as to the value of the land that they should have bought or sold such land or similar property, or that their opinion should be based upon values realized on actual sales.

2. SAME—MINING PROSPECT—MARKET VALUE, HOW ASCERTAINED.

A mining prospect upon which shafts have been sunk,—one 41 feet, another 20 feet,—but which has produced no return, has a market value, and such value is to be ascertained, in proceedings for condemnation of the claim for railroad purposes, under the same rule as is the value of other property; and testimony as to the value is not necessarily based upon sales of the same and similar property.

3. SAME—VALUE AS TOWN LOT.

In proceedings for the condemnation of a mining claim for railroad purposes, the owner may prove the value of the land for town-lot purposes, whether built upon or not, in addition to proving its value as a prospect, but his recovery is confined to the value for one or the other purpose.

4. APPEAL—THE RECORD—VERBATIM COPY OF STENOGRAPHER'S NOTES.

A transcript containing a *verbatim* copy of the stenographer's notes of the testimony in the court below, with no attempt to reduce the same to narrative form, or to omit questions withdrawn on objection, is not such a record as should be filed in the appellate court.

5. SAME—ERRORS IN STATEMENT NOT REFERRED TO IN BRIEFS.

Assignments of error in the statement, not referred to in the appellant's brief, will not be considered.

Appeal from district court, Silver Bow county.

Samuel Word and *W. W. Dixon*, for appellant, *Montana Ry. Co.* *Knowles & Forbis*, for respondents, *Warren* and others.

BACH, J. This action was commenced by a petition, upon which commissioners were appointed to assess the value of certain lands lying in Silver Bow county, and belonging to the respondents, over which lands the appellant sought to obtain an easement for the purpose of constructing a railroad. The land mentioned in the petition was a mining claim, known as the "Nipper Lode,"—a claim undeveloped, but upon which there were several shafts, one 41 feet deep, another 20 feet deep. In fact, the property was of that description generally known as a "prospect." The commissioners made their final report, from which the respondents appealed to the Second judicial district court in and for the county of Silver Bow. The case was heard in that court before a jury, which found a verdict for the respondents herein for the sum of \$7,000. A motion for a new trial was heard, and an order was made denying the same; from which order, and from the judgment entered upon the verdict, an appeal was taken to this court.

There are assignments of error in the statement which are not referred to in the appellant's brief; and which will therefore not be considered by this court. Those relied upon are as follows:

1. That there was admitted in evidence the opinion of witnesses as to the value of the land, which opinion was not based upon sales of the land, or of similar property. The witnesses whose opinion was so given had lived for many years in the neighborhood of the Nipper lode. They knew the character of adjacent property, and had bought and sold property of the same description in that neighborhood. The well-settled rule of law is that value of real estate may be proved by witnesses other than experts. In newly-settled communities there could be no experts as to the value of real estate. The value of lands may be proved by the opinion of witnesses who know the character of that land, its availability, fertility, situation, and the character of similar and adjacent property.

A witness as to value of property need not to have been engaged in buying or selling the same. 1 Suth. Dam. 798; 3 Suth. Dam. 463, and cases cited in note; *Railroad Co. v. Bunnell*, 81 Pa. St. 414-426; *Sedg. Dam.* 696, 697; *Railroad Co. v. Pearson*, 35 Cal. 247-261; *Robertson v. Knapp*, 85 N.Y. 91.

In the case last cited, farmers were called as witnesses to testify as to value of lands. The court say: "The value of land in the vicinity is usually understood by all of the residents of a farming neighborhood, without respect to occupation. I can perceive no objection to the competency of the evidence objected to." See, also, *Lawson, Exp. Ev.* 436, and numerous cases cited in the note. It is there remarked that only one state holds a contrary doctrine. This point naturally recurs in the other assignments of error.

2. The appellant claims that the evidence is insufficient to justify the verdict, and that it is against the law, because the Nipper lode was an undeveloped mining claim, which had produced no return, from which no ore had ever been taken, which was a mere prospect; and that consequently its value was a speculative value only.

It is admitted by both parties that the true measure of damages is the difference between the market value of the property before and after the con-

struction of the road. The only questions are whether a prospect has a value that may, in law, be called a market value; and, if so, whether there is proof in this case of any market value. Has a "prospect"—an undeveloped mine—any market value? A full, positive answer to that is that prospects are sold in the market every day. Certainly, property so sold has a market value. The records of Silver Bow county will probably show more transfers by sale of property, such as is known as "prospects," than of any other kind of real estate. They are frequently sold on execution, foreclosure, and partition sales. They are the subject of daily litigation in our courts.

The witnesses Tibbey and Clark were called by the appellants. Tibbey says that the Kanuck mine was a prospect when \$3,000 were paid for a half interest therein. The Kanuck was a small claim, with shafts no deeper than those upon the Nipper lode. He says \$15,000 were paid for the Adventure claim when it was a prospect. Clark bought the Steward lode when it was a prospect. Those lodes had no market value. The record shows that portions of the Nipper lode had been sold.

Does the fact that the Nipper lode had produced no return justify the legal conclusion that that property has no legal value, as is claimed by appellant to be the rule of law? A vacant lot in a large city "produces no return." Any return therefrom in the future must be a matter of speculation,—a speculation depending, among other things, upon the nature and size of the house which is still to be built, and the rent that can be obtained from a lease thereof, if it ever can be leased. If we should apply, in such a case, the rule invoked by appellant, there would be no value assignable to a property which, as a matter of fact, may be immensely valuable. What, then, is the value of such a lot? It is its market value,—the price which it would bring in a fair market,—which price may be established by competent witnesses, who know the character and situation and usefulness of that property. See cases cited above.

Under certain circumstances a stream of water flowing through land makes that land valuable, because of the power to be derived therefrom, or because of the possibility of irrigation, as in this country. There may be no mill. There may have been no attempt to use that water for the purposes of irrigation. Still those are qualities or characteristics which may, under certain circumstances, enhance the present market value of that property, with a mill, or when irrigated and cultivated. That would be speculation. The question is, what effect have these circumstances upon the opinion of the community? How do they affect the market value? A man may have property well situated to a certain purpose,—such as a mill-site, or as a farm, or as a residence or store, or as a mine,—and he may refuse to use it for any one of those purposes to which it is best suited. Still he may sell it in open market to a purchaser whose opinion of its present market value is based upon the future use to which it may be put. Still he may claim, in any proceeding to condemn that land, the market value thereof, as that value is fixed by the public for those purposes.

The difference between such a valuation and speculation seems clear. Land never used by its owner for any purpose is sought to be condemned. The fertility of the soil is one of the characteristics or properties of that land. It has never produced any returns; but there is no attempt to prove future productions. They are speculative. The fertility of the soil is a fact,—a fact which in some cases may add great value to the property, and may be one of the constituents of the market price. See *Boom Co. v. Patterson*, 98 U. S. 403. The court says, (page 407:) "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses to

which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Its capability of being made thus available gives it a market value which can be readily estimated." And the court cites with approval *Young v. Harrison*, 17 Ga. 80, in which case the value of farming land at a bridge site was allowed to be proved.

In *Boom Co. v. Patterson*, just above cited, the value of land on account of its availability for building a boom across a river was allowed to be proved. In the one case there was no bridge; in the other there was no boom. The value of those lands, if a bridge or boom was built, was a matter of speculation; but the present market value of those lands was more or less dependent upon the fact that they might be put to such uses. That was fact. See, also, the other authorities in case of *Boom Co. v. Patterson*.

So with a "prospect." It certainly has value in the market. What is the characteristic of the prospect? If ore has been found, that fact is an element of value. It is the "fertility" of that piece of property. The value will increase as the prospect becomes more developed; but, as soon as a vein of ore is found in land in a mining district, it places a market value upon that land, greater or less, owing, as in all cases, to circumstances. That fact is as certain an element of price as is the fertility of the soil, the situation, chances for a mill-site, or, in case of a well-developed mine, the possibility of future production of ore. In what respect does a prospect differ from a mine, except the fact that ore has been taken from the latter in large quantities? Can it be said of a mine that it will continue to produce valuable ores with any greater certainty than it can be said of a well-developed prospect that it will produce valuable ores? Future profits are a matter of uncertainty in the one case as well as in the other. In fact, the only distinction is that the mine is poorer than it was as a prospect because of the extraction of valuable ore once contained therein. Land adjacent to a well-known mine has a market value greater or less, depending whether it lies on or off the vein. In one case its present value depends upon its mineral character; in the other case, upon its adaptability for a dump, or for building purposes. As has been already said, a prospect is more a matter of speculation than is a mine from which ore has been taken. The future of each is equally uncertain. The value of each is to be ascertained in the same way, viz., under all the circumstance, what is the market value?

In *State v. Moore*, 12 Cal. 56, the court say: "There is no force in the objection that the value of a mining claim, which depends upon the amount of precious metals it contains, must necessarily be left to conjecture. The mineral standard of value is the amount of money which can be realized by a sale of the property, and this will apply to mining claims as to other lands. Sales and hypothecations of mining claims are of every day's occurrence, and we apprehend their value can be ascertained with sufficient accuracy."

In our opinion, mining prospects have a value, which is to be ascertained under the same rule as is the value of other property.

Appellant cites the case of *Searle v. Railroad Co.*, 33 Pa. St. 57. We think the case does not sustain the rule as stated by appellant. In that case the judge, at the trial term, charged the jury as follows: "What is the value of this land? We refer you to the testimony. This value has been given regarding it, both as agricultural and coal land. *It is worth more for the coal under the ground than for the mere surface.* * * * We do not see why the value of the land, as it is, with the coal under it, estimated comparatively with the whole tract, is not the true subject for the consideration of the jury." See page 59. Now, it is evident that the value of that land, as coal land, was in evidence. The owner of the land then wished to prove further "that there was over an acre of coal under the road, worth \$4,000," (see page 63;) and

that was the error complained of. The appellate court say, (page 64:) "The jury were permitted to find, in favor of the plaintiffs, *the full value of the land, as coal land.*" Then, in relation to the \$4,000 worth of coal, the court held there was no error. Page 64. "It would require us to ascertain the possible value of the land, in order to get at the value of the land itself. * * * It is easier to value the land directly than thus." Then the court say, (page 64:) "Though we might have the most accurate calculation of the quantity of coal in the land, yet, without knowing exactly the expense of bringing it to the surface and carrying it to market, and the amount likely to be lost in mining and conveying, and the times in which it would be brought out, and the market price at those times, the quantity would not help us to value the lands." It would seem that there was another reason for rejecting such evidence. To admit such evidence would necessarily allow the value of the coal to be twice estimated, and as an element of the value of the land. However, the only point in that case was whether the value of the coal itself could be proved, and the court held that it could not. But the court did not disapprove of the charge of the judge below, that the jury could find the value of the land as coal land. It indirectly approved of that rule. Yet, although the value was proved as of coal land, in the statement of facts we find that "the plaintiff's ground had been used for agricultural purposes; no mine having been opened on the land." The case clearly sustains our position, that mining prospects, whether of coal, silver, or gold, have a market value, and that that value is to be ascertained as in other properties.

But appellant claims that the testimony as to the value must be based upon sales of the same or similar property. It is not necessary for us to decide whether or not evidence in chief may be given as to the sales of the same or similar property. The price realized upon a sale is certainly one of the grounds upon which opinion may be based; but it is not the only ground. Witnesses who know the property, and are familiar with the uses to which it may be put, can give their opinions as to the market value. The witnesses called by respondent had been living in the neighborhood of this property for many years, and during that time had been engaged in mining, and had bought and sold mines and prospects. They were competent to give their opinions. See cases already cited.

To establish such a rule as that stated by appellant, that actual sales of the same or similar property are the only test of value, would allow the condemnation of immensely valuable property at a nominal price only. Many of our most valuable mines stand isolated and alone; the property adjacent has never been sold; the mines have not been sold for years; and, following the rule invoked by appellants, those mines could be condemned for public purpose at the nominal value of a dollar. It is evident, at least, that such a rule could not apply to newly-settled and sparsely populated countries such as this.

Counsel for appellant have selected certain portions of the testimony of the respondent's witnesses given upon cross-examination, in order to show that their evidence was "mere guess-work." It would be a rare case where able counsel could not, on cross-examination, lead a witness to make some such statement. The better rule is to ascertain from the whole testimony whether or not the well-founded opinion of witnesses, or "guess work," is given. In this case it appears from an inspection of the whole record that the opinions which were given were based upon the requisite facts,—the description, the character of the land in question, and of property adjacent thereto.

The appellant also relies upon this: that the court charged the jury that the opinions of witnesses as to value must be based upon the sale or offers to sell the same or similar property; that the jury disregarded this instruction; and that, therefore, the verdict must be set aside, whether the instruction stated the true rule or not, because juries cannot disregard instructions given by the court. As matter of fact, each of the witnesses had knowledge of such

sales,—sales of the same and similar property. Some of the latter was at considerable distance from the Nipper lode, but it was not so far distant that the court can say that it found no test of the value of the Nipper lode. Whether or not such land was similar to the Nipper lode is a question involving, to a great extent, the discretion of the judge presiding upon the trial in the court below. *Benham v. Dunbar*, 103 Mass. 365.

The respondent was allowed to prove the value of the land for town-lot purposes. He had the right to do so, whether he had built upon it or not. As we have seen, the question is not to what use the land had been put. The owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether or not he so used it. See cases already cited.

The court instructed the jury that the respondent could not recover the value of the land for both purposes, and we cannot presume the jury disregarded the instruction, for it does not so appear from the testimony.

The remaining point is that of prejudice or passion. The verdict is not for a sum larger than the smallest amount given in the evidence for respondent as the difference between the market value of the property immediately prior to and after the taking. The verdict is larger than the largest sum fixed by appellant's witnesses. But there is a conflict of testimony, and this court is bound by the finding of the jury. The witnesses for appellant, moreover, admit that they never examined the property as mining property; that, when they looked at it, snow was upon the ground; that they never had assayed any of the ore taken therefrom. But the most important conflict of testimony was in this: that respondent's witnesses testify that, in their opinion, the vein of the Anaconda mine runs through the Nipper ground, while appellant's witnesses say, in their opinion, it does not; but they admit, if it does so run into the Nipper ground, it would add much to the value of that claim. There is an important conflict of testimony, and we cannot say that the jury disbelieves respondent's witnesses.

Those are all the errors complained of and relied upon in appellant's brief.

The transcript in this case contains 143 pages (type-writing) of testimony, which is a *verbatim* copy of the stenographer's notes. The questions and answers are not reduced to narrative form in any instance. Much of the testimony has no application to the points relied upon. There appear upon the record questions which were withdrawn after objections thereto had been made. It is certainly apparent that it is not such a record as should be filed in this court.

There being no error, the judgment and the order denying the motion for new trial are affirmed, with costs.

(6 Mont. 285)

BECK v. BECK and another.

(*Supreme Court of Montana. January 5, 1887.*)

1. NEW TRIAL—ON APPEAL—CONFLICT OF TESTIMONY.

The appellate court, on an appeal from an order denying a motion for new trial alone, on the ground that the evidence did not support the verdict, will not reverse such order, where there has been a conflict of testimony in the court below.

2. APPEAL—WHAT IS OPEN—ALLEGATION IN ANSWER NOT REFUTED—No OBJECTION BELOW.

A defendant cannot rely on an appeal from an order denying a motion for a new trial upon a failure of the plaintiff to reply to an allegation in the answer, which the appellant claims was new matter, when the point was not raised in the court below, either on the trial or on the motion for a new trial, and where the appellant treated it as denied, and produced evidence in support of it.

Appeal from district court, Gallatin county.

Vivion & Shelton, E. W. & J. K. Toole, and Wm. Wallace, Jr., for respondent, Amos W. Beck. *J. J. Davis and H. N. Blake,* for appellants, William and Julia Beck.

BACH, J. This action was brought for the purpose of obtaining a decree declaring the plaintiff to be the owner of certain water-rights, and that he be declared to be entitled to the use and enjoyment of the same; and also for a permanent injunction, restraining the defendants from interfering with the plaintiff in his use and enjoyment thereof. A verdict was rendered in favor of the plaintiff. A motion for a new trial was heard and overruled. An appeal was taken from the order denying said motion, and also from the judgment. There is no judgment in the record; and it does not appear from the record that any judgment has been entered from which an appeal could be taken; therefore, the only appeal which we are called upon to consider is that which is taken from the order denying the motion for a new trial.

The only point made by the appellant is that the evidence is insufficient to sustain the verdict, because it appears therefrom that defendant first appropriated the water; and, to sustain his position, he calls the attention of this court to portions of the evidence introduced by him in the court below. The record, as a whole, however, does show a decided conflict of testimony, upon all the material issues in the case. There being a conflict of testimony, this court cannot reverse the order denying the motion for a new trial. See *Lincoln v. Rodgers*, 1 Mont. 217; *Toombs v. Hornbuckle*, Id. 286; *Ming v. Truett*, Id. 322.

It is not necessary for this court to consider the effect of plaintiff's failure to reply to an allegation in the answer which the appellant claims was new matter. The point was not raised in the court below, either on the trial or in the motion for a new trial, and it cannot be raised in this court. The appellant treated the allegation as denied, and produced evidence to support it at the trial; and, further, in the instructions to the jury given at his request, appellant assumed the burden of proof as to that particular allegation. He cannot now claim that the allegation was admitted, and take advantage of his neglect at the trial of the cause. *Rucouillat v. Rene*, 32 Cal. 450; *Gale v. Water Co.*, 14 Cal. 28.

The order denying the motion for a new trial is affirmed, with costs.

(6 Mont. 287)

MCINTOSH and others v. HURST.

(*Supreme Court of Montana. January 8, 1887.*)

ATTACHMENT—BOND TO DISSOLVE—NOT SIGNED BY PRINCIPAL—ACTION AGAINST SURETY.
In an action against a surety, on an undertaking to prevent an attachment under Code Civil Proc. Mont. § 182, it is no defense that the defendant in the action in which the undertaking was given did not sign the undertaking as principal.

Appeal from district court, Dawson county.

Action against surety on undertaking to prevent attachment. Demurrer to complaint overruled. Defendant appeals.

A. F. Burligh and John Trumbull, for respondents, McIntosh and others.
No appearance for appellant.

BACH, J. This action was commenced in the probate court of Dawson county, and was brought against the defendant, as one of the sureties upon an undertaking to prevent an attachment which had been issued in an action pending in the district court of Dawson county, in which the plaintiffs herein were plaintiffs, and Charles H. Corbett was defendant. The undertaking is the one provided for in section 182 of the Code of Civil Procedure. The defendant demurred to the complaint in the probate court. The record fails to

show what disposition was made of the case in that court, and merely states that the case was, "from there, on motion, certified to the district court." In the district court the defendant demurred to the complaint, upon the ground that it did not allege facts sufficient to constitute a cause of action. The demurrer was overruled; and the defendant, failing to answer, judgment was thereupon entered in favor of the plaintiffs. From that judgment the appeal is taken.

The point raised by the appellant, and upon which the demurrer is based, is that the defendant in the action in which the undertaking was given, did not sign the undertaking as principal. It is unnecessary to refer to the authorities which the appellant cites in his brief. This court has already decided that, in an undertaking on attachment, the plaintiff need not sign as principal. See *Pierse v. Miles*, 5 Mont. 549; S. C. 6 Pac. Rep. 347. The same rule applies to an undertaking to prevent an attachment.

Judgment is affirmed, with costs.

(14 Or. 349)

COLEMAN v. ROSS, Sheriff, etc.

(*Supreme Court of Oregon. January 5, 1887.*)

SHERIFF—FEES—COMMISSION ON SALES—SESS. ACTS OR. 1885, PAGE 121, § 4.

Under section 4, Sess. Acts Or. 1885, p. 121, fixing sheriff's fees, "for all sums of money *actually made* on any process, and returned to the clerk, under \$1,000, three per centum, and on all sums over \$1,000 two per centum," a sheriff is not entitled to a commission on a sale of property on execution bid in by the execution creditor where the amount of his bid is credited on the execution; no money being *actually made* or returned to the clerk.

Appeal from circuit court, Clatsop county.

C. W. Fulton, for appellant, Coleman. *C. H. Page*, for respondent, Ross.

STRAHAN, J. The only question presented in this case involves the construction of the following language in section 4, Sess. Acts 1885, p. 121, fixing sheriff's fees: "For all sums of money *actually made* on any process, and returned to the clerk, under one thousand dollars, three per centum, on all sums over one thousand dollars, two per centum." In this case the plaintiff bid in the property, and the amount of his bid was credited on the execution, so that no money was in fact paid, except about \$74, which included all costs and disbursements in the case except the sheriff's commissions on the sale. The question, therefore, is this: Is the amount bid by the plaintiff at his execution sale a "sum of money *actually made* on any process, and *returned to the clerk*?" If it is, then the sheriff is entitled to the commission claimed; otherwise he is not. It seems to me it must be conceded at the outset that there was no sum of money *actually made*; nor was there any sum *returned to the clerk*. Both of these conditions must exist before the sheriff is entitled to commission. In other words, this court has uniformly adopted the rule of strict construction as applied to fees and costs and disbursements; and therefore, to entitle an officer or a party to fees or to disbursements, he must bring himself within the terms of the statute authorizing or requiring its payment. In construing a similar provision of the fee bill relating to the clerk's commission, this court, per *LORD, C. J.*, said: "The facts concede that no money was actually received, kept, or disbursed by the clerk. Will the rule of strict construction, applicable to such statutes, admit of the argument that there was a constructive receiving, keeping, and disbursing of this money which entitle the clerk to his commissions?" *Jackson v. Siglin*, 10 Or. 93. Such, also, is the effect of the language of this court in *Crawford v. Abraham*, 2 Or. 163, where, in speaking of a claim for disbursements, it is said: "The claim for disbursements must be for the number of miles *actually traveled*, and the number of days in *actual attendance* as a *witness, only*;" thus

excluding all possibility of constructive charges. So in *Howe v. Douglas Co.*, 3 Or. 488, this court expressly rejected the theory that a sheriff could receive payment for constructive mileage in executing certain papers in behalf of the county.

In this case the sheriff charged and received his regular fees for every official act performed by him in executing this process, such as for the levy, notices of sale, certificate of sale, and return; and it does seem to me to be an unreasonable claim for him to demand nearly \$400 for commissions when there was no money whatever received by him or paid over to the clerk, and no risk or liability incurred. Of course, if the statute plainly allows it, we have nothing to do with the question as to whether it is reasonable or not; but in cases of doubt it might be very material to consider the consequences of a particular construction. But in this case there can be no doubt of the legislative intent, and that was not to allow commissions unless the money was actually—not figuratively or constructively—received on the process, and then paid over to the clerk. Unless this language is to receive this interpretation, its careful and studied use by the legislature is without meaning and without effect.

Nor do I think a sheriff could lawfully demand or compel the plaintiff to pay over the amount of his bid in money when he happens to become the purchaser, and when he is entitled to receive it back again at once. *Fowler v. Pearce*, 7 Ark. 28. In such case, the whole purpose of the proceeding is accomplished when the amount of the bid is credited on the execution, and a certificate of sale issued, the costs paid, and the writ returned to the clerk. This enables the court to confirm the sale, to be followed in due time by the sheriff's deed, for which he is entitled to charge a specified fee.

Fiedeldey v. Diserens, 26 Ohio St. 312, tends very much to sustain our construction of this statute. It was there said: "The question argued by counsel is whether the master was entitled to poundage on the \$6,000, the purchase money of the property sold. The master was entitled to the same fees allowed to sheriffs in like cases, (Code, § 613;) and, by the statute regulating sheriff's fees, (S. & S. 365,) he is allowed poundage on all moneys *actually* made and paid to him. It seems to us that the common pleas was right in holding that this sum of \$6,000 was not money made and paid within the meaning of the statute." From the facts in this case it appears that one Burkett obtained a decree of foreclosure against Fiedeldey for \$1,800 due on mortgage, and for a sale of the mortgaged premises; that the defendant in error was appointed special master commissioner in the case. An order of sale was duly issued to him, and he made return thereon that he had made sale of the mortgaged premises to Joseph Longworth for the sum of \$6,000. The sale was in all respects regular and according to law; but, before the sale was confirmed, Fiedeldey paid the amount of the judgment to the plaintiff, Burkett. The court thereupon set the sale aside, and ordered Fiedeldey to pay the costs. Among other items was \$70 *poundage* on the \$6,000.

So, also, in *Dawson v. Grafflin*, 84 N. C. 100, it is held that a sheriff is entitled to commissions only on moneys actually collected by himself under execution, and not where the same is paid to the plaintiff by the defendant after levy.

I am aware there are numerous cases where sheriffs have been allowed commissions or "poundage" after a levy, and even when there was no money paid; but in no case that I have been able to find have any such allowances been made under a statute containing the guarded language to be found in ours.

I think the judgment should be reversed, and the cause remanded to the court below for further proceedings.

LORD, C. J., concurs. THAYER, J., expresses no opinion.

(4 N. M. [Gild.] 29)

LAMY v. LAMY.*(Supreme Court of New Mexico. January 8, 1887.)*

1. **ERROR—ASSIGNMENT—FAILURE TO FILE IN TIME.**
Where no assignment of errors is filed within the time required by law, the supreme court of New Mexico will dismiss the writ of error.
2. **SAME—BRIEF—EFFECT.**
A brief in the usual form, containing, under the head of "Assignment of Errors" a statement that the trial court erred in certain particulars which are set forth, is not, in legal effect, an assignment of errors, and the supreme court of New Mexico cannot consider it as such.

Error to district court, Santa Fe county.

LONG, C. J. This cause is here by writ of error under section 2194 of the Compiled Laws. *Præcipe* for writ was filed August 25, and it issued September 30, A. D. 1885. A transcript of the proceedings in the court below was filed with the clerk of this court, and the cause docketed December 23, 1885. The supreme court, at its last term, convened on the fourth day of January, A. D. 1886, and on the second day of that term the defendant in error, by Catron, Thornton & Clancy, appeared, and on the same day leave was asked by plaintiff for time in which to file brief, and it was given. On the eighth day of January, within the time so extended, plaintiff filed his brief. To that date there was no assignment of error, and four days of the term had expired. The printed brief is in the usual form. Its title-page contains the name of the court and the term wherein the cause is pending, and the words "Brief of Plaintiff in Error," with the signature of the solicitor who appeared for him. The brief contains subdivisions printed under prominent head-lines as follows: "Statement of the Cause," "Assignment of Errors," "Points and Authorities." Following the first subdivision is a narration of the proceedings in the court below as shown by the record. Under the words "Assignment of Errors" is a statement that the court erred below in six particulars, which are named, and then follow the points and authorities relied upon, and the signature of the plaintiff's solicitor as such.

It is not contended by plaintiff that the cause was not returnable at the January term, A. D. 1886, but he claims that his brief is, in legal effect, an assignment of errors; and, although not filed until the fourth day of that term, the court should not for that reason disregard it. On the other hand, the defendant moves to dismiss the writ for the alleged reason that plaintiff did not assign error on or before the first day of the January term, A. D. 1886; and the question for the court now to determine is whether or not this motion shall be sustained.

It is clear that error was not assigned "on or before the first day of the term at which the cause is returnable." There is no claim or pretense of assignment within that time. Unless the contents of the brief can be regarded as an assignment of error, there is none at this time.

Can the brief be treated as such an assignment as the law requires? Bouvier defines a brief to be "an abridged statement of the party's case;" "a summary of the points or questions in issue;" "this statement should be perspicuous and concise." In general legal usage, a brief is in no sense a pleading. It contains a statement of the facts shown by the record, and the points, authorities, and arguments relied upon to sustain the contention presented for consideration. It is in the nature of an argument.

What is an assignment of error? "In practice, the statement of the case of the plaintiff, setting forth the errors complained of. It corresponds with the declaration in an ordinary action. All the errors of which the plaintiff complains should be set forth and assigned in distinct terms, so that the defendants may plead to them." Bouv. 197. "An assignment in error is in the nature of a declaration, and is either of errors in fact or errors of law."

2 Tidd, Pr. 1168. "To an assignment of errors the defendant may plead or demur." Id. 1173. "Issue being joined in error, the proceedings are entered of record." Id. 1175, 1176. "In the house of lords, when the defendant hath joined in error, the cause is set down to be heard in turn."

The author of Powell on Appellate Proceedings, after discussing the manner in which causes may be carried into the appellate court, proceeds: "The next matter in the course of procedure is the pleadings of the parties preparatory to their coming to a hearing. These pleadings consist, on the part of the plaintiff, of his assignment of those errors of which he complains, and, on the part of the defendant, his pleas or answer thereto." "Assignment of error is as indispensable in these proceedings as a declaration and cause of action in the original cause." Powell, App. Proc. 277. To the errors so assigned the defendant must plead or demur within the time allowed by the rules of the court. Id. 280.

In *Hinkle v. Shelley*, 100 Ind. 89, it is held: "In this court the assignment of error is the complaint of the appellants, and, like a complaint in the trial courts, it must be good as to all who join therein, or it will be good as to none." See, also, *Robbins v. Magee*, 96 Ind. 176, to the same point.

"An assignment of error is indispensable. It is a pleading upon which an issue is to be made by demurrer, joinder, or plea." *Wells v. Martin*, 1 Ohio St. 388.

Authorities to the same effect could be multiplied. It is apparent that an assignment of error is in the nature of a pleading, and, while it might properly be copied into the brief as a part of the statement of the cause, it should be made in some more formal way. It may be much doubted whether it is good or permissible practice to omit a formal assignment, relying on the recitals of the brief to supply the omission.

Adams v. Munson, 3 How. (Miss.) 77, is in point on the motion here. In that case a rule of court required error to be assigned by a particular time, and because of an omission to do so the cause in which the question arose, and 18 others involving the same point, were dismissed, on motion in the appellate court, with the observation: "Error must be assigned within the time prescribed by the rule, or the case will be dismissed on motion."

To the same effect is *Tucker v. Ellis*, 1 Ark. 273. Section 11 of the statute of that state is as follows: "In appeals and writs of error the appellant and plaintiff in error shall assign errors on or before the third day of the term to which such appeal or writ of error is returnable, and, in default of such assignment of errors, the appeal or writ of error may be dismissed, or the judgment affirmed, unless good cause for such failure be shown." On the foregoing statute, in the supreme court of Arkansas, the cause was affirmed by reason of appellant's failure to assign errors in time.

The clause of section 2189, Compiled Laws, which controls the practice here, is identical with the statute of Arkansas on the same subject, and was adopted after the foregoing decision. It is safe to follow the courts of Arkansas and Mississippi upon a rule identical in terms with our own.

It is not necessary to decide whether the plaintiff's brief constituted also an assignment of errors, as that was not filed until the fifth day of the term. It is apparent, however, from the authorities cited, that the assignment of errors is in the nature of a pleading. It is the foundation of the plaintiff's cause in this court, and without it he can have no standing here. To this assignment the court must look for the questions to be determined. Upon it the issue is made. In this cause there is no record of any such pleading. There is no application to the court, showing an excuse for omitting to assign errors at an earlier day, for leave to now assign them.

It is, however, contended by plaintiff that the recital in the brief is at least evidence that an effort was made in good faith to comply with the statute, and therefore that good cause is shown for the failure to make a strict compli-

ance therewith. If the defendant's motion were to dismiss because no assignment of error was made on the fifth day of the term, the argument might have some force. It is not, however, perceived how an effort to assign errors on the fifth day of the term can constitute any excuse for failing to do so on the first day. Ten days passed between the date when the transcript was filed and the commencement of the term, and no reason whatever is given for failure, within this period, to make the necessary assignment. In addition, four more days passed, and no leave was asked for time within which to assign errors, nor was any cause shown why they had not been assigned before, nor cause given for delay. The interest of the bar and of litigants will be best subserved by holding a reasonably strict rule; otherwise a lax, irregular practice will prevail, tending to confusion and delay. The requirements of the statutes are in such clear terms as to preclude misapprehension. The authorities define beyond doubt the character and office of an assignment of error. Under such conditions, the failure to comply with a clear and obvious requirement cannot constitute such an excuse as to invoke the discretion of the court to relax the rule of the statute. Discretion cannot, or at least should not, be exercised so as to create delay, without facts upon which to predicate the exercise of discretion.

The motion of the defendant is sustained, the writ of error is dismissed, and the costs occasioned thereby taxed against the plaintiff.

BRINKER and HENDERSON, JJ., concur.

(6 Mont. 288)

SILVER BOW MINING & MILLING CO. v. LOWRY.

(*Supreme Court of Montana. January 5, 1887.*)

1. SALE—CONDITIONAL SALE—ATTACHMENT FOR PURCHASER'S DEBTS.

Where, on a sale of chattels, it is agreed between the parties that the property shall be delivered to the purchaser, but that the title shall remain in the seller, and the purchaser shall not be the owner thereof until he has paid the purchase money in full, the property is not subject to attachment for such purchaser's debts, but the ownership remains in the seller; following *Heinbockle v. Zugbaum*, 5 Mont. 345; 8. C. 5 Pac. Rep. 897.¹

2. SAME—ABSOLUTE SALE—NOTE AND MORTGAGE FOR PURCHASE PRICE.

If the seller, at the time of the delivery of the property, takes a note from the purchaser for the purchase price, and takes a mortgage on other property to secure the note, then the sale is an absolute sale, notwithstanding an agreement between the parties that the title to the property sold should not pass until the note was paid.

3. SAME—REDHIBITORY ACTION—NEW TRIAL.

Where, in an action of claim and delivery, in which the plaintiff maintains that the chattels claimed were sold conditionally, and defendant maintains the sale was absolute, the evidence shows that the transaction was an absolute sale, the trial judge ought promptly to set aside a general verdict in plaintiff's favor, and grant a new trial.

4. SAME—ABSOLUTE OR CONDITIONAL—EVIDENCE.

In an action of claim and delivery for goods alleged by plaintiff to have been sold on the condition that the title should not pass until the purchase money was paid in full, but claimed by defendant to have been sold absolutely, where it appears that the property was delivered to the purchaser; that he was charged up with the purchase price on plaintiff's books; that he gave to plaintiff a note for the amount of the purchase money, bearing interest, and a mortgage on other chattels than

¹As to the validity of a sale of chattels followed by delivery, but reserving the title in the vendor subject to the performance of a condition by the vendee, see *Marvin Safe Co. v. Norton*, (N. J.) 7 Atl. Rep. 418; *Cooley v. Gillan*, (Conn.) 6 Atl. Rep. 180; *Dixon v. Blondin*, (Vt.) 5 Atl. Rep. 514; *Rafferty v. McKennan*, (Pa.) 1 Atl. Rep. 546; *The Marina*, 19 Fed. Rep. 760; *Blackwell v. Walker*, 5 Fed. Rep. 419; *Baals v. Stewart*, (Ind.) 9 N. E. Rep. 403; *Marquette Manufg Co. v. Jeffery*, 13 N. W. Rep. 592; *Smith v. Lozo*, (Mich.) 3 N. W. Rep. 227; *Warner v. Jameson*, (Iowa,) 2 N. W. Rep. 961; *Heinbockle v. Zugbaum*, (Mont.) 5 Pac. Rep. 897; *McIntosh v. Hill*, (Ark.) 1 S. W. Rep. 680; *Paine v. Hall's Safe & Lock Co.*, (Miss.) 1 South. Rep. —.

those purchased to secure such note; and that the cattle, when levied on under writs of attachment against the purchaser, were found in his possession,—it will be held that the sale was an absolute sale, and that the property was subject to attachment for the purchaser's debts.

Appeal from district court, Silver Bow county.

W. W. Dixon, for appellant, Silver Bow Mining & Milling Co. *Knowles & Forbis*, for respondent. Lowry.

McLEARY, J. This was an action of claim and delivery brought by the appellant to recover certain oxen, and a wagon, chains, etc., alleged to be the property of appellant, and wrongfully detained from it by the respondent. The respondent, being the sheriff of Silver Bow county, after special denials, justifies the taking and holding of the property by virtue of certain writs of attachment issued in suits against Oscar Durand, and alleges that the property had been taken from the possession of respondent by the coroner, under process in this suit, and delivered to the appellant.

The main issue in this case, as made by the pleadings, is this: Were the wagon, oxen, and chains, at the time of the taking, the property of Oscar Durand, or of the Silver Bow Mining & Milling Company? The jury found a verdict in favor of the plaintiff for the property, and one dollar damages and costs; and the court granted a new trial, on motion of the defendant. From the order granting a new trial the plaintiff appeals. The new trial may have been granted for any one or all of the several reasons assigned by the defendant in his motion therefor, to-wit: (1) Errors of law—*First*, in admitting the testimony of Joseph Perron over objections; *second*, in giving the instructions asked by the plaintiff; *third*, in refusing instruction asked by defendant. (2) Insufficiency of the evidence to justify the verdict—*First*, because the evidence shows that the sale was absolute.

1. As to permitting the question to the witness Perron. The question was as follows: "Did you ever have any dealings with Durand with reference to these cattle, and did you ever buy any of these cattle from Durand?" Plaintiff's counsel stated that the evidence was for the purpose of contradicting Durand, and showing that Durand had previously sold cattle to witness, and subsequently mortgaged the same cattle to the plaintiff. Defendant's counsel objected that Durand had not given any testimony with reference to any sale to Perron, and hence such answer would not contradict Durand; and, if such evidence was to be given to impeach Durand by disproving his character for honesty and integrity, that testimony as to specific acts of a witness was not admissible for this purpose. The statement shows that Durand had not testified on the subject, and the question could not have been properly asked for the purpose of contradiction.

Was the question admissible for the purpose of showing the bad character of Durand for honesty and integrity? The statute reads: "A witness is presumed to speak the truth. This presumption, however, may be repelled by evidence affecting his character for truth, honor, or integrity." Rev. St. Mont. § 601, 1st Div. p. 153. But such evidence should, according to the weight of the best authorities, be confined to the general reputation of the witness, and it is not permitted to introduce evidence of particular facts; for "every man," says Greenleaf, "is supposed to be capable of supporting the one; but it is not likely he should be prepared to answer the other without notice." Greenl. Ev. § 461, pp. 508, 509.

But the plaintiff's counsel claims that the question was admissible, because the answer shows "the improbability that the appellant received the mortgage as security, and confirmed the testimony on the part of the appellant that it would not accept the mortgage." Such evidence would have a very remote bearing upon the case from a point of view such as this, and is certainly impertinent even for this purpose, unless the appellant was shown to

have some knowledge of these transactions between Durand and Perron, and to have acted on such knowledge. But neither the president nor the secretary of the company testified to any such knowledge, and the presumption is that the appellant knew nothing of it at the time. For the reasons given, we cannot think the question to the witness Perron admissible for any purpose, and are compelled to hold that its admission was error for which the court below was justified in granting a new trial.

2. Did the court err in giving the instruction asked by the plaintiff? This instruction reads as follows: "If the jury believe from the evidence that the agreement, made in 1882, between the plaintiff, by James A. Talbot, its president, on the one part, and Oscar Durand on the other part, in reference to the cattle and other property described in the complaint, was that the property should be delivered to said Durand, but that the title thereto should remain in plaintiff, and Durand should not be the owner of said property until he had paid the purchase money therefor, then, until such purchase money was paid, no title in the property vested in Durand, and the property was not subject to attachment for Durand's debts, but the ownership thereof remained in plaintiff, and the jury will find a verdict for plaintiff." This instruction appears to be correct, and is in accordance with the principle announced by this court in the case of *Heinbockle v. Zugbaum*, 5 Mont. 345; S. C. 5 Pac. Rep. 897.

Payment by the purchaser may be made a condition precedent to the passage of the title, although the possession of the goods may be delivered to the vendee. Benj. Sales, (2d Amer. Ed.) p. 274, and note *d*, with cases there cited; *Russell v. Harkness*, 7 Pac Rep. 865; cases cited in 5 Mont. 350 *et seq.*, and 5 Pac. Rep. 897; *Call v. Seymour*, 40 Ohio St. 673; *Coggill v. Hartford & N. H. R. Co.*, 3 Gray, 546 *et seq.*; *Zuttmann v. Roberts*, 109 Mass. 54; *City Nat. Bank v. Tufts*, 63 Tex. 115 *et seq.*, and cases cited; *Woods v. Half*, 44 Tex. 634; *Harkness v. Russell*, 7 Sup. Ct. Rep. 51.

3. Did the court err in refusing the fifth instruction asked by the defendant? This instruction reads as follows: "(5) If the Silver Bow Mining & Milling Company, at the time of the delivery of the property in controversy to Durand, took a note from Durand for the purchase price, and took a mortgage on other property to secure the note, then was the sale an absolute sale, notwithstanding there may have been an agreement between the parties that the title to the property sold should not pass until the note was paid."

The mere fact that the vendor took the note of the purchaser for the purchase price would not make the transaction an absolute sale, as has been heretofore decided in the case of *Heinbockle v. Zugbaum*, 5 Mont. 345; S. C. 5 Pac. Rep. 897; and in *Call v. Seymour*, 40 Ohio St. 673; *Heryford v. Davis*, 102 U. S. 245; and other cases. Would the additional fact, that a mortgage was taken on other property to secure the payment of such notes, necessarily render the sale absolute? If the sale was merely conditional, the taking of a mortgage on other property would be utterly useless. There is no stipulation for hire to be paid at stated times, to secure which the mortgage could have been supposed to have been given. On the contrary, the mortgage introduced in evidence was given to secure the \$750, the purchase price of the wagon and oxen, etc., sold to the mortgagor. To hold that this would be consistent with a conditional sale would be going beyond any decision which has fallen under our notice. The instruction refused states the law as laid down by the current of authorities, and should have been given to the jury. *Heryford v. Davis*, 102 U. S. 246.

4. Does the evidence show that this transaction was an absolute sale, and not a conditional one? If so, the judge of the trial court ought, in the exercise of a sound discretion, to have set the verdict aside, and granted a new trial. Such a case has no analogy to the finding of a jury on the amount of damages suffered by a party, or to cases of conflicting evidence upon any par-

ticular question of fact. This is a mixed question of law and fact, in which the error of a jury ought to be promptly and unhesitatingly corrected by the trial court. The jury returned a general verdict for the plaintiff. The evidence contained in the record was not sufficient to support this verdict, and the court very properly granted a new trial.

There is a conflict of evidence as to a conversation which took place in the month of May, 1882, at the time the property was delivered, to the effect that the wagon, oxen, etc., were to remain the property of the Silver Bow Mining & Milling Company until the purchase price was paid. But there is no doubt that the property was delivered to Durand, and that he gave an order on the Parrott Company for the \$750, to be paid therefor, and that he was charged up, on the books of the Silver Bow Mining & Milling Company, with nine head of cattle, chains, and wagon, \$750; and that on the non-payment of the order on the Parrott Company, that Durand, on the thirteenth of July, 1882, gave a note for \$750, bearing interest at the rate of 1½ per cent. per month, and a mortgage on 20 head of work cattle, other than those purchased, to secure the payment of this note; that the note was payable on the twenty-seventh day of August, 1882, and the writs of attachment were levied on the oxen and wagon, etc., in October, 1882, found in possession of Durand. All these facts, taken together, show that the sale made by the Silver Bow Mining & Milling Company to Durand was an absolute sale, and that the property was subject to the attachment; and the whole current of authority, as far as we have had the leisure to examine, has been to that effect. *Boynton v. Libby*, 62 Me. 254.

Since this case was submitted, and, in fact, since the foregoing opinion was written, counsel for appellant has submitted for the consideration of the court the case of *Harkness v. Russell*, 7 Sup. Ct. Rep. 51, decided by the supreme court of the United States, on an appeal from the supreme court of Utah, on the eighth day of November last, in which Justice BRADLEY, in a very exhaustive and able opinion, reviews all, or at least a great many, of the decisions rendered involving the doctrine of conditional sales. This case has been carefully considered by this court, and we do not find anything therein contained at variance with the views herein expressed. On the contrary, it is an authority to sustain us in the opinion that the trial court, in this case, properly gave the instruction asked for by appellant in regard to the payment of the purchase money being a condition precedent to the passage of title, if so intended by the parties.

Taking the view that we do of this case, it is not necessary to antagonize any of the cases cited by the appellant.

For the reasons hereinbefore given the court below properly granted the new trial, and the said order is affirmed.

(6 Mont. 295)

HARTMAN, Probate Judge, etc., v. SMITH and others.

(*Supreme Court of Montana. January 11, 1887.*)

ACTION—PARTIES—PROBATE JUDGE—TRUSTEE OF EXPRESS TRUST—TOWN SITES—CODE CIVIL PROC. MONT. § 6.

The probate judge in Montana territory, in relation to town sites, is the trustee of an express trust, and has the authority to sue, under section 6 of the Code of Civil Procedure, to protect his title as such.

Appeal from Gallatin county, First district.

Suit to protect title to a certain tract of land known as the "town-site of Cooke." On demurrer to the complaint, the court rendered judgment for defendant. Plaintiff appealed.

Charles S. Hartman and Henry N. Blake, for appellant. *Vivion & Shelton*, for respondents.

WADE, C. J. This is an appeal from a judgment in favor of respondents, rendered in consequence of sustaining a demurrer to appellant's complaint, which he, declining to amend, abides the same, and submits the question of its sufficiency to this court. The complaint substantially alleges that on or about the twenty-third day of August, 1884, the probate judge of Gallatin county entered, in pursuance of law, and purchased at the proper land-office, a certain tract of land, consisting of about 48 acres, known as the "town-site of Cooke," in trust for the several uses and benefits of the inhabitants of said town-site, according to their respective interests; that the appellant is the successor in office of said probate judge, and, as such, is the trustee, and is seized in fee, of certain parcels and lots of said town-site, which are described, and which it is alleged the respondents claim, as a mill-site appurtenant to a certain mining claim, for which they are seeking to obtain a patent from the United States, and which claim of the respondents is declared to be without right or title.

As to the sufficiency of this complaint, the demurrer is an admission that all material matters, properly alleged therein, are true. It appears from the complaint that the probate judge of Gallatin county, in pursuance of the acts of congress, and the statutes of the territory in relation thereto, entered the town-site of Cooke in the proper land-office, and purchased from the United States the lands embraced in said town-site, in trust, for the several uses and benefits of the inhabitants of said town-site. These proceedings appear to have been authorized by, and in pursuance of, the statutes applicable to such cases. For all the lands embraced within a town-site, and lawfully entered as such, the probate judge receives a patent, a title in fee, which title he holds in trust for the occupants; and, when such occupants have complied with the statute, said trustee is required to make to such occupants good and sufficient deeds to the property, according to their respective rights and interests. These statutes, in relation to town-sites on the public domain, belong to our general system of pre-emption laws, and were enacted in order to devise means whereby the real owner might become possessed of a good and sufficient title to his property. If, after all the occupants and claimants have received from the probate judge titles to their lots, according to their respective rights and interests, and there is a residue of lots remaining in the possession of the probate judge, and unclaimed for the period of 60 days, it then becomes the duty of the probate judge to post notices, and to offer so many of such remaining lots for sale as he may think proper; and thereafter the lots remaining unsold become subject to private entry, at the minimum price. The probate judge continues to hold the title in fee to the unclaimed and unsold lots until they are finally sold in the manner provided by law. His trust continues in full force until all the lots and parcels embraced within the town-site, and subject to the operation of the town-site acts, are sold and disposed of; and, having the title in fee, he has the right to defend and protect his title, like an owner, until, in pursuance of the law, his trust shall cease.

It is immaterial by what right or title the respondents claim the property described. If the same was not subject to town-site entry, or was exempted from the operation of the town-site patent, a trial would make these facts to appear; and, if the claim of respondents has to do with the unclaimed or unsold lots embraced in the town-site of Cooke, the probate judge has the right, and it is his duty, to protect his title as trustee until a better title is shown. The probate judge, as to town-sites, is the trustee of an express trust, and his authority to sue is given by section 6 of the Code of Civil Procedure.

The judgment is reversed, and the cause remanded for a new trial.

(4 N. M. [Gild.] 21)

COLEMAN and others v. BELL and others.

(Supreme Court of New Mexico. January 8, 1887.)

1. **EJECTMENT—IMPROVEMENTS—FAILURE TO ASK FINDING ON VALUE OF LAND WITHOUT.**
Where, in an action of ejectment, which was tried by agreement without a jury, the defendant obtained judgment for improvements upon the lands, and the plaintiff did not, by pleadings or by motion for new trial, ask the court to find the value of the lands without improvements, the supreme court of New Mexico will not, for the failure of the judge to find upon such point, reverse the judgment.
2. **NEW TRIAL—MOTION—DISCRETION OF COURT—BILL OF EXCEPTIONS.**

A motion for a new trial in the federal courts is addressed to the discretion of the court, and the decision of the court, in granting or refusing it, alone is not the proper subject of a bill of exceptions.

Error to the district court, San Miguel county.

Ejectment. Trial without a jury. Judgment that plaintiffs obtain possession of the lands on payment of the sum of \$500 to the defendants for improvements made by them. Plaintiffs bring error.

Wm. Breeden and Louis Sulzbacher, for plaintiffs in error. *Lee & Fort*, for defendants in error

HENDERSON, J. This was a suit in ejectment, brought by plaintiffs in error, to recover possession and right of his wife, Fannie Coleman, of a certain lot of land in Las Vegas, against defendant in error. It was commenced at the March term, 1884. Defendants appeared, and entered their plea of not guilty. By stipulation of the parties in writing a jury was waived, and a trial had before the court. The trial began at the March term, 1884, but was not completed until the March term, 1885. The defendants obtained leave to file notice of their claim of permanent improvements, and to have same assessed by the jury. The claim and notice were filed in proper time, to which the plaintiffs replied, and filed notice that they would claim rents and profits of the premises while held by defendant. The stipulation filed by which a jury was waived is in the words following, to-wit: "It is hereby stipulated and agreed, between the plaintiffs and defendants to the above-entitled cause, that the said cause shall be tried before the court, without the intervention of a jury, and that a jury is hereby waived, and that the court make special findings as to the law and facts on all material questions that may be reviewed, and that either party shall have the right to take said cause to the supreme court of this territory, and have the same reviewed, the same as if it had been tried by a jury, and, especially, the said supreme court may review the special findings of the court as to the law and facts, if asked for by either party." This agreement was signed by counsel of the respective parties. The defendants obtained leave therefor, and filed an additional plea, setting forth more fully than in the notice his possession under a deed conveying the title to him, and that he had "made divers valuable improvements upon the said premises, to-wit, of the value of one thousand dollars," and prayed to have the value of his said improvements assessed in this form as of the date of the judgment to be given against him for the possession thereof, in case such judgment shall be given, and that the value of such improvements be adjudged a lien upon the land.

The findings of the court, as they appear upon the record, are as follows: "That said plaintiffs are entitled to the possession of the premises described in the declaration; that the amount of mesne profits accrued to said defendants for the said premises is three hundred dollars; and that the value of the permanent improvements made upon said premises by said defendant is eight hundred dollars; and that defendant shall recover of said plaintiff the sum of five hundred dollars, the difference of the value of the improvements and the mesne profits; and thereupon the said plaintiff gave notice of a motion for a new trial and an arrest of judgment."

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A motion for a new trial was made and overruled. Plaintiff then moved an arrest of judgment in these words: "And now come the plaintiffs, by their attorney, and move the court to arrest the judgment in said cause upon the finding in favor of said defendants, for the value of the alleged improvements upon the premises in question, because the said second plea is unauthorized by law, and no judgment in favor of said defendants in said plea can be lawfully entered. And for other errors apparent upon the record in said cause."

This motion was also overruled. Then follows a judgment in favor of the plaintiff for possession of the premises in suit, and \$500 for the defendant on account of permanent improvements. The plaintiffs under this judgment were required to pay the \$500 adjudged to defendants before the writ of possession should issue. An appeal was prayed and granted. An appeal-bond was filed in the sum of \$1,000; and that portion of the judgment in favor of defendants was superseded, and execution stayed. The writ of possession was, however, thereupon ordered to issue forthwith.

The following errors are assigned: (1) The court erred in rendering a judgment upon the verdict or findings by the court which did not show the value of the land in controversy, in its natural state, without improvements. (2) The court erred in refusing and overruling plaintiffs' motion for a new trial. (3) Other errors and erroneous rulings appear on the face of the record.

The question presented by the first assignment of error was not made in the court below. There was nothing in the pleadings to call for an inquiry into the value of the land, in its natural state, without improvements. The plaintiff in error did not, by his motion for a new trial, or otherwise, present the question for the determination of the court below, either in its findings, or in considering the errors complained of in the motion for a new trial. It is well settled, both in this territory and elsewhere, that the appellate court will not consider alleged errors to which the attention of the court below was not called. The party alleging errors "must call the attention of the trial court by seasonable objections to the proceeding or error complained of, and, upon an adverse decision, except to the action of the court at the time." *Williams v. Thomas*, 9 Pac. Rep. 356; Comp. Laws, § 2188.

The supreme court of the United States, in the case of *Wood v. Weimar*, 104 U. S. 786, said: "The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly."

The court below did not, directly or indirectly, pass upon the question of the value of the land without the improvements. The plaintiff in error did not complain of or object to the finding of the court on that account. If our statute is to be construed as a somewhat similar one in Virginia has been, it would devolve the duty upon the plaintiff to present an issue upon which proof of the value of the land, without the improvements, could be ascertained. The statute, it is true, is not explicit. It does not in terms make it the duty of the plaintiff to raise the issue as in Virginia; still, as the provision is obviously for the benefit of the plaintiff, to enable him to elect whether he will accept the value of the land without the improvements, rather than to pay for the improvements, the duty is upon him to have such issue raised and decided. He did not do so. *Goodwyn v. Myers*, 16 Grat. 336.

We find no exceptions in the record taken to the action of the court below in overruling the motion for a new trial. There was no bill of exceptions. A motion for a new trial in the federal courts is a motion addressed to the discretion of the court, and the decision of the court, in granting or refusing it, alone is not the proper subject of a bill of exceptions. *Henderson v. Moore*, 5 Cranch, 11; *McLanahan v. Universal Ins. Co.*, 1 Pet. 183; *U. S. v. Buford*, 3 Pet. 32; *Barr v. Gratz*, 4 Wheat. 218; *Brown v. Clarke*, 4 How. 4.

The universal rule of practice is that matters resting entirely in discretion

are not re-examinable in the court of errors. *Pomeroy v. Bank of Indiana*, 1 Wall. 592; *Rosenthal v. Chisum*, 1 N. M. 633; *Springer v. U. S.*, 102 U. S. 586.

Finding no error in the record, the judgment of the court below is affirmed, with costs.

I concur: BRINKER, J.

LONG, C. J. I concur in the conclusion reached. There is no evidence in the record, and therefore nothing to show the error complained of and pointed out in the appellants' brief. I do not think it necessary to construe the statute referred to in the close of the opinion, and do not express any opinion as to the practice thereon.

(5 Utah, 89)

BROOKS v. WARREN and others.

(*Supreme Court of Utah. January 17, 1887.*)

PROHIBITION, WRIT OF—WHEN GRANTED.

A writ of prohibition will not be granted when the thing sought to be stopped is already done.

Application for writ of prohibition.

Sheeks & Rawlins, for applicant. *J. N. Kimball and A. R. Heywood*, for defendants.

BOREMAN, J. This is an original proceeding in this court. It is an application for a writ of prohibition. The plaintiff had instituted an action against the defendant, Warren, in a justice's court, for forcible entry, and the justice gave judgment for the plaintiff for restitution of the property, and the plaintiff was put in possession thereof.

The defendant, Warren, appealed the case to the district court, and, on trial in the district court, judgment was rendered for said defendant, Warren, and he was restored to the possession, the court refusing to stay proceedings, or to fix the amount of a stay-bond. The plaintiff thereupon applied for the writ of prohibition against said Warren and his attorneys, and the United States marshal. An alternative writ was issued, returnable to this term of this court; but it was not served until said Warren had been restored to the possession of the property. In the petition for the writ, it was stated that the injury sought to be prevented by its issuance was the placing of said Warren in possession, and this was all that was prayed to be prohibited.

The office of the writ of prohibition is to "arrest proceedings." It commands the person to whom it is addressed not to do some act which the petitioner says he is about to do. It is not a command to do some act, but a command not to do it. If the thing sought to be stopped is already done, there is no office for the writ. The supreme court of the United States says: "If the thing be already done, it is manifest the writ of prohibition cannot undo it; for that would require an affirmative act, and the only effect of a writ of prohibition is to suspend all action, and to prevent any further proceedings in the prohibited direction." *U. S. v. Hoffman*, 4 Wall. 158. We see nothing that this court can do, in the present proceedings, towards replacing plaintiff in the position occupied by him at the time the judgment was rendered. The matter of costs in the district court, to which our attention has been called, is not in question, as that is not an injury sought to be prevented, and the writ is not prayed to arrest the collection of the costs; and, besides, the subject of costs is covered by the appeal-bond of \$300, which was filed.

The application for the writ of prohibition is therefore denied. Judgment for costs goes in favor of the defendants.

ZANE, C. J., and HENDERSON, J., concurring.

(6 Utah, 182)

BULLION BECK & CHAMPION MIN. CO. v. EUREKA HILL MIN. CO. and others.

(*Supreme Court of Utah. January 18, 1887.*)

1. INJUNCTION—SETTING ASIDE ORDER—AFTER TERM.

An injunction granted in favor of an appellant pending the appeal may be set aside, even after the term at which it was granted, if the court had not jurisdiction to grant it.

2. SAME—UPON APPEAL TO SUPREME COURT OF UNITED STATES—TERRITORIAL COURTS.

A territorial court, writs of error and appeals from which to the supreme court of the United States are allowed and taken "in the same manner and under the same regulations as from the circuit courts of the United States," can grant an injunction in favor of plaintiff, pending an appeal taken by him from such court to the supreme court of the United States.

Motion to dissolve injunction.

W. H. Dickson and M. Kirkpatrick, for the motion. *Arthur Brown and J. G. Sutherland, contra.*

ZANE, C. J. It appears from this record that the appellant was the owner of mining claim lot No. 76, and that lot No. 39, owned by respondent, was immediately east thereof; that more than 100 feet beneath the surface of the first-mentioned lot there was a valuable mineral vein, the apex of which was claimed by both parties to lie within their surface lines vertically extended downwards, and by virtue thereof they both asserted ownership and possession of the vein, and commenced mining it. It also appears that appellant filed a complaint for trespass and for an injunction against respondent, and that respondent filed an adverse claim against appellant, in which it asked that the right of possession and ownership might be adjudged to it, and for an injunction. By consent both parties were enjoined from working the mine until final decree, which was entered on January 18, 1886. From this decree appellant prayed an appeal to this court, and for an order restraining defendant from mining. This was granted for the period of 26 days in which to perfect the appeal. This was done, and the decree of the court below was affirmed at the last term, and at the same time an appeal was prayed to the supreme court of the United States, and an injunction was also asked and granted, restraining respondent from working the mine during the pendency of the appeal. This injunction the respondent now moves the court to dissolve, for the reason, as alleged, that the court issued it without jurisdiction, and the appellant insists that the court should not consider the motion, for the reason that the term has passed at which the restraining order was made.

We will first consider the point made by the complainant. If the restraining order was made without jurisdiction it is void; while the court from its record declares that it is valid, and will continue to do so until it is set aside. If the order is void, the court ought to say so on its record, that its dignity may be preserved, and that persons who may wish to rely upon the order may not be deceived and led into errors. We hold that this court may set aside the restraining order in question for want of jurisdiction, though made at the last term, if it shall be of the opinion that the order was made without jurisdiction. In this view we are supported by the following authorities: *Ex parte Crenshaw*, 15 Pet. 119; *Shuford v. Cain*, 1 Abb. 302; *Freem. Judgm. (3d Ed.)* § 96, pp. 78, 100.

This brings us to the respondent's point: Had this court power to make the restraining order in question? The third section of an act of congress in

relation to courts and judicial officers in the territory of Utah provides "that district courts shall have exclusive original jurisdiction in all suits or proceedings in chancery," etc. Comp. Laws Utah 1876, p. 53. And section 9 of "An act to establish a territorial government for Utah" provides for writs of error and appeals from district courts to the supreme court of the territory, and, in the following language, from the latter to the supreme court of the United States: "Writs of error and appeals from the final decisions of said supreme court shall be allowed and may be taken to the supreme court of the United States in the same manner, and under the same regulations, as from the circuit courts of the United States," etc. Comp. Laws Utah 1876, p. 31.

In the case of *Hovey v. McDonald*, 109 U. S. 150, S. C. 3 Sup. Ct. Rep. 136, appealed from the supreme court of the District of Columbia, the court said: "In this country the matter is usually regulated by statute or rules of the court, and, generally speaking, an appeal, upon giving the security required by law, (when security is required,) suspends further proceedings, and operates as a *supersedeas* of execution. This we have seen is the case in the circuit courts of the United States. But the decree itself, without further proceedings, may have an intrinsic effect which can only be suspended by an affirmative order either of the court which makes the decree, or the appellate tribunal."

The appeal-bond given by the appellant in this case in the court below suspended further proceedings in that court, but the decree had an intrinsic or operative effect upon the rights of the parties. It dissolved the injunction which existed to that time, and adjudged the possession and ownership to be in the respondent, and left the respondent in possession of the mine, with the right to take the ore, and dispose thereof in any way it might see fit, and enjoined the appellant from mining the same, or from interfering in any way. And this right to take the ore, and dispose of it, could only be suspended by an affirmative order of the district court or of this court,—the court which made the decree, or the appellate tribunal; and, when the decree of the district court was affirmed by this court, the decree so affirmed retained and possessed the same operative effect, and could only be suspended by an affirmative order of this court or the supreme court of the United States.

Further along in the same opinion the court said: "It was decided that neither a decree for an injunction, nor a decree dissolving an injunction, was suspended in its effect by the writ of error, though all the requisites for a *supersedeas* were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree rendered."

While the decree in this case was rendered by the district court, when it was affirmed by this court, and an appeal from that affirmance was taken, the decree, for the purposes of the appeal, must be regarded as a decree of this court, and the appeal from that decree or decision must be taken "in the same manner, and under the same regulations, as from the circuit court of the United States."

By the term "regulations" is meant the rules by which the action of the circuit courts of the United States are limited and controlled in granting appeals, and the action of this court is limited and controlled by the rules which govern those courts. Therefore, if the circuit courts of the United States have the power, in granting appeals, to suspend by an affirmative order the intrinsic or operative effect of the decision or decree appealed from, this court has it also. Speaking with respect to appeals from the circuit courts of the United States and other courts, in the case of *Hovey v. McDonald, supra*, the court held that the power undoubtedly exists to order a continuance of

the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary. This court may reverse, affirm, or modify any judgment appealed from, and may direct the proper judgment or order to be entered, or a new trial or further proceedings to be had, and it may grant an appeal to the supreme court of the United States, as was done in this case, that the parties may have their rights with respect to the property in dispute determined by that tribunal. In this grant of power it appears reasonable that the authority should be implied to restrain the effect of the judgment appealed from so as to preserve the subject of litigation for disposition according to the final judgment of the appellate court. The object of the appeal is not to give that tribunal of last resort merely an opportunity to make a vain display of its powers and wisdom. The appeal in this case was given that the parties might have their rights to the property in question determined, and that it might be given to the one entitled to it as finally decided. If, when that decision shall be made, the property shall be beyond the effect of the decree and the process of the court, and the party to whom it may be adjudged does not get it, the purpose of the appeal will have been defeated, and the ends of justice will not have been reached.

The motion to dissolve the injunction is denied.

BOREMAN and HENDERSON, JJ., concur.

(6 Mont. 297)

TERRITORY ex rel. McCANN v. SHERIFF OF GALLATIN CO.

(*Supreme Court of Montana. January 10, 1887.*)

1. INSANE PERSONS—INQUISITION—DEFECTS IN—HABEAS CORPUS.

Where, on hearing upon the return to a writ of *habeas corpus* for the discharge of a person adjudged insane, it appears that the jury who examined the relator failed to certify upon oath that the charge was correct, and that only two jurors qualified to do so signed the verdict, he will be discharged from custody.

2. SAME—CONSTITUTIONAL LAW—GEN. LAWS MONT. FIFTH DIV. § 711; ACT OF MARCH 7, 1883.

Gen. Laws Mont. Fifth Div. § 711, providing for the examination and commitment and custody of persons charged and found insane, though imperfect in its protective requirements, is not unconstitutional. That portion of it which required that the person committed shall be shown to be incompetent to provide for his or her own proper care or support, and to have no property applicable to such purpose, and no kindred, etc., is abrogated by the act of March 7, 1883, providing "that all persons hereafter adjudged insane shall be cared for by the territory."

Appeal from district court, Gallatin county.

Habeas corpus.

George Haldorn, for appellant and petitioner, McCann. No appearance for respondent.

GALBRAITH, J. This is an appeal from an order of the judge of the First judicial district, made at chambers, remanding the appellant to the custody of the respondent, after a hearing upon a return to a writ of *habeas corpus*. The relator was held by the sheriff, by virtue of a warrant of commitment, issued out of the probate court of Gallatin county to the said sheriff, ordering him to be confined in the asylum for the insane, at Warm Springs, Montana territory. The statute under which the probate court proceeded, and by virtue of which the commitment was issued, is as follows: "From and after the passage of this article, it shall be the duty of the probate judge, or, in his absence or inability to act, the chairmen of the boards of county commissioners of the several counties of this territory, upon the application of any person, under oath, setting forth that any person, by reason of insanity, is unsafe to be at large, or is suffering under mental derangement, to cause the said person to be brought before him, at such time and place as he may direct; and the said

judge or commissioner shall also cause to appear, at said time and place, a jury of three citizens of his county, one of whom shall be a licensed practicing physician, who shall proceed to examine the person alleged to be insane; and if such jury, after careful examination, shall certify, upon oath, that the charge is correct, and the said probate judge or commissioner is satisfied that such person, by reason of insanity, is unsafe to be at large, and is incompetent to provide for his or her own proper care or support, and has no property applicable to such purpose, and has no kindred in the degree of husband or wife, father or mother, children, or brother or sister, living within this territory, of sufficient means and ability to provide for such care and maintenance, or if he or she have such kindred within the territory, and such kindred fail or refuse to properly care for and maintain such insane person, such judge or county commissioner shall make out duplicate warrants, reciting such facts, and place them in the hands of the sheriff of such county, who shall immediately, in compliance therewith, convey the person or persons therein named, and deliver him, her, or them, to the contractor aforesaid, at the place designated in the notification herein required; and such contractor shall acknowledge, by indorsement in writing, upon the back of each of said warrants, the delivery of such person, described therein, to him, and the date thereof; and such sheriff shall return one of said warrants to the office issuing the same, and forward the other to the secretary of the board of county commissioners aforesaid, who shall file and preserve the same."

It will be observed that this law does not make any provision for the time within which any of its provisions may be had. From the time of the application to the delivery of the warrant of commitment to the sheriff,—from the time of the commencement of the proceedings to their close,—the time in which they may be done is not mentioned. All the penalties of the law may be employed within a day, or even an hour. Under this statute no opportunity may be allowed for the person against whom the charge of insanity is made to obtain counsel or prepare for trial; but although this law does not seem to be in harmony with the spirit of our institutions and our other laws, which erect such substantial safeguards around the liberty of the citizen, nevertheless, we do not see that it is objectionable on the ground of unconstitutionality. But, providing, as it does, for such summary proceedings, we must hold that it was the intention of the legislature that they should be strictly pursued,—that there should be a strict compliance with every requirement of the law. On examination of the record, we do not find that such is the case. The proceedings are defective in several substantial features. There is not the certificate of the jury, upon oath, which the law requires. The statute requires that the jury summoned to try the question of insanity shall make their certificate upon oath that the charge is correct. In a law providing for proceedings of this summary character, the requirements are mandatory. The warrant does not, it is also true, recite all the facts required by the law to be set forth therein; such as that the person thereby committed "is incompetent to provide for his or her own proper care or support, and has no property applicable to such purpose, and has no kindred," etc. But this clause of the statute was virtually repealed by an act of the legislature, which became a law on March 7, 1883, providing "that all persons hereafter adjudged insane, whether indigent or not, shall be cared for by the territory," under its present contract for the care and maintenance of the indigent insane. Therefore, those facts need not appear in the warrant of commitment.

But not only does the record fail in that there was no such certificate of the jury upon oath as required by law, but also that the verdict, which was doubtless intended for such certificate, which was not signed by the jurors summoned, although three persons signed the verdict. Only two of the jurors who were summoned, and whom the record shows to have been qualified persons, signed the verdict. For aught we know, the third person may

not have been a citizen of the county, as the law requires, and therefore an incompetent person. For these reasons, the judge at chambers erred in refusing to discharge the respondent.

The judgment is reversed, and the petitioner discharged.

(6 Mont. 300)

DAVIS v. FREDERICK.

(*Supreme Court of Montana. January 13, 1887.*)

1. SET-OFF AND COUNTER-CLAIM—ACTION IN TORT—COUNTER-CLAIM ON ACCOUNT—DEMURRABLE.

An action brought to recover damages for the wrongful issuance of an execution upon a judgment previously recovered against plaintiff by defendant, but alleged by him to have been satisfied, and on account of the levy of such execution upon money of the plaintiff in the hands of the sheriff is founded in tort, and the fact that plaintiff claims judgment only for the amount seized, with interest, does not alter its nature, and defendant cannot, under the Montana Statutes, set up in his answer, by way of counter-claim, an indebtedness to her of the plaintiff upon an account.

2. SAME—EVIDENCE—PAYMENT OF A JUDGMENT.

In such a case, where defendant in his answer denies the payment of the judgment in respect of which the wrongful execution was issued, and the record shows that a certain sum had been paid to defendant's attorneys to be applied on the judgment, (which purported to be a balance,) and in full thereof, evidence is admissible to show that certain amounts of money had been paid to defendant's attorneys to be applied on such judgment.

Appeal from district court, Gallatin county.

Henry N. Blake, for appellant, Frederick. *Chumasero & McCutcheon* and *Vivion & Shelton*, for respondent, Davis.

GALBRAITH, J. The respondent in this case brought his action to recover on account of the wrongful issuance of an execution upon a judgment previously recovered by the appellant against the respondent and another, and which the respondent alleges had been satisfied before the execution was issued, and the levy of such execution upon the property of the respondent, the same being money in the hands of the sheriff, and the payment thereof to the appellant upon the execution. The answer, after denying the allegations of the complaint, sets up a counter-claim, alleging an indebtedness from the respondent to appellant, upon an account. The appellant demurred to this counter-claim, which demurrer was sustained, and the action of the court is assigned as error. The court evidently sustained the demurrer upon the ground that, the complaint having alleged a tort, the appellant could not set up a cause of action arising upon contract, which is the nature of an account, as a counter-claim.

Our statute upon this subject is as follows: "The answer of the defendant shall contain * * * second, a statement of any new matter constituting a defense or counter-claim. * * * The counter-claim * * * shall be * * * a cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense, or connected with the subject of the action; second, in an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action." Code Civil Proc. § 87.

The complaint sets forth an action in tort. The action was brought for the wrongful issuance of the execution, and the complaint sets forth the facts which constitute such wrongful act. The cause of action set forth in the complaint being in tort, the counter-claim, being on an account, did not certainly arise out of this. The subject of the action was the money seized under the execution, and paid to the appellant. The counter-claim cannot be said to be connected with the subject of the action. The cause of action being in tort, the counter-claim does not come within the second provision above

set forth. It is true, the respondent might have waived the wrongful issue of the execution, and brought his action upon the implied contract, to repay the money wrongfully seized and paid over under the execution, or, as the expression would have been before the adoption of the Code, waived the tort, and sued in *assumpsit*. But this is not a question of what might have been done, but of what, in fact, was done. We must take the pleadings as we find them. When the respondent chose to rely upon the tort, we cannot say that the cause of action was a contract. We do not think this was the kind of a contract meant by the above provision of the Code, but that it intends a cause of action arising *ex contractu*, and not *ex delicto*, which was the character of action set forth in the complaint in this case. It is argued that, because the respondent only claimed a judgment for the amount seized and paid over, with interest, that this constitutes it an action on contract. We do not think so. Under the facts alleged, this is all he would be entitled to as damages. The demurrer was properly sustained.

The second error alleged and relied upon is as to the introduction of certain testimony upon the trial of the case. Certain witnesses testified, against the objection of the appellant, that certain amounts of money had been paid to the attorneys of the appellant, to be applied upon the judgment upon which the alleged wrongful execution was issued. The objection was that this testimony was "irrelevant, and contradicted the allegations of the complaint." The allegation of the complaint was "that on the twenty-fourth day of April, 1882, the plaintiff fully paid and satisfied the said judgment by paying to Messrs. Johnson & Toole and Shober & Lowry the full amount thereof, principal, interest, and costs, at the time due and unpaid thereon." This was denied by the answer. The record shows the receipt, by the above-named attorneys, of a certain sum of money, to be applied on the judgment, which purported to be a balance, and in full thereof. It was necessary, by reason of the above issue, to show that the judgment was satisfied, and this testimony of prior payment of money on the judgment was relevant and admissible for this purpose.

This disposes of the errors alleged. The judgment is affirmed, with costs.

(14 Or. 356)

POWELL v. DAYTON, S. & G. R. Co.

(*Supreme Court of Oregon*. January 10, 1887.)

VENDOR AND VENDEE—AGREEMENT FOR SALE—DEPENDENT COVENANTS—FAILURE OF VENDOR—BAR TO RECOVERY OF DAMAGES.

Where an agreement for sale and purchase of land is to the effect that vendee agrees "to purchase of said vendor, and pay said vendor, on or before the expiration of said term, the [price] for all said property," and that, "on the said payment of said vendee, * * * the said vendor contracts and agrees to make and deliver to the said vendee a good and sufficient deed," the covenants are dependent and concurrent; and, where the vendor fails to tender his deed at the time fixed for the performance of the agreement, he cannot afterwards recover of the vendee for non-performance.

This is an action brought by the vendor of real estate against the vendee for the breach of a written contract to purchase the estate. The plaintiff leased the premises to the defendant for the term of five years, at a monthly rental, and the lease contained the further provision, and the defendant agreed, "to purchase of said Powell, and pay said Powell, on or before the expiration of said term of five years, the sum of ——, for all the said warehouse property," etc. The plaintiff alleges that he made out and tendered a deed to the defendant four months after the expiration of the five years, and, assuming thereby to have performed all conditions precedent on his part, claimed the entire purchase price. The case was before the court on appeal before, and is reported in 8 Pac. Rep. 544. That appeal was from a judgment in favor of

plaintiff. The majority of the court then held that it would be useless to direct a new trial, for the reason that the failure of plaintiff to make a tender of a deed at the time fixed for the performance of the contract would be fatal to his claim, and reversed the judgment for plaintiff.

H. H. Northup, for appellant, Dayton, S. & G. R. Co. *James K. Kelly*, for respondent, Powell.

LORD, C. J. This case is reported in 12 Or. 488, and 8 Pac. Rep. 544. It comes now on demurrer to an amended complaint. The only question involved and to be determined is whether the covenants in the agreement are dependent or independent. At the former hearing, we held that they were dependent, and we are now urged to reconsider the grounds of that decision. The provision in respect to the purchase and payment in the contract is that the defendant "agreed to purchase of said Powell, and pay the said Powell, on or before the expiration of the said term of five years, * * *" and that, "on the said payment of said company, * * * the said Powell contracts and agrees to make and deliver to said company a good and sufficient deed," etc.

In construing contracts, it is a primary rule that the intention of the parties must control, and this equally applies when the inquiry is directed to ascertaining whether the covenants in a contract are dependent or independent. It must be said, however, that, when the language of the contract will admit of it, justice and general convenience incline to the construction of a simultaneous performance.

Said THOMPSON, J., in *Bank of Columbia v. Hagner*, 1 Pet. 464: "In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a contrary intention clearly appears. A different construction in many cases would lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property for which he had paid it. * * * The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return. Hence, in such cases, if either a vendor or vendee wish to compel the other to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement, or a tender and refusal. And an averment to that effect is always made in the declaration containing dependent undertakings, and that averment must be supported by proofs."

In *Ackley v. Richman*, 10 N. J. Law, 306, the court said: "Such is the ordinary understanding and intention of the parties, in whatever language the scrivener may clothe their contract. They intend to create what are denominated concurrent or dependent covenants, and not those called independent, where each party must rely on the promise, and not on the performance, of the other."

But it is argued that the words, "on the said payment of said company," indicate the order of time in which the intent of the transaction requires their performance, and means that the payment was to precede the execution and delivery of the deed, and consequently that the covenants are not mutual or concurrent, but independent. The basis of this argument rests upon the preposition "on," and this is certainly giving to that word an import and an effect not countenanced by any judicial authority, when employed in a similar connection. In a contract for the sale of real property, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or on or upon the payment of the money, or as soon as it is paid, the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform. Considering the variety of respects in which the question has been presented,

the authorities are numerous and uniform in holding such covenants to be dependent.

In *Johnson v. Wygane*, 11 Wend. 48, the covenant read: "And upon the payment thereof I am to receive from said Johnson a good warrantee deed of said land." The court say: "The payment of the last installment on the whole consideration money, and the giving of the deed, were to be concurrent acts. Upon the payment of the money the deed was to be given. It is well settled that covenants like these are dependent, and that neither party can recover against the other without averring a tender of performance on his part; a mere readiness to perform is not sufficient."

In *Frey v. Johnson*, 22 How. Pr. 325, the plaintiff agreed to sell to the defendant the farm, and execute and deliver the deed, "provided and upon condition" that the defendant should pay him the sum of \$19,000. The court say: "The words, 'provided and upon condition,' do not render them other than dependent. Similar language was used in the agreement on which the action was brought in *Beecher v. Conradt*, 13 N. Y. 108. The words there were, 'upon the express condition,' and it was held that the covenants were dependent, notwithstanding these words. In such case, when the delivery of the deed by one party and payment by the other are dependent, the one on the other, neither party can maintain an action for the breach without showing performance, or an offer to perform, on his part." *Van Schaick v. Winne*, 16 Barb. 89; *Garlock v. Lane*, 15 Barb. 359; *Beecher v. Conradt*, 13 N. Y. 108; *Stevenson v. Maxwell*, 2 N. Y. 408; *Culver v. Burgher*, 21 Barb. 324; *Williams v. Healey*, 3 Denio, 363; *Hepburn v. Auld*, 1 Cranch, 321; *Dunham v. Pettee*, 8 N. Y. 508; *Lester v. Jewett*, 11 N. Y. 453; *Cunningham v. Jones*, 20 N. Y. 486; *Baker v. Higgins*, 21 N. Y. 397.

In *Courtright v. Deeds*, 37 Iowa, 507, the instrument obligated the defendant to pay \$500 upon a condition expressed in these words: "Provided, that upon such payment there shall be delivered to me a certificate of stock," etc. The court say: "It has been held that the use of the words 'upon' or 'on,' occurring in a like connection, make covenants dependant. *Adams v. Williams*, 2 Watts & S. 227; *Halloway v. Davis*, Wright, (Ohio,) 129; *Taylor v. Rhea, Minor*, 414. It clearly has that force in the obligation in suit. The word 'upon' indicates, in the connection found in the instrument, a state of dependence which is extended to the covenant of the defendant by use of the word 'provided.' The covenant of defendant to pay the sum of money specified in the contract, and the obligation of the plaintiff to deliver the stock certificates, being mutual and dependent, to give plaintiff a right of action it is necessary that he perform or tender a performance of his covenants." *School-district v. Rogers*, 8 Iowa, 316; *Berryhill v. Byington*, 10 Iowa, 223; *Winton v. Sherman*, 20 Iowa, 295. See, also, *Bailey v. White*, 3 Ala. 331; *Hill v. Grigsby*, 35 Cal. 663; *Felter v. Weybright*, 8 Ohio, 168.

In the event the option given the defendant was not exercised, (which it is unnecessary now to consider,) the contract bound the defendant to purchase on a particular day, and at a fixed sum. It was to be a cash transaction, no credit whatever being given. Now, what was the defendant bound to do in order to make such purchase? It certainly was not bound to pay the price agreed upon without receiving anything in return. "A cash purchase," said EDWARDS, J., "can only be made by a payment of the purchase money on the one side, and the delivery of the thing purchased on the other. These are, and must necessarily be, concurrent acts. The purchaser is not bound to pay the purchase money unless he receives the thing purchased; and how can it be said that he has refused to receive the thing purchased, and to pay the money for it, when he never had the opportunity of receiving it? I cannot perceive how a person can be said to be in default for not doing a thing, when the party who alleges his default, and who alone could put it in his power to do the thing, has neglected to do so." *Lester v. Jewett*, 11 N. Y. 454.

So far as the lease is concerned, it is wholly distinct and severable from the contract for the sale of the warehouse and property, and each rests upon a distinct consideration for its operation and effect. The old case of *Glazebrook v. Woodrow*, 8 Term R. 370, is a complete answer to the argument on this point. And as the rule is well settled that in the case of dependent covenants, if either party wishes to compel the other to perform the contract, or to subject him to damages for non-performance, he immediately makes his part of the contract precedent, and cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal; and, as it is admitted this is not alleged nor can it be alleged, the judgment must be reversed, and the complaint dismissed.

(14 Or. 184)

HEXTER *v.* SCHNEIDER.

(*Supreme Court of Oregon.* November 24, 1886.)

1. REPLEVIN—DEFENSES—VERDICT OF CONSTABLE'S JURY.

In an action to replevy goods seized under attachment by a constable, the court will exclude all evidence adduced on a trial by a jury summoned by the constable to try the question of ownership of the property seized, for his protection, under Civil Code Or. § 284.

2. EXECUTION—SALE—RIGHTS OF PURCHASEES—BONA FIDES.

A purchaser at a void execution sale cannot rely upon his own good faith, which avails nothing against the true owner who is not a party to the process.

3. PLEADINGS—PRACTICE—AMENDMENT BY PLEA IN ABATEMENT—ACTION OF REPLEVIN.

When, in an action of replevin of goods bought under execution by a purchaser with notice of plaintiff's claim, defendant asks leave to amend his answer by pleading in abatement that the real parties in interest were other than the plaintiff, the court may in its discretion refuse to allow such amendment; and, where the advantage sought by it is purely technical, permission is rightly refused.

4. ACTION—JOINER OF PARTIES—ACTION ON BILL OF SALE.

Where a bill of sale is made to a party for the use of other parties, the party to whom it is made has nevertheless the right to bring an action upon it in his own name, without joining the parties interested in the action.

5. APPEAL—OBJECTION WAIVED—MOTION TO STRIKE OUT—AMENDED ANSWER.

Where the court has allowed a motion by plaintiff to strike out parts of the defendant's answer, and defendant has filed an amended answer, the latter cannot afterwards assign as error the allowance by the court of the motion to strike out.

Appeal from circuit court, Multnomah county.

This was an action for replevin of goods brought on an execution sale. The firm of Clinton & Fagan, conducting the Elite Theater in the city of Portland, owned the property in controversy in December, 1888, under these circumstances: They had been attached by one Buckley, of San Francisco, and their property, including the safe and piano in controversy, was then in the hands of the sheriff. They had been dealing with the firm of Fleckenstein & Myer, who, in order to get such attachment released, procured the plaintiff, who was their book-keeper, to purchase the property of said Clinton & Fagan. Fleckenstein & Myer furnished the money to Hexter to make the purchase. The attachment was released, and a bill of sale executed by Clinton & Fagan to the said Hexter, and the property delivered to him. Hexter placed Clinton in charge of the property, and continued the business on his own account and in his own name for some time, until it was finally closed. Afterwards he rented the safe and piano to Mrs. Clinton, who moved the same into what is called the "Tivoli Theater Buildings." The property was afterwards sold by the constable on an execution against Clinton, and purchased by defendant. There was testimony that Hexter was present at the sale by the constable, and that, before the sale, Hexter, by his attorney, made a demand for the property of the constable. During the pendency of the trial, the defendant asked leave to amend his answer by pleading that the action abated for the alleged reason that the real parties in interest were Fleckenstein & Myer,

and not Hexter, which application was denied. For the rest, the case is sufficiently stated in the opinion. Judgment was rendered for plaintiff, from which defendant appeals.

F. V. Drake, for appellant. *Jos. Simon*, for respondent.

STRAHAN, J. This is an action of replevin brought to recover the possession of one McNeal & Urban safe and one Decker piano, alleged to be of the value of \$600, and damages for their detention in the sum of \$50. The amended answer denies all of the allegations of the complaint, except the taking and detention of the goods. The defendant alleges, by way of justification of the taking and detention, that on the twelfth day of May, 1885, one F. Berliner commenced an action against one R. Clinton, in Madison precinct, Multnomah county, Oregon, to recover \$190; that an attachment was duly issued in said action; and that said constable duly served the summons therein on the defendant, and attached the property in controversy as the property of R. Clinton, the defendant therein; that on the twentieth day of May, 1885, a judgment was duly rendered in said action against the defendant for \$190, and \$66.70 costs; and that an execution was duly issued on said judgment, and the attached property applied thereon, and sold by virtue of said execution; and that at such sale the defendant herein became the purchaser of said property for the price and sum of \$180, which he then and there paid to said constable; and that said constable then and there executed and delivered to him a bill of sale thereof. The answer also alleges that, at the time of the sale, the plaintiff was present, and made no claim to the property, nor forbid the sale, nor gave defendant notice of his claim, and that defendant believed and understood that he would acquire title to said property; that it had theretofore been, and was then, the property of said R. Clinton, and that defendant bid and paid his money in good faith, under the full conviction that said property was the property of said R. Clinton, and of no other person; that plaintiff's silence was a fraud upon defendant, and that plaintiff ought not to be heard now to assert right or title to said property, and that he is estopped to assert ownership or right of possession to all or any part of said property. The reply denied the new matter in the answer. Trial in the court below, and verdict and judgment for the plaintiff, from which the defendant has appealed to this court. Numerous errors are assigned by the appellant. Such of them as appear to require it I will now consider.

The appellant assigns error in the ruling of the court on the plaintiff's motion to strike out parts of the defendant's original answer. This question is not before us, for the reason that, after the motion had been allowed by the court, the defendant filed an amended answer. This was a waiver of all questions touching the original answer, or of the rulings of the court in relation to the same. If the property in controversy was the plaintiff's property, then the seizure thereof by virtue of an attachment against Clinton was clearly wrongful, and no demand was necessary before the commencement of the action.

Nor did the court err in excluding all evidence in relation to the trial before the constable. The verdict of the jury called by the officer to try the question of the ownership of the property will protect the officer, but it does not conclude the rights of the claimant. The statute plainly provides that the verdict of the jury "shall be a full indemnity to the sheriff, proceeding in accordance therewith, but shall not preclude the claimant from maintaining an action at law for the recovery of the possession of such property, or for damages for taking the same." Civil Code, § 284.

Nor did the court err in refusing to allow the defendant to plead in abatement during the progress of the trial. Amendments are in the discretion of the trial court, and this court would not interfere with that discretion, unless in case of plain abuse of discretion. Further, amendments are allowed in

furtherance of justice, and not ordinarily to give one of the parties a purely technical advantage over the other. There was no error in the ruling of the court on this application.

Caveat emptor is the rule at all execution sales, and therefore whoever buys at such sale does so at his peril. *Hoxter v. Poppleton*, 9 Or. 482. One wishing to purchase property at a judicial sale must take the precaution to inform himself as to the ownership of the property about to be sold, and not rely blindly upon his own good faith. It will avail nothing against the true owner who is not a party to the process.

There was no error in the ruling of the court on the subject of the estoppel.

The defendant insists that the bill of sale of the property in controversy made by Clinton & Fagan to the plaintiff was for the use of Fleckenstein & Myer, and therefore the plaintiff cannot use it as evidence of his title to the property sued for. If this were true, the conclusion which the appellant seeks to deduce from it would not follow. If this contract was made in the name of Hexter for the benefit of Fleckenstein & Myer, then he is a trustee of an express trust, and may sue on the contract, or use it in evidence of an action dependent upon it, without joining Fleckenstein & Myer in the action. Civil Code, § 29; Pom. Rem. §§ 175-177.

The instructions given to the jury as to the nature and character of the instrument in writing made by Clinton & Fagan to the plaintiff, that is, whether it was a mortgage or bill of sale, stated the law favorably to the defendant,—perhaps more so than he could have claimed under the facts. There seems to have been no question but what the property in controversy was either mortgaged to the plaintiff by Clinton & Fagan, or it was sold to him. The court submitted each of these questions fairly to the jury, and no error is shown. This disposes of every question requiring notice.

The judgment appealed from is affirmed.

(The other judges concur.)

(14 Or. 317)

STARKS *v.* STAFFORD.

(Supreme Court of Oregon. December 20, 1886.)

1. APPEAL—JUSTICES OF THE PEACE—NOTICE—SUFFICIENCY—JUSTICES' CODE OR. § 69.

“Notice,” in the sense used in the Justices’ Code Or. § 69, as to notice of appeals, simply means making known to the adverse party the fact that the appeal is taken; and if the motion accomplishes this, and is in writing, the statute is complied with; and where, in an action before a justice, the plaintiff, in the complaint and answer, is described as Amanda H. Starks, and in the notice of appeal as A. H. Starks, the cause being otherwise described correctly, such a discrepancy is no cause for dismissal.

2. SAME—UNDERTAKING ON APPEAL—AFFIDAVIT OF SURETY DEFECTIVE.

An affidavit of a surety on an undertaking for appeal from a justice’s court, which reads as follows: “_____, being first duly sworn, say that I am a resident householder under the state of Oregon, and am worth the sum of _____. P. M. Corrin,” is not in compliance with the law, and the appeal will be dismissed for the defect.

Robert Eakin, for appellant. *Wm. M. Ramsey* and *J. W. Shelton*, for respondent.

LORD, C.J. This action was brought in a justice’s court, and resulted in a judgment against the defendant, from which he appealed to the circuit court; but, on motion of the plaintiff, his appeal was dismissed for insufficiency of the notice and return of service, and from the judgment of that court dismissing his appeal this appeal is taken. The following is a copy of the notice of appeal and return:

"IN THE JUSTICE'S COURT OF THE STATE OF OREGON FOR UNION PRECINCT
AND COUNTY.

"*A. H. Starks, Plaintiff, vs. Wm. M. Stafford, Deft.*

"*To A. H. Starks, Plaintiff, and T. H. Crawford, her Attorney:* You will take notice that the defendant in the above-entitled action appeals to the circuit court of the state of Oregon for Union county, from the judgment rendered against the defendant, William M. Stafford, and in favor of said plaintiff, A. H. Starks, on the thirteenth day of December, 1884, in the above-named justice's court, by O. F. BELL, justice, for the sum of \$84, and costs and disbursements taxed at \$29.40.

"*R. EAKIN, Attorney for Deft.*"

"*State of Oregon, County of Union—ss.: I hereby certify that I served the annexed notice on the within-named A. H. Starks, within this county and state, on the seventeenth day of December, 1884, by delivering to her in person a copy of said notice of appeal, certified to by me as sheriff; and I further certify that I also served a copy of said notice on her attorney, T. H. Crawford, by delivering to him in person a copy of said notice of appeal, certified to by me as sheriff, on the seventeenth day of December, 1874.*

"*A. L. SAUNDERS, Sheriff.*"

The title of the cause in the complaint and the answer is: "In the justice's Court for Union Precinct, Union County, Oregon. *Amanda H. Starks, Plaintiff, vs. Wm. M. Stafford, Deft.*" In the notice of appeal the plaintiff is written, "*A. H. Starks, Plff.*"; but who could look at the transcript, appeal, and all other proceedings, and not know that the plaintiff in either instance is one and the same person, it is difficult to comprehend. It is hardly necessary to make any comment upon the grounds of the alleged dismissal. The whole matter in respect to notices of appeal from justices' courts, and the service indorsed thereon, was quite recently examined by STRAHAN, J., in *Lancaster v. McDonald, ante*, 374, a case in which the notice and service was much less definite than any particular which can be noted here, and in which he said: "'Notice,' in the sense here used, [section 69, Justices' Code,] simply means making known to the adverse party the fact that the appeal is taken. If the motion accomplishes this, and is in writing, the statute is complied with."

There is, however, another objection to which our attention has been brought that is more serious. It is the defect in the affidavit of the surety upon the undertaking for appeal. It reads as follows:

"*State of Oregon, County of Union—ss.: _____, being first duly sworn, say that I am a resident householder under the state of Oregon, and am worth the sum of _____.*
P. M. COFFIN."

This is not a compliance with the law, and the judgment must be affirmed.

STRAHAN, J., did not sit in this case.

(2 Ariz. 246)

TERRITORY ex rel. GOODRICH v. BASHFORD, Treasurer, etc.

(Supreme Court of Arizona. January 24, 1887.)

COUNTIES—COUNTY TREASURER—SHORTAGE IN ACCOUNTS—APPORTIONMENT OF LOSS BETWEEN COUNTY AND TERRITORY.

On the default of a county treasurer, having a shortage of moneys collected both for the county and the territory, the shortage will be apportioned between them according to the amount each is entitled to receive of the taxes collected.

Briggs Goodrich, Atty. Gen., for petitioner. Herndon & Hawkins, for respondent.

BARNES, J. This is a petition for a writ of *mandamus* requiring the treasurer of Yavapai to turn over to the treasurer of the territory moneys alleged to be in his hands belonging to the territory. It appears that the present treasurer went into office the first of January, 1887, and that he received, as funds in the hands of his predecessor, the sum of \$57,230.88, which he now holds. It also appears that the amount of money which should have been turned over to him is \$65,108.76, of which the amount due the territory would have been \$16,108.07, and the amount due the county of Yavapai would have been \$49,604.69, so that there is a balance still due from the late treasurer to the defendant of the sum of \$8,481.88. It was urged that the county should be paid the full amount of \$49,604.69, and that the balance of the \$57,230.88 be paid to the territorial treasurer. It is also urged that the shortage of \$8,481.88 should be apportioned between the territory and county, and it is urged by the attorney general that the territory should be paid in full, and that the county should bear the loss. It is true that the county treasurer is a county officer, and that his bond is approved by the board of supervisors of the county. For some purpose, he is the agent of the county, but as to funds in his hands he is, in the same sense, an agent of any branch of the government whose funds he may have. He is rather the custodian of funds which he may have officially, and the trustee for the benefit of whatever branch of the government may have funds with him.

A failure by the treasurer to pay over funds to whomsoever has the legal right to receive them will subject him and his sureties to action "by the territory, or any person injured or aggrieved." Acts 1883, p. 157. His bond is made payable to the territory. The territory and county have each the right to recover on the official bond of a county treasurer for money in his hands due either. In this case we have a gross sum in the hands of the present treasurer. He can be compelled to account for no more than the funds in his possession. The gross sum falls short of the amount due the county and territory. The amount so short is due from the late treasurer. It is manifestly unjust that the whole of his shortage should fall upon either. Equity requires that each should bear its proportion of the loss, and each can enforce its rights against the late treasurer for the balance due. Of taxes collected, it appears that the territory is entitled to sixty-five and one-half cents out of every three dollars. Treating the amount in the hands of the treasurer at this time as money collected, there is due the territory \$12,495.40, which is the amount the defendant will be required to pay to the territorial treasurer.

PORTR, J., concurs.

(71 Cal. 550)

HALL v. SUPERIOR COURT, EL DORADO Co. (No. 11,018.)

(Supreme Court of California. January 18, 1887.)

1. APPEAL — FROM JUSTICE'S COURT — FILING AND SERVICE OF NOTICE AND UNDERTAKING—CODE CIVIL PROC. CAL. §§ 974, 978.

Under Code Civil Proc. Cal. §§ 974, 978, it is not necessary that the notice and undertaking on appeal from a justice's court to the superior court should be filed before service thereof.

2. CERTIORARI—WRONGFUL DISMISSAL OF APPEAL.

If an appeal from a justice's court is erroneously dismissed by the superior court, the error may be remedied, and the cause reinstated by *certiorari*.

Commissioners' decision. In bank. On *certiorari*.

Geo. C. Blanchard and *Chas. A. Swisler*, for petitioner. *Irwin & Irwin*, for respondent.

FOOTE, C. On the nineteenth day of November, 1885, this court ordered the issuance in this cause of an alternative writ of *certiorari* to the superior court of El Dorado county. 8 Pac. Rep. 6, 509. Upon the return of the

certified transcript of the proceedings had by that court in the case of *Went v. Hall*, it appears that the appeal pending therein from a justice's court was dismissed upon motion, because the former court was of opinion that it did not have jurisdiction to hear and determine the said cause upon its merits. It further appears that the opinion was based upon the view entertained by the court that, as prerequisites to the validity of such appeal, it was necessary that the notice thereof should have been *filed* in the justice's court *prior* to the *service* of a copy of the same upon the adverse party, and that the undertaking should have been *filed simultaneously* with said *notice*, notwithstanding that all of those jurisdictional acts had been performed within 30 days of the date of the rendition of the original judgment.

This construction of sections 974 and 978, Code Civil Proc., was clearly erroneous, as this court held in *Coker v. Superior Court*, 58 Cal. 177. The superior court of El Dorado county had jurisdiction to hear and determine the case before it upon its merits, and the arbitrary dismissal of it upon motion was an improper divestiture of its rightful jurisdiction. Where such is the case, the writ of *certiorari* is a proper proceeding to annul the order dismissing the appeal. *Levy v. Superior Court*, 66 Cal. 292; S. C. 5 Pac. Rep. 353. The order of dismissal should be annulled, and the cause reinstated, heard, and determined upon its merits by the superior court of El Dorado county.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the order of dismissal is annulled, and the cause ordered reinstated, to be heard and determined upon its merits.

(71 Cal. 557)

HEINLEN v. HEILBRON and others. (No. 11,410.)

(*Supreme Court of California*. January 18, 1887.)

1. NEW TRIAL—NOTICE OF MOTION—FORM OF—CODE CIVIL PROC. CAL. §§ 657, 659.

Under Code Civil Proc. Cal. § 657, providing that "the former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes," etc., and section 659, requiring service upon the adverse party of notice of intention to move for a new trial, designating the grounds upon which the motion will be made, the notice need not specify that the mover will ask that the former verdict or other decision be vacated.

2. ACTION—MISJOINDER OF PARTIES—DEFENDANTS IN TORT.

At the trial of an action *ex delicto*, a nonsuit having been granted as to certain defendants, for want of evidence to sustain the allegations as against them, and the complaint having been amended by striking their names from it, the other defendants are not entitled to a nonsuit on the ground of misjoinder of parties defendant.

3. APPEAL—BILL OF EXCEPTIONS—SPECIFICATION OF ERROR IN.

Upon appeal from the judgment in an action to recover damages from defendant for diverting the waters of a water-course from plaintiff's land, error committed by the court in finding plaintiff to be the owner of certain lands, including lands not described in the complaint, and awarding damages upon that basis, may be availed of, although the error is not specified in the bill of exceptions, as it appears on the face of the record independently of the bill of exceptions.

Commissioners' decision. In bank.

Appeal from superior court, Tulare county.

Action to recover damages for diversion of water. Plaintiff had judgment against certain defendants, who appealed.

Brown & Daggett and *D. S. Terry*, for appellant. *Atwell & Bradley* and *G. A. Heinlen*, for respondents.

SEARLS, C. This is an action to recover damages for the diversion of water from Cole slough or King's river, and for a perpetual injunction restraining the defendants from diverting the waters thereof. The cause was tried by

the court, a jury having been waived, findings in writing filed, upon which judgment in favor of plaintiff was rendered for \$100 damages, and awarding a perpetual injunction against defendants, restraining them from maintaining any dam or dams in Cole slough, or the channel thereof, or from in any manner interfering with the waters thereof, or obstructing or diverting the same from their natural channel, etc. From this judgment, and from an order denying a new trial, defendants appeal.

It is objected on the part of the respondent that the notice of motion for a new trial (a copy of which is inserted in the bill of exceptions, and thereby made a part of the record) is insufficient, in that while it notified respondent that defendants would "make and submit to said court above named a motion for a new trial of said cause," and designated the grounds of said motion, yet did not specify that they would ask that the former verdict or other decision be vacated, etc. The statute (Code Civil Proc. § 657) provides that "the former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes," etc. The section quoted does not make provision for a notice of the motion, but section 659 requires that "the party intending to move for a new trial must, within ten days after the verdict of the jury, or after notice of the decision, * * * file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made," etc.

In *Bauder v. Tyrrel*, 59 Cal. 99, it was said: "The section regarding the notice of motion for a new trial does not require that the notice shall, in terms, contain a notice of motion that the decision should be vacated. The order granting a new trial does of itself vacate the decision. That must be its necessary effect, for how can there be a new trial if the former decision stands?"

In *Kimple v. Conway*, 10 Pac. Rep. 189, a notice of motion for "a rehearing or new trial" was construed to be a notice of motion for a new trial, and that the words "rehearing" and "new trial" were used as synonymous.

The language used in the notice indicated clearly the intention of the moving party. Such notice was not defective in any of the specific requirements of section 659, and was therefore sufficient.

The complaint charges all the defendants jointly with having wrongfully built dams, head-gates, etc., in Cole slough, and a water ditch or canal therefrom, and thereby diverting a large portion of the waters thereof from plaintiff. There were two answers filed in the cause,—one by the defendants James and Burrell, and another by the defendants composing the firm of Poly, Heilbron & Co., in each of which answers said defendants pleaded a misjoinder of parties defendant. At the trial a motion for nonsuit was made on the part of defendants James and Burrell, who had answered separately, which motion the court at first overruled, but subsequently granted, upon the ground that there was no sufficient evidence against them to make a case either for damages or for an injunction. Thereupon, upon motion of the plaintiff, leave was granted by the court to amend the complaint by striking therefrom the names of said James and Burrell as defendants.

Defendants Heilbron and others, of the firm of Poly, Heilbron & Co., who had answered separately, also moved for a nonsuit, upon the ground that it appeared from the evidence that there was a misjoinder of parties defendant, in that the acts as proved showed separate and distinct wrongs and injuries committed by defendants James and Burrell from those proven against these defendants, and that no collusion or joint injuries by all the defendants was proven, etc. The court denied the motion, and its action is assigned as error.

Misjoinder of parties defendant. In actions *ex contractu*, if too many parties were made co-defendants, under the common-law rule, advantage could be taken of the misjoinder, (1) if the defect appeared on the face of the

record by demurrer; (2) by motion for nonsuit at the trial; (3) by motion in arrest of judgment; or (4) by writ of error. *Mansell v. Burridge*, 7 Term R. 352; 1 Chit. Pl. 50, and cases cited.

In actions *ex delicto* no advantage could generally be taken by the defendant of a misjoinder of parties defendant, and the only effect of a misjoinder was that the parties who should not have been included in the action were entitled to a verdict at the trial. Archb. Pl. 72. To this general rule there was, however, the exception that where the tort could not, in point of law, be joint, as in the case of slander and some others, the misjoinder was ground for demurrer, or, after verdict, for motion in arrest of judgment, or writ of error. But in these exceptional cases the objection was aided by the plaintiff's taking a verdict against one only, or, if several damages were assessed against each, by entering a *nolle prosequi* as to one after verdict and before judgment. 1 Chit. Pl. 16, (Amer. Ed. 97,) and cases cited.

If several persons jointly commit a tort, the plaintiff, in general, has his election to sue all or some of the parties jointly, or one of them severally, for the reason that a tort is in its nature a separate act of each individual. It is consequently held that in actions in form *ex delicto*, as trespass, trover, or case for malfeasance, against one only for a tort committed by several, he cannot plead the non-joinder of the others in abatement or bar of the action, or give it in evidence under the general issue; for the plea in abatement can only be adopted in those cases where the parties *must* be joined, and not where the plaintiff *may* join them or *not* at his option. The rule as to the misjoinder and non-joinder of parties plaintiff, in actions *ex delicto*, was quite different from that governing the matter of defendants. We need not define it here, and only refer to it for the purpose of saying that the case of *Gillam v. Sigman*, 29 Cal. 639, relied upon by appellants, was one in which there was an alleged misjoinder of plaintiffs. Our Code has so far modified the common-law rules on the subject that all objections to the misjoinder or non-joinder of parties, either plaintiff or defendant, must be taken by demurrer or answer, and, if not so taken, they are waived. In the present case the defendants set up in their answer the matter of which they complained. Had the proofs shown the defendants guilty severally of distinct wrongful acts, and had the court held them jointly or severally liable therefor, the question involved in *Keyes v. Little York, etc., Co.*, 53 Cal. 734, and *Hillman v. Newington*, 57 Cal. 56, would arise.

But the action of the court below in granting a nonsuit as to the defendants James and Burrell, whom the testimony failed to show as joint tort-feasors with the other defendants, eliminated this question from the case, and, as there was testimony sufficient to hold the other defendants, there was no error in refusing the motion for nonsuit as to them. In other words, the nonsuit as to James and Burrell was granted because the latter were not shown to have been guilty of the wrongful acts charged in the complaint, and a failure of proof against a defendant charged jointly with others does not support a plea in abatement, based upon the theory that defendants are *several* and not *joint* trespassers.

It is next objected that the findings do not support the judgment; and, among other objections thereto, is one that the court finds the plaintiff to be the owner of, say, 2,000 acres of land, not described in his complaint, and awards damages to plaintiff for diverting water therefrom. Turning to the complaint, and comparing it with the findings, we discover: (1) That plaintiff describes the land of which he is seized and possessed by legal subdivisions, aggregating some 10,000 acres, a portion only of which the court finds him to own. (2) The court finds the plaintiff to be the owner of sections 5, 21, W. $\frac{1}{2}$ of section 9, W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of section 16, E. $\frac{1}{2}$ and S.W. $\frac{1}{4}$ of section 28, in township 19 S., range 20 E., aggregating over 2,000 acres, not described in the complaint, or claimed by the plaintiff. The court further

found that defendants had obstructed Cole slough so as to turn away and divert the waters thereof from the lands of plaintiff, and that, by reason of the wrongful acts of the defendants in diverting the water, plaintiff has been damaged in the sum of \$100, for which sum judgment was rendered, etc.

A party who seeks to recover damages to land of which he avers himself seized and possessed, and who only succeeds in establishing ownership to a part thereof, may have his damages for injury to such part; but we know of no rule by which he can show ownership of land, and recover damages for an injury thereto, which is not described in his complaint or claimed by him. The findings as to such lands were without the issues, and the defendants were not sued for injury to them. The plaintiff can only recover upon the cause of action set out in his complaint, and not upon some other which the proofs may develop. *Mondran v. Goux*, 51 Cal. 151; *Heinlen v. Fresno Canal, etc., Co.*, 8 Pac. Rep. 513.

It was said in *Morenhout v. Barron*, 42 Cal. 605: "A finding is useless and idle unless the facts found are within the issues, and a judgment based upon such facts cannot be sustained." It is urged by respondent that appellants cannot avail themselves of the supposed error, for the reason that they failed to specify the same as error in their bill of exceptions. Where a motion is made for a new trial on the ground that the findings are not sustained by the evidence, the statement must specify the particulars in which the evidence is insufficient. Code Civil Proc. § 659; *Bate v. Miller*, 63 Cal. 233.

So, too, when the notice designates, as the grounds of the motion, errors of law occurring at the trial and excepted to by the moving party, they must be specified in the statement, and, if no such specifications are made, the statement is to be disregarded. The error complained of is one which appears upon the face of the judgment roll, and, if we disregard the bill of exceptions, it remains equally patent. The appeal is from the judgment as well as from the order denying a new trial, and the error complained of is one which might have been inquired into had no motion for a new trial been made. It appears of record, and requires no statement or bill of exceptions to make it apparent.

A decision and judgment in favor of a party upon a cause of action for which he has not sued is a decision against law, and, if not apparent on the record, may be corrected by a motion for a new trial, in which the statement performs the office of making a record of that which was not so before; but where the facts are all of record, an inquiry may be had in this court into the regularity of the proceedings, equally without as with a motion for a new trial, provided, as here, there is an appeal from the final judgment. The case of *Putnam v. Lamphier*, 36 Cal. 151, is in point. The court said: "The point is made that the judgment is not authorized by the pleadings. This objection may be taken upon the judgment roll alone, whether there is a statement on motion for a new trial or not. It is sometimes included among the grounds of the motion, but without any necessity, as it derives no support from the statement, and its omission, in stating the grounds of the motion, raises no presumption that it is waived." The appellate court will take notice of errors appearing in the judgment roll, even if not named in the specification of errors in the statement. *Shepard v. McNeil*, 38 Cal. 72; *Patterson v. Sharp*, 41 Cal. 183; *Sharp v. Daugney*, 33 Cal. 505.

For the error indicated, we are of opinion the judgment and order of the court below should be reversed, and a new trial ordered.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

(71 Cal. 555)

LUCO and others v. SUPERIOR COURT, TUOLUMNE CO. (No. 11,597.)

(Supreme Court of California. January 18, 1887.)

1. ACTION—VENUE—CHANGE OF ACTIONS IN SUPERIOR COURTS OF CALIFORNIA ON APPEAL FROM JUSTICES' COURTS.

Under section 5, art. 6, Const. Cal., providing that "superior courts shall have appellate jurisdiction in such cases arising in justices' and other inferior courts as may be prescribed by law," that part of section 980, Code Civil Proc. Cal., declaring that "the provisions of this Code as to changing the place of trial * * * are applicable to trials on appeal to the superior court," is unconstitutional; and where an action tried in a justice's court of a county is appealed to the superior court thereof, such court has jurisdiction of the action, and will refuse an application to transfer it to the superior court of another county, on the ground that the defendants are residents of such other county.

2. SAME—PERSONAL ACTION—NON-RESIDENT DEFENDANT—WAIVER OF OBJECTION TO JURISDICTION.

Where, in a personal action, the defendants are not residents of the county where the action is brought, and make a motion to dismiss for lack of jurisdiction by reason of that fact, and then voluntarily withdraw the motion, and go to trial on the merits, they waive the question of jurisdiction. Code Civil Proc. Cal. § 848.

Commissioners' decision. In bank.

H. P. Irving, for petitioners. *F. W. Street*, for respondent.

FOOTE, C. From the certified copy of the transcript brought here in response to the requirements of the alternative writ of mandate issued from this court to the superior court of Tuolumne county, it appears that on the ninth day of February, 1885, one Isaac T. Holland commenced an action in a justice's court of Tuolumne county against Juan M. Luco, I. N. Thorne, and S. F. Ambler,—all of said defendants being non-residents of said county;—that on the sixth day of March following, defendants Thorne and Luco (Ambler not having been served with process) filed in the justice's court affidavits and a motion to dismiss the action, on the ground of a want of jurisdiction in the court to try the cause, also separate answers to the complaint; that on twenty-first day of December, 1885, the case was tried in said justice's court, but before the trial commenced Thorne and Luco, by consent, withdrew the motion to dismiss the action. Judgment was then rendered against them, and from that they appealed to the superior court of Tuolumne county, on questions both of law and fact.

After the filing of the papers on appeal in said superior court, the defendants Thorne and Luco moved, upon affidavits, for a change of the place of trial of the cause to the superior court of the city and county of San Francisco, upon the ground that their residence then, and at the time of the commencement of the action, was at the latter place. The court overruled their motion. And it is to compel its action to transfer the case for trial as demanded by their motion that the present proceedings were instituted.

The fact that the defendants voluntarily, by consent, withdrew their motion to dismiss the case, and went to trial on the merits in the justice's court, was a waiver of the question of jurisdiction raised on the motion, under section 848, Code Civil Proc., the action being in its nature personal. The action undoubtedly arose in the justice's court of Tuolumne county, and therefore no other superior court save of that county had appellate jurisdiction to hear and determine it; and, as the superior court of the city and county of San Francisco was without jurisdiction so to do, it was proper for the court below to have refused, as it did, to transfer the cause, as requested by the defendants.

This construction of the provisions of section 980, Code Civil Proc., relative to a change of place of trial, and of article 6, § 5, of our state constitution, as bearing upon the constitutionality of that former section as applicable to

cases like the one under consideration, is sustained in the case of *Gross v. Superior Court, ante*, 264, (decided by this court in bank, December 7, 1886.)

For these reasons the writ of mandate should be denied, and the petition therefor dismissed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the application for a writ of mandate is denied, and petition dismissed.

(6 Mont. 203)

CRYSTAL PLATE GLASS CO. v. FIRST NAT. BANK OF LIVINGSTON and another, Receiver, etc.

(*Supreme Court of Montana*. January 12, 1887.)

BANKS AND BANKING—CERTIFICATE OF DEPOSIT—SIGNED BY CASHIER—BANK LIABLE.

A bank ordered certain goods from plaintiffs on behalf of third parties. These parties being unable to pay at the time, the then acting cashier of the bank took their paper, and sent to plaintiffs a certificate of deposit payable in three months, and regular in form, except that it was signed by him in his name alone, and not as cashier. Held, that the proceeding was in the ordinary course of business, and the cashier did not exceed his authority, and the bank was consequently liable.

Appeal from district court, Gallatin county.

Action against a bank on a certificate of deposit. Judgment for plaintiff. Defendants appeal.

E. W. & J. K. Toole and *Wm. Wallace, Jr.*, for appellants, First Nat. Bank of Livingston, and another, Receiver, etc. *Savage & Elder* and *Chumasero & McCutcheon*, for respondent, Crystal Plate Glass Co.

GALBRAITH, J. This case was tried by the court without a jury. There was a judgment rendered for the respondent for the full amount of its claim. It is admitted by the appellants that the whole question may be determined by a consideration of the action of the court in overruling the motion for a nonsuit.

The testimony introduced by the respondent, and upon which it rested its case, was as follows:

“(Certificate of Deposit.)

“\$780. THE FIRST NATIONAL BANK OF LIVINGSTON.

“LIVINGSTON, M. T., May 21, 1884.

“This is to certify that Crystal Plate Glass Co. have deposited in the bank, seven hundred and eighty dollars, payable in current funds, to the order of themselves, three months after date, with interest at the rate of six per cent. per annum, on return of this certificate properly indorsed. No interest after three months.

“No. 508.

D. E. FOGARTY.”

Fogarty was cashier of the bank at the time this certificate was issued.

A letter by Fogarty to the respondent, which was as follows:

“LIVINGSTON, MONT., May 21, 1884.

“*Crystal Plate Glass Co., Saint Louis, Mo.*—GENTLEMEN: Your favor of 16th is received. Owing to the stringency in the money market here, the parties we ordered the glass for are unable to pay for the same at present. They are perfectly good. Consequently we will take their paper for three months, and inclose our C. D. for three months to secure you, which we trust will be satisfactory.

“Respectfully,

D. E. FOGARTY.”

The action was brought upon the above certificate of deposit; and the questions for our determination, as admitted by the appellant's counsel in their argument, are—*First*, was the certificate of deposit issued by Fogarty as cashier of the bank? and, *second*, if so, did he, under the above state of facts, have the authority to issue it? We find, upon an examination, as admitted by appellants, the testimony introduced by them to sustain their answer, and the amended answer to which the demurrer was sustained, do not substantially modify the above facts.

As to the first question. It is true that the certificate was not signed by Fogarty as cashier, but the evidence shows that he was cashier of the bank at the time of its issuance, and the letter of the same date, relating to it, as above set forth, is signed by him as cashier. We have no doubt, therefore, from the above state of facts, and from the inherent nature of the transaction, that it was issued by him in his official capacity of cashier of the bank. Had he the authority to issue this certificate? From the foregoing evidence, it appears that it was not issued upon the strength of funds of the respondent deposited in the bank, but upon the promissory notes of third persons, made payable to the bank, for whom the bank had previously ordered the goods. The letter was admitted without objection; and it appears from it that the bank itself had ordered the goods, for the price of which the certificate of deposit was issued. It is fair to presume that the credit was given to the bank, and that it was responsible therefor. It was therefore a demand against the bank, and the certificate of deposit, payable three months after date, was, in substance, the promise of the bank to pay at the expiration of that period. We think this to have been within the authority of the cashier. But even proceeding upon the theory that it was not the debt of the bank, but of the third parties who gave the notes, the bank, by taking these notes, payable to itself, assumed their indebtedness, and became liable therefor. In this case, the cashier would have the authority mentioned before. But, aside from this, it is the regular course of business in banks that persons make their promissory notes thereto, and have the amount thereof placed, as so much cash, to their credit, and a certificate may be issued therefor to themselves, or to any one to whom they may direct. Therefore, putting out of view the liability of the bank, when the bank took the promissory notes of the persons for whom the goods were ordered, they may be considered funds in its hands upon which the cashier might issue a certificate of deposit to their creditor, the respondent.

We think that the proceeding was according to the ordinary course of business in banks, and that the cashier did not exceed his authority. The judgment is affirmed, with costs.

(71 Cal. 565)

PEOPLE *v.* ROGERS. (No. 20,236.)

(Supreme Court of California. January 18, 1887.)

1. HOMICIDE—MURDER—EVIDENCE—COMMISSION OF OTHER OFFENSE.

On the trial of an information for murder, evidence of the commission of two burglaries by the accused is admissible, notwithstanding the rule that such evidence is objectionable as, in effect, trying the accused for an offense not charged in the information, and as prejudicing the jury against him, when the evidence tends to show that the person who killed the deceased gained entrance to his house by means of a knife and chisel taken in one of the burglaries, and killed him with a pistol taken in the other.

2. SAME—INSTRUCTION.

Evidence tending to show the prisoner guilty of the crime charged is properly admitted, although it also tends to show him guilty of other offenses, when the jury are properly instructed that they are not to convict the defendant because the evidence shows him a man of bad character in having committed the other offenses, and are only to consider the evidence in its connection with the offense for which the prisoner is on trial.

3. **SAME—NEW TRIAL—THE JURY—PRESUMPTION AS TO EXERCISE OF JURISDICTION.**
The court having properly instructed the jury as to how evidence is to be considered by them, it is a presumption of law that they exercised their jurisdiction correctly.
4. **SAME—QUESTION FOR JURY—SUFFICIENCY OF EVIDENCE.**
The question of the sufficiency of evidence to connect the prisoner charged with murder with burglaries is for the jury, after the court has determined that the evidence is admissible.
5. **SAME — REFUSING TO GIVE PROPER INSTRUCTIONS — LAW GIVEN IN OTHER INSTRUCTIONS.**
It is not error to refuse instructions asked, when the legal propositions of such instructions are embraced in others given.

Commissioners' decision. In bank.

Appeal from superior court, Humboldt county.

H. J. Smith and *A. J. Monroe*, for appellant. *The Attorney General*, for the People.

FOOTE, C. The defendant was convicted of the crime of murder in the first degree. From the judgment therein, and an order refusing him a new trial, he has appealed. He contends that the prosecution was allowed, over his objection, to introduce evidence which tended to show that, prior to the night on which he is alleged to have murdered Kimball, the deceased, while burglarizing the latter's house, another burglary had been committed of a saloon belonging to Knight & Pardee, situated some 12 miles distant from the place of Kimball's murder, and that, from the saloon, a pistol, a small nugget of gold, with some other articles, were then and there stolen; that the nugget of gold was found in a box, with a piece of cloth around it, other jewelry being also in the box; that the pistol was found in the woods with a sack, which contained articles of food and a cup, and that, near the spot where the pistol was found, was also discovered a quilt, which the evidence tended to show was the property of the defendant; that evidence was also allowed to be introduced, notwithstanding his objection, to the effect that the house of J. S. Connick had been burglarized the night previous to the killing of Kimball, and articles of food, a small sack, and shirt taken therefrom, and that the defendant had been seen in that neighborhood about the time of the commission of the burglary.

It appeared in evidence, in addition to the matters just stated, that the box containing the jewelry and nugget of gold was found by the witness Peterson near by the spot at which the defendant was arrested, in a certain road; that this box had been on the next morning delivered to one T. M. Brown; that after such delivery he asked the defendant where he got "that jewelry," or "the jewelry that is in the box," to which the defendant answered that he got it from Dan (who Dan was not being shown;) that Mr. Knight identified the pistol as being one taken from the burglarized saloon, and Mr. Pardee identified the nugget of gold which was in the box when delivered to Mr. Brown as having been taken at the same time with the pistol. It was also shown that the person who entered Kimball's dwelling and killed him used, to effect his burglarious entrance, a knife and a chisel, and that said articles, some food, a cup, a shirt, and a sack had been taken from the burglarized house of Connick, and belonged to him; that around the box containing the jewelry and nugget of gold was a piece of cloth similar in color, texture, and general appearance to the shirt of Connick thus taken.

The evidence also strongly tended to make it apparent that Kimball was killed with a pistol, and that, in accomplishing his murder, three shots were fired; that the pistol ball taken from the body of the deceased was the same in size as those carried by the pistol produced in evidence; and that such weapon, when stolen from the saloon, had five chambers thereof loaded, and when found had but two. It therefore became a most material question in the

case whether the defendant ever had that pistol in his possession. Therefore the existence of that fact became a relevant subject of inquiry, and, having become a relevant fact, any evidence which tended to prove it became also relevant. Reynold's Steph. Ev. art. 9. p. 15. It is very clear that it was proper to show that the defendant admitted the possession of a nugget of gold, which had been taken at the same time as the pistol. The other facts and circumstances claimed as having been improperly admitted in evidence tended necessarily to explain and throw light upon those above stated, and were therefore relevant, whether in favor of or against the defendant.

But it is claimed for him that the admission of such facts and circumstances, if they proved him to have committed the burglaries of the saloon and Connick's house, was erroneous, because it involved substantially a trial of offenses not charged in the information upon which he was then being tried, and would prejudice the jury against him as a hardened criminal. As a general proposition the point contended for might be well taken. But it must be borne in mind in this case the evidence objected to tended directly to show that the defendant had committed the crime of which he stood charged, and must, therefore, have been relevant and competent; and, if it also tended to induce the belief that he had been the perpetrator of other crimes, he cannot be heard to complain, since his own acts, in multiplying his offenses against the laws of the land, ought not to be permitted to diminish the volume of competent evidence. *State v. Adams*, 20 Kan. 819; *People v. McGilver*, 67 Cal. 56; S. C. 7 Pac. Rep. 49.

The jury were well and clearly instructed that the evidence claimed as erroneously admitted could only be considered by them "for the purpose of passing upon the question as to whether the pistol in evidence had been in the possession of the defendant, and used by him to kill said Kimball as charged." And they were, in language full and explicit, forbidden to convict the defendant because the evidence showed him to be a man of bad character, as having committed the burglaries of the saloon and Connick's dwelling. It is a presumption of law that the jury exercised its jurisdiction soundly, after the court had performed its duty, as it did, in instructing them correctly as to the applicability of the evidence before them. *State v. Watkins*, 9 Conn. 54.

The defendant urges further that the trial court left the question of the sufficiency of the evidence connecting him with the burglaries of Connick's house and the saloon to the jury; that this was a matter of law for the court to determine, and not for the jury. As it seems to us, the duty of the court in that particular was well and correctly performed. It admitted the evidence as being pertinent and relevant, and left the jury to determine its weight, under proper instructions as to the law governing its applicability. The circumstantial evidence in the case, taken in connection with the testimony of the widow of the deceased, satisfy us that the jury were fully warranted in believing, as they did, that the defendant and no other person was the murderer of Kimball.

The legal propositions contained in instructions 2, 5, 6, 8, and 11, asked for by the defendant, and refused, were all of them plainly and sufficiently enunciated in the charge of the court to the jury, and nothing contradictory to or conflicting therewith was otherwise given.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 578)

HART and others v. FINIGAN. (No. 9,355.)*(Supreme Court of California. January 20, 1887.)***PARTNERSHIP—ACCOUNTING—PLEADING—FINDINGS.**

In an action for an accounting between partners, based upon the alleged existence of a partnership which is denied by the defendant, the court may, in a trial without a jury, find facts which partly sustain the plaintiff's allegations of partnership, but show such a dissolution before action brought as would defeat a judgment in the plaintiff's behalf.

Commissioners' decision. In bank.

Appeal from superior court, city and county of San Francisco.

Mestick & Maxwell and *Geo. N. Williams*, for appellants. *W. H. L. Barnes*, for respondent.

FOOTE, C. This cause was tried by the court without a jury. A judgment was rendered for the defendant. In the complaint it was alleged by the plaintiffs that they and the defendant, about the fifteenth day of April, A. D. 1872, entered into a joint venture for profit in the purchase of 100 shares of the capital stock of the Consolidated Virginia Mining Company, which venture continued to July 1, 1874, at which time this action was instituted for an accounting, and that the defendant meantime might be restrained from disposing in any way of the stock so claimed as partnership property, and that a receiver be appointed to take charge of the same to abide the final decree of the court, etc. The defendant answered, denying all the material allegations of the complaint. From the judgment and order denying a new trial the plaintiffs appeal.

The points relied on here by them for the reversal of the judgment and order, and obtaining a new trial, are that the trial court failed to find on the material issues made by the pleadings, and that the findings on which the judgment is based, are outside of the issues in the case, and not supported by the evidence.

As it appears to us, the court found certain facts, mainly ultimate, which did not sustain precisely, according to the language employed, the allegations of the complaint, or the defendant's denial of them; yet those facts, as found, made it evident that the court passed upon all the material issues made by the pleadings, and none other; and such findings being based, to some extent, upon contradictory evidence, should be upheld.

Under the facts as found, upon the testimony admissible under the issues as made up, it appears that the conclusions of law of the court are correct. When such is the case, it would seem to subserve no useful purpose to reverse a judgment, because the court below upon the evidence, conflicting as it was, has not found as a matter of fact that the contention of plaintiffs, or its denial by the defendant, are absolutely true in all respects in the language of the pleading.

That tribunal has certainly passed upon and considered the material issues as presented by the pleadings, and its action cannot be called in question if, upon the evidence as adduced, it has not fully agreed with the language of the plaintiffs' forcible allegations, or that of the defendant's emphatic denials. Grant that a partnership existed, as the plaintiffs contend, which the court does not find to be exactly so, as charged, yet the partnership is found by that tribunal to have been dissolved by mutual consent at the end of 30 days from its inception, and long before this suit was brought, the defendant taking the entire interest in the property, as well as all the risks attendant on the venture, and that no profit had resulted to the partnership during its existence, and, as a consequence, no action such as the one brought could be successfully maintained for an accounting or injunction. Where such an action is instituted, based upon the alleged existence of a partnership, which is flatly de-

nied by the defendant in his answer, as in this case, it is not permissible to say that a court must be precluded from finding facts which partly sustain the plaintiffs' allegation of partnership, but show such a dissolution before suit brought as would defeat a judgment in the plaintiffs' behalf.

Parties bringing suit state the facts constituting their cause of action. Defendants deny such facts, which is entirely proper. But a court, in passing upon the issues as made, must find the facts ultimately, or such probative facts as that ultimate facts may be inferred. Where, as in this case, such action is had by the court, and the facts as found show beyond doubt that the conclusions of law arrived at are correct, the judgment should not be reversed because the findings do not positively negative either the plaintiffs' or defendant's allegations in their pleadings in all respects as they are worded, but do so substantially.

It sufficiently appears that the court below did pass on all material issues as made in this cause by the pleadings, and that the facts as found entitle the defendant to the judgment he obtained. As has been before stated, the evidence was in some respects conflicting, and therefore we cannot say that the findings were not thereby supported. The latter support the judgment, and it and the order denying a new trial should be affirmed.

We concur. BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(2 Cal. Unrep. 737)

GREEN and another v. STATE. (No. 11,169.)

(*Supreme Court of California. January 20, 1887.*)

1. WATER AND WATER-COURSES—CANAL—SACRAMENTO AND AMERICAN RIVERS—ACT OF CALIFORNIA MARCH 12, 1885—LIABILITY OF STATE.

The California act of March 12, 1885, (St. Cal. 1885, p. 107,) authorizing suits to be brought against the state for damages caused by the destruction of property from the cutting of a canal by order of the levee commissioners, for the purpose of diverting the waters of the American river into the Sacramento river, by virtue of the California act of April 9, 1862, had merely the effect of submitting the state to the jurisdiction of the courts, and did not create any new ground of liability against the state.

2. SAME—EMINENT DOMAIN—TAKING LAND FOR PUBLIC USE.

Under the language of the California constitution, as it existed prior to the adoption of the new constitution of 1879, if, in pursuance of an act of the legislature, the channel of a river be turned or straightened where it empties into another river, so that the land on the opposite side of the river is destroyed or injured, the damage thus sustained is not a taking of the land for public use; following *Green v. Swift*, 47 Cal. 536.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county.

A. L. Hart and *C. T. Jones*, for appellants. *E. C. Marshall*, Atty. Gen., and *John T. Carey*, for the State.

SEARLS, C. This cause was decided by Department 1 of this court, in an opinion filed July 14, 1886, affirming the judgment of the court below. 11 Pac. Rep. 602. A rehearing in bank was thereafter ordered, and the case again comes under review.

1. The act of March 12, 1885, authorizing the commencement of this action by plaintiffs against the state, simply empowered them to bring a suit, and to make the defendant a proper party thereto. It did not create for them a cause of action, or waive, on the part of the defendant, any defense which it had to such action. The state submitted itself to the jurisdiction of the court, subject to its right to interpose any defense which, as a sovereign

state, it might lawfully urge to the action when instituted. The contention that the act of March 12, 1885, (St. 1885, p. 107.) amounts to a legislative concession of the liability of the state, is not supported by sound reason. Were the state to pass a general law permitting all persons at will to institute suits against it, surely it would not be contended that such an act conceded the existence of a cause of action in favor of all persons bringing suits.

Ordinarily, and in theory, a sovereign state is presumed to be ready and willing to do justice to the citizen, without the necessity of invoking the assistance of the judicial arm; but, in exceptional and intricate cases, the legislative department finds itself inadequate to balancing and adjusting claims, depending upon the solution of abstruse questions of law. In such cases it is eminently proper that the question of legal obligation and the measure of damages be submitted for adjustment to that department of the government whose peculiar province it is to investigate and determine questions of like character. How such submission to the courts can be construed into a recognition of the existence of a cause of action we cannot comprehend.

It may be the legislature could, in a proper case, determine the liability of the state, and then refer the question of the amount of compensation to the courts, if it saw fit so to do. But in the present case it has not pursued that course. The language of the statute does not bear any such construction. We quote: "If it appears, upon the trial of any said actions, that damage has been done to the plaintiff by any act for which the state is legally liable," etc. To hold that this expression of legislative intent is to be construed as admitting a right to recover, is to beg the question, and do violence to the statute. By authorizing the plaintiffs to bring suits against the state, the legislature simply remanded them to the courts for a determination of their rights, and no argument in favor of the liability of the state can be drawn therefrom which may not with equal force be urged in favor of any plaintiff against the defendant whom he is authorized to sue at law.

2. The whole question of the right of plaintiffs to recover was necessarily involved in the determination of *Green v. Swift*, 47 Cal. 536.

Agreeing, as we do fully, with the views expressed by Justice MCKINSTRY in the former decision of this cause, we are of opinion the judgment heretofore rendered, affirming the judgment of the court below, should stand as the judgment of the court herein.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

THORNTON, J. I dissent from the judgment in the above entitled action.

TODHUNTER v. STATE. (No. 11,283.)

(*Supreme Court of California*. January 20, 1887.)

Commissioners' decision. In bank.

John Heard and Freeman, Johnson & Bates, for appellant. *E. C. Marshall*, Atty. Gen., and *John T. Carey*, for respondent.

SEARS, C. The judgment in this cause should be affirmed, upon authority of *Green v. State, ante*, 683.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(71 Cal. 582)

MASSMAN v. SUPERIOR COURT. (No. 11,836.)

(Supreme Court of California. January 21, 1887.)

NEW TRIAL—AFTER NONSUIT—APPEAL FROM JUSTICE'S COURT.

The superior court, after a nonsuit in the trial of an appeal from a justice's court, can grant a new trial.

Commissioners' decision. Department 2.

An action was brought in a justice's court of San Francisco for \$299 damages, for injuries caused by alleged negligence of defendant therein. Appeal taken from judgment to superior court, which latter court, on plaintiff's testimony, granted a judgment of nonsuit. Plaintiff subsequently moved for a new trial (as to all of the steps taken towards which motion defendant objected) on the grounds of "error in law occurring at the trial, and excepted to by plaintiff," and "that the said order directing a judgment of nonsuit was a decision against law." The superior court ordered a new trial, which was had, and judgment rendered in favor of plaintiff for \$150. Application now to supreme court for writ of review.

Ladd & Finlaysen, for petitioner. No appearance for respondent.

BY THE COURT. Application for a writ of review. The application must be denied. The superior court, in our opinion, had jurisdiction to grant a new trial in the case of a nonsuit on the trial of an appeal to it from a justice's court. Code Civil Proc. § 980.

Ordered accordingly.

(71 Cal. 583)

BAKER v. SUPERIOR COURT OF SHASTA CO. (No. 11,942.)

(Supreme Court of California. January 22, 1887.)

1. CERTIORARI—PARTIES—SERVICE.

In *certiorari* brought by the plaintiff in an action in the superior court, the superior court was alone made respondent, and service of the alternative writ was made upon the judge of that court and the defendant. Held, that the service was sufficient, and the proper parties were before the court.

2. PLEADING—TIME—CODE CIVIL PROC. CAL. § 1054.

Extension of time to answer or demur being limited by Code Civil Proc. Cal. § 1054, to 30 days, an order granting until the receipt of a *remittitur* in another case pending on appeal is erroneous.

3. CERTIORARI—WHEN IT LIES.

Certiorari is the appropriate remedy in such case.

4. SAME—MODIFYING ORDER.

Such erroneous order can be modified by the supreme court on *certiorari*, and it is not necessary to determine whether or not it is totally void.

Department 2. *Certiorari*.

The copy of alternative writ and petition was served on attorneys of defendant, Banks, in the action mentioned in opinion, and also on the judge of the superior court. The superior court was the only party respondent to the writ.

Frisbie & Wiley, for petitioner. *Eugene B. Cushing*, for respondent.

McFARLAND, J. We think that the service in this proceeding was sufficient, and that the proper parties are before the court, and therefore the motion to quash is denied. The return to the writ of review in this proceeding shows that in the case of *L. H. Baker, Petitioner Herein, v. William Banks, Defendant*, pending in the court of respondent, an order was made by the court on the twenty-ninth day of December, 1886, extending the time of defendant to answer or demur until 10 days after the receipt of the *remittitur* in a certain other case of *N. J. Pehrson v. John B. Hewitt*, then pending on appeal from the court of respondent to this court. The order also contained

some directions about a stay of proceedings, but we treat it as being substantially an order extending the time to plead, as above stated.

It is clear that the order, so far as it attempted to extend the time to plead more than 30 days, was an excess of jurisdiction, (Code Civil Proc. 1054;) and it is equally clear that petitioner has no plain, speedy, and adequate remedy other than *cetiorari*.

As this court may modify the order, we do not deem it necessary to determine whether or not it should be considered as a unit, and therefore totally void. It is therefore ordered that the order under review be modified so as to extend the time within which the defendant in said case of *Baker v. Banks* may plead, 30 days from and after the twenty-ninth day of December, 1886, and no further.

We concur: SHARPSTEIN, J.; THORNTON, J.

(2 Ariz. 233)

SIMMS v. HAMPSON and another.

(*Supreme Court of Arizona. January 17, 1887.*)

1. CONTRACT—"SUB-LESSEE" OF RAILROAD CONTRACT—CONSTRUCTION.

Defendants sublet to plaintiff, by a written agreement, the construction of three tunnels comprised in their contract with U. to construct a railroad. Defendants were to pay plaintiff for the work done in any calendar month, before the twentieth day of the next month. The defendants' contract with U. was made part of the agreement, except so far as they conflicted. By the contract with U., defendants were to be paid monthly, on the certificate of U.'s engineers. *Held*, that the payments to plaintiff were not conditional on the presentation of the certificate of U.'s engineers; plaintiff having no control over or dealings with U. or his engineers, and the interval of 20 days being apparently fixed up to enable defendants to get their certificates, and pay thereon, before payment to plaintiff.

2. INTEREST—WRITTEN INSTRUMENT—COMP. LAWS ARIZ. § 3450.

A written agreement for the assignment of a contract for the construction of railroad tunnels is a written instrument, within Comp. Laws Ariz. § 3450, providing that "interest shall be allowed * * * on all moneys after they become due on any bond, bill, promissory note, other instrument in writing," and the assignee is entitled to interest on the payments thereunder as they fall due.

3. ACCORD AND SATISFACTION—CONDITIONAL DEPOSIT WITH BANK.

Defendants made a deposit in a bank to be placed to the credit of plaintiff; saying in their letter: "Don't place this to credit until he sends receipt in full." The bank did place the amount to the plaintiff's credit. The cashier told plaintiff, when he asked for a statement of his account, that defendant required a receipt in full. This he declined to do, insisting that there was more due him. He then drew out his balance. *Held* not a satisfaction of the debt.

Appeal from district court, Yavapai county.

E. M. Sanford and Neill B. Field, for appellants. *Rush & Wells*, for appellee.

BARNES, J. This is a suit by Simms, plaintiff, against defendants, Hampson and Garland, for a balance he claims to be due for work, labor, and material furnished on a contract. Defendants had contracted with one Underwood for the construction of a railroad from Lordsburg to Clifton, according to the ordinary terms of a railway contract, and they sublet the construction of three tunnels, on the line, to plaintiff, agreeing to pay him 5 per cent. less than their contract price for the work with Underwood. Simms undertook to excavate said tunnels, of the "size, character, and length required by the engineer of the railway company under the original contract," and defendants undertook "to pay for the work done in any one calendar month, on or before the fifteenth or twentieth of each calendar month following, less 10 per cent. thereof; which shall be retained until the completion of the work," subject to all instructions by the engineers of the railway company; and he agreed to be bound by the provisions of the contract of defendants with Un-

derwood, and that all estimates of work done or claimed by him should be made by the engineers, by virtue of said original contract, which was therein referred to and made part thereof, and the stipulations therein made stipulations between Simms and defendants except so far as they conflict. The original contract provided for monthly payments for work done, less 15 per cent., on the certificate of the said engineers. There is a material difference in these two contracts as to time of payment. In the first Underwood undertook to pay monthly for the work done, on the certificates of his engineers. In plaintiff's contract with defendants the latter contracted to pay for the work done in a calendar month, on or before the fifteenth or twentieth of the next month. The meaning of these contracts is clear. Defendants could demand payment from Underwood at the end of each month on the certificate of the engineers. In their contract with Simms they contract to pay him 15 or 20 days later, with the evident purpose of giving them time to get said certificates, and inspect the work and verify the same.

It is contended that these contracts are to be construed to mean that Simms was to be paid after the middle of the month, for work done in the preceding month, only on presentation of the certificate of Underwood's engineers of the amount of work he had done. We do not think the contract can bear that construction. Defendants had agreed to monthly estimates and payments to them by Underwood, on the certificate of the engineers, and they also agreed to pay Simms the fifteenth or twentieth of the month for work he had done. This gave them 15 or 20 days after they could put Underwood in default before they were to be called on by Simms, and the terms were made evidently for that purpose. It is a stretch of construction to hold that Simms, before he could put defendants in default, should get the certificate of the engineers of the other party to the original contract, and with whom he had no contract, and upon whom he could not call for estimates, and by doing so put them in default. There was no privity of contract between Simms and Underwood. Defendants, on the other hand, could demand of Underwood that his engineers estimate the work, and certify the same, and, in default thereof, demand payment for the work done. The contract by defendants with Simms was that they would pay him, on the fifteenth or twentieth of each month, for work he had done in the preceding month, and it was for them to secure the certificate of work done. On the twentieth day of each month, therefore, there was due Simms the amount of work done by him in the preceding month, at the contract price, less 15 per cent. He then had a right of action therefor.

The statute (Comp. Laws, § 3450) provides that "interest shall be allowed * * * on all moneys after they become due on any bond, bill, promissory note, other instrument in writing." It is insisted that the contract between plaintiff and defendant is not an "instrument in writing" contemplated by statute. It was held, under a similar statute, that a written contract for the construction of a building was an "instrument in writing," and that interest should be allowed from the time payments became due. *Downey v. O'Donnell*, 92 Ill. 559. A plain reading of the words of the statute leads to no other construction.

The evidence shows that estimates of the work done in each month were made by the engineers, and certified, and their correctness has never been called in question by defendants, and there is evidence that they knew of them at the time. They certainly might have known, and the law in this case must presume that they knew of them until the contrary appears. They made payments, from time to time, based upon them, and Underwood had contracted to furnish them to defendants.

The only other question in the case is as to whether there was an accord and satisfaction of the indebtedness. On this point there is a flat conflict in the evidence between plaintiff and one of the witnesses; but, as the jury found

for plaintiff, we must assume the facts to be as plaintiff testifies. It appears that on April 7, 1884, one of the defendants deposited \$12,815.65 in a bank, to be placed to the credit of plaintiff. Plaintiff was absent at the time, and knew nothing of it. On that date one of the defendants wrote Simms: "I have this day deposited to your credit \$12,815.65, being full amount due for work, etc. Please send receipt in full." It does not appear that Simms received this letter before he received that sum. As a postscript to the letter directing the bank to credit Simms, defendants wrote: "Don't place this to credit until he sends receipt in full." Bank did place the amount to Simms' credit. When Simms returned, he asked the bank for a statement of the account, and saw his credit. The cashier then told him defendants required a receipt in full. This he declined to give, saying they owed him more, which he insisted upon. He then drew out his balance. We do not think this to be a satisfaction of the debt. The bank, for the purposes of this transaction, was the agent of defendants, and we must treat what occurred as though Simms had been dealing with them. The money had already gone to his credit, and they asked for a receipt in full, which he refused to give, saying they owed him more. Then he was permitted to draw out the money. Simms expressly refused to satisfy the debt, and we do not think his drawing out the money under the circumstances a release.

This disposes of all the questions in the case of sufficient importance to require our attention.

The judgment is affirmed.

(6 Mont. 306)

BOARD OF COM'RS OF SILVER BOW CO. v. DAVIS.

(*Supreme Court of Montana. January 4, 1887.*)

1. TAXATION—NATIONAL BANK STOCK TAXABLE IN TERRITORIES—REV. ST. U. S. § 5219.
Rev. St. U. S. § 5219, providing that shares of any national banking association may be taxed as other personal property in the state in which such association is located, and the taxation thereof may be regulated by the legislature of such state, subject to the restriction that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state, extends and applies to territories as well as states, and the shares of national banks in Montana are taxable as other personal property.

2. SAME—EQUALIZATION—NATIONAL BANK STOCK AND MINES—LAWS MONT. TWELFTH SESS. PAGE 67—REV. ST. MONT. § 1015.

In an action to recover taxes upon certain shares of national bank stock it appeared, upon an agreed statement of facts, that by Laws Mont. 12th Sess. p. 67, stocks or shares in any bank or company, incorporated or otherwise, are subject to taxation, except that, where the entire capital stock of any incorporated company shall be invested in assessable property in the territory of Montana, such stock shall not be taxed; that, in the county suing, shares of stock in corporations, whose entire capital stock was invested in assessable property in the territory were not taxed; that mining claims not patented were not assessed or taxed at all, and, where patented, were assessed at the government price of five dollars per acre, without regard to their market value; that there were a large number of mining corporations whose entire capital stock was invested in assessable property; and that part of said property consisted of mining claims; that defendant's shares of bank stock were taxed at the market value. Held, such statement did not show such a discrimination against defendant, in the taxation of his bank shares, as brought the case within the restriction imposed by Rev. St. Mont. § 1015; and that, shares of bank stock and of capital invested in mines being different classes of property, where the rate of taxation in each case is the same upon the amount assessed, "discrimination" will not apply between them.

Appeal from district court, Silver Bow county.

Action to recover taxes. Judgment for plaintiff. Defendant appeals.

Knowles & Forbis, for appellant, Davis. *W. W. Dixon*, for respondent, Board of Com'rs of Silver Bow Co.

WADE, C. J. This is an action by the plaintiff and respondent to recover the sum of \$1,562.75 from the defendant and appellant for taxes levied for the year 1885 upon certain shares of the capital stock of the First National Bank of Butte, owned by the appellant. The cause was tried upon the following agreed statement of facts:

"(1) That the First National Bank of Butte is now, and was during all of the year 1885, and before that time, a corporation duly created under and by virtue of the laws of the United States relating to national banks, and located and carrying on a general banking business in Butte City, in the county of Silver Bow and territory of Montana, and that the capital stock of said bank is \$100,000, divided into shares of \$100 each.

"(2) That, during all of said year 1885, the said defendant, Andrew J. Davis, was the owner and holder of 940 shares of the capital stock of said bank, and that said shares were, during all of said year, and are now, of the true value in money at private sale, and of the market value, (which is the same,) of \$125 each.

"(3) That, for and in the said year 1885, there was duly levied and assessed, according to the laws of Montana territory, in said Silver Bow county, for territorial, county, and other purposes, upon all property in said county subject to taxation, an *ad valorem* tax, amounting in all to thirteen and three-tenth mills on each dollar of assessed valuation.

"(4) That said 940 shares of stock of the said First National Bank of Butte were assessed for taxation, in the manner provided by the laws of said Montana territory for the said year 1885, to said defendant, Andrew J. Davis, (who then owned and held said shares in said county of Silver Bow,) at their estimated true value in money at private sale, and at their market value, (which is the same.)

"(5) That the said defendant has not, nor has said bank, or any one for him or it, ever paid said tax on said shares so assessed as aforesaid, or any part of said tax.

"(6) That, in the general assessment of said Silver Bow county for said year 1885, shares of stock in corporations generally were assessed in accordance with the provisions of section 1003 of chapter 53 of the fifth division of the Revised Statutes of Montana territory, as amended by the act of the legislative assembly of February 22, 1881, on page 67 of the Laws of 1881; and, where the entire capital stock of any incorporated company was invested in assessable property in said territory, such stock, or the shares thereof, were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and, where held under patent from the United States, were assessed at the government price of five dollars per acre, without regard to their true market value; that there are a large number of mining corporations in Montana territory whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims."

There was a judgment for the plaintiff for the amount claimed, from which the defendant appeals, and asks for a reversal of the judgment, for the reasons, viz.: *First*, that, under the provisions of the general banking act, shares of stock in national banks in the *territories* are exempt from taxation; and, *second*, that by the laws of Montana, and by the showing of the agreed statement of facts, there has been an unjust discrimination against the appellant in the taxation of his shares of national bank stock. Both of these questions arise under the following section of the national banking act.

"Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national

banking associations located within the state, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to its value, as any other real property is taxed." Rev. St. Mont. § 1015.

1. The proposition of the appellant is that, by virtue of this section, the right to tax national bank shares, is limited to national banks located and doing business in a *state*, and that such shares are not subject to taxation in a *territory*. In construing this section, reference must be had to all the sections, and to the general scope and meaning of the act of congress authorizing and establishing our national banking system. The sections or different parts of every statute must be construed together, and as they are modified by one another. If the object and intent of the statute is distinctly defined and clearly expressed, ordinary words will be given such a meaning, if they have such a meaning, as to make them harmonize with such object and intent, even though they might be so interpreted as to be in conflict therewith. The word "state" has various meanings. It may mean a place; it may mean an organized political community. If used in the latter sense, the word might mean the same as territory, for that is also an organized political community.

The general scope and purpose of this act of congress was to give to the people of the United States, whether they lived in a state or in a territory, a uniform system of banking, whereby they should be authorized to form associations for carrying on that business. It requires such associations in their certificates to name the place where its operations of discount and deposit are to be carried on, designating the *state*, *territory*, or district, and the particular county, city, town, or village. Section 5134. Here the words "state, territory, or district," mean simply the place—the locality—in which the business is to be carried on.

The right to form such associations is made a privilege,—a franchise,—which is distributed equally among the people of the *states* and *territories*, according to the population of either, (see sections 5178—5180;) and every association is allowed to charge and to receive interest at the rate allowed by the laws of any state, *territory*, or district where the bank is located, (section 5197.) Penalties for the violation of any of the provisions of the act, by the officers of *any* banking association, are the same, whether such violation occurs in a state or territory. Section 5239.

The banking system created and established by the act extends alike to the states and territories. The constitution and laws of the United States, which are not locally inapplicable, have the same force and effect in the territories as elsewhere within the United States. Rev. St. U. S. § 1891. The territories are as much a part of the United States as are the states. There is but one banking system for all. No provisions of the banking act are locally inapplicable to the territories. The legislative powers of the territories extend to all rightful subjects of legislation. It is just as competent for a territorial legislature to determine and to direct the manner and the place of taxing personal property as it is for a state legislature to do the same thing. In this respect their powers are alike. Either may levy and assess taxes upon property subject to taxation within its jurisdiction. Each must raise a revenue by taxation for carrying on the local government. The national banking system extending over each alike, it would seem that the words of section 5219, "in assessing taxes imposed by authority of the state within which the association is located," ought to be interpreted to mean the legislative authority, or the authority within the locality in which the banking association is situated

that may rightfully and legally levy and assess taxes upon personal property. Otherwise burdens are imposed upon banking associations in the states, and exemptions are allowed to these in the territories, which would be inconsistent with the whole spirit of the act, which was designed to give a uniform system to every locality. If this interpretation of the word "state" be correct, then there are no restrictive words in section 5219, which is a part of chapter 3 of the act, and is controlled by section 5157, which provides that chapters 2, 3, and 4, which are expressed without restrictive words, as applying to "national banking associations," or to "associations," apply to all associations organized to carry on the business of banking under any act of congress. If this interpretation is not correct, then, by virtue of the same section, the real estate of any banking association in a territory is exempt from taxation, and by virtue of section 5242 attachments and injunctions may issue against banking associations, before final judgment, if located in a territory. And so, if the word "state" means one of the United States, and not the place in which the banking association is located, then, while the comptroller of the currency, by virtue of section 5181, is given authority to equalize the currency in a state according to the population, he has no such power in the territories.

These incongruities are avoided, and the act made consistent and harmonious, by giving to it a uniform operation in the states and territories, which can be done without violating any of its words or phrases, and which was the evident purpose of congress when it provided a banking system for the people of the United States.

2. The second proposition is that, by the laws of Montana, and by the showing of the agreed statement of facts, there has been an unjust discrimination against the appellant in the taxation of his shares of national bank stock. The statute of the territory concerning property subject to taxation provides, among other things, for the taxation of "stocks or shares in any bank or company, incorporated or otherwise, and when by any other state or territory, and whether situated in this territory or not, except that, where the entire capital stock of any incorporated company shall be invested in assessable property in the territory of Montana, such stock shall not be taxed." 12 Sess. Laws, p. 67.

The sixth finding of fact is, in substance, that in the year 1885, in Silver Bow county, shares of stock in corporations generally were assessed in accordance with the provisions of the foregoing statute; and, where the entire capital stock of any incorporated company was invested in assessable property in the territory, such stock, or the shares thereof, were not taxed, and that mining claims not held under patent from the United States were not assessed or taxed at all, and, where held under patent, were assessed at government price of five dollars per acre, without regard to the market value; that there are a large number of mining corporations whose entire capital stock is invested in assessable property; and that part of said property consists of mining claims. It is also found as a fact that 940 shares of stock in the First National Bank of Butte, in said county, were assessed and taxed, for the year 1885, at the market value, and at the same rates as other property in said county.

Shares in corporations represent the capital stock. If the capital stock is taxed, the shares ought not to be; and, if the shares are taxed, the capital stock ought to be exempt. If both are taxed, there will be double taxation. To prevent this the legislature provided that, if the entire capital stock was in the territory and assessable, the shares should be exempt. The converse of this would be true, that, if the capital stock was not assessable, the shares would be subject to taxation. If the capital stock was not within the territory, and therefore not assessable, or if it was exempt from taxation by law, the result would be the same, and the shares would be subject to taxation. National bank shares are taxable, but the right to tax them is subject to the condition that the taxation shall not be at a greater rate than is assessed upon

other moneyed capital in the hands of individual citizens. Section 5219, Rev. St. U. S.

How is other moneyed capital in the territory taxed? This is the first thing to be determined, in order to ascertain if the taxation of bank shares is an unjust discrimination. The agreed statement of facts shows that there are a large number of mining corporations in the territory, whose entire capital stock is invested in assessable property, and that part of said property consists of mining claims, assessed for taxation at the rate of five dollars per acre, without regard to market value. The capital stock being assessable, and subject to taxation, the shares, which merely represent such capital stock, are, and ought to be, exempt. Otherwise the same property would be taxed twice for the same year. But if, for any reason, the capital stock of these corporations could not be reached for taxation, then the shares would become assessable, under the statute of the territory. National bank stock is in that condition. It is not subject to taxation. It is represented by government bonds, which are exempt, and hence bank shares are assessable, the same as the shares in other corporations whose capital stock is not invested in the territory; and, in order to show an unjust discrimination against bank shares, it would be necessary to show that the taxation of such shares resulted in a higher or greater tax upon the money invested than results in the taxation of the capital stock of these corporations whose capital stock is assessable in the territory. It is immaterial whether the taxation is upon the shares or upon the capital stock, if the tax upon the money invested is equal.

Mining claims are real estate, and it is legal for national banks to purchase and to hold such claims. If other corporations invest in such claims, and they are taxed at the rate of five dollars per acre, without regard to the market value, there is no unjust discrimination against national banks, unless the mining claims which they may own are taxed at a higher rate. Nothing of this kind appears in the agreed statement of facts.

It is said, in appellant's argument, that it may be safely asserted that no corporation formed under the laws of Montana, and doing business in the territory, but has its entire capital stock invested in assessable property in the territory, and that the shares of stock in such corporations are exempt from taxation. Taking this statement to be true, it simply shows that the capital stock is taxed, instead of the shares, but does not touch the proposition that the shares ought to be exempt where the capital stock is not taxed. Suppose the capital stock is not in the territory or assessable here,—and that is the case in hand,—the fact that the shares in other corporations whose capital stock is assessable in the territory are exempt from taxation has no bearing on the question. The inquiry is as to an unjust discrimination against bank shares. If money is invested in such shares and taxed at the same rate as money invested in mining or other corporations, then there can be no just cause of complaint, because in one case the money is taxed as shares, and in the other as capital stock. There is no discrimination against a bank where its capital stock is taxed in the form of shares, and in favor of other corporations, whose shares are exempt, but whose capital stock is taxed. In either case the moneyed capital of the corporation is taxed, and it does not make much difference by what name it is called. It would be an unjust discrimination in favor of national banks not to tax their shares, (their capital stock being exempt,) while at the same time subjecting to taxation the capital stock of other corporations whose entire capital stock is invested in assessable property in the territory. Shares in national banks are taxable, even though the entire capital stock is invested in United States bonds, which are exempt from taxation. *Van Allen v. Assessors*, 3 Wall. 573; *People v. Commissioners*, 4 Wall. 244. It is not shown that the entire capital stock of the bank of the appellant, or that any part of such stock, is invested in assessable property in Montana, whereby its shares of stock become exempt.

The board of commissioners of each county sits as a board of equalization to hear complaints and to adjust and to equalize taxation, but it is not shown that the bank or the appellant ever appeared before such board to have the assessment on these shares reduced or remitted, or to show that there was a discrimination against the bank in assessing these shares. If it had been shown there, or here in the agreed statement of fact, that the capital stock of the bank was invested in assessable property in the territory, or that it owned property in the territory which had been assessed at a higher rate than that of similar property belonging to other corporations in the territory, or that such deductions had not been made as had been allowed to such other corporations, then there would have been just cause of complaint. If there were no deductions to be made from the amount of the tax, the tax would be legal, even though the statute prohibited the making of authorized lawful deductions. The denial of a right is no injury to him who has no right to enforce.

Says Justice MILLER in *Supervisors v. Stanley*, 105 U. S. 311: "What is there to render it [the statute of New York] void as to a shareholder in a national bank who owes no debts which he can deduct from the assessed value of his shares. The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What interest has he in a question that only affects others? Why should he invoke the protection of the act of congress in a case where he has no rights to protect?"

The statute of the territory is not invalid because it subjects bank shares to taxation, and exempts the shares of other corporations. In order to affect its validity, it would be necessary to show that there is an unjust discrimination in the amount of the tax upon the money invested in bank shares, and money invested in the shares of other corporations in the territory; and this cannot be shown while it appears that in one case the money is taxed at equal rates, as shares, and in the other, as capital stock invested in the territory.

The appellant has no legal interest in the question as to how money invested in other corporations in the territory is taxed, unless he can show that his money, invested in bank shares, is taxed at a greater rate; thereby making an unequal discrimination against his investment. Such discrimination does not appear, for the following reasons: (1) It is not shown that the bank has any of its capital stock invested in assessable property in Montana. (2) It is not shown that it is the owner of any mining claims, taxed at a greater rate than the mining claims of other corporations in the territory. (3) It is not shown that any deductions were denied, in taxing the bank shares, that were allowed to other corporations in the territory. (4) It is not shown but what the taxation of bank shares is just equivalent to the taxation of other corporations whose entire capital stock is invested in assessable property in the territory. (5) It does not appear that money invested in bank shares is subjected to any higher or greater rate of taxation than any other moneyed capital invested in the territory. (6) On the contrary, it does appear that, if the entire capital stock is assessable in the territory, the shares which represent such stock ought to be exempt, and that, if the capital stock is exempt, for any reason, the shares, in order that there may be no discrimination in their favor, ought to be taxed. (7) If money invested in a national banking association, or other corporation, is taxed at the same rates as other property, it is immaterial whether the tax is levied upon the shares, which represent the capital stock, or upon the capital stock itself. In either case the same result is arrived at, and the money invested is subject to the same and equal taxation. (8) The right to form banking associations being a privilege of great value, by means of which large profits are earned for the shareholders, this right or privilege is property, and the shares become subject to taxation, though the capital stock is exempt; and so a banking association has the same

relation to the statute of the territory as would any other corporation whose capital stock was not invested in assessable property in the territory, in which case the shares would be subject to taxation.

The judgment is affirmed, with costs.

(6 Mont. 318)

BECK v. BECK.

(*Supreme Court of Montana. January 5, 1887.*)

1. **HUSBAND AND WIFE—DIVORCE—ADVISORY VERDICT SET ASIDE—REV. ST. MONT. § 508.**

Under Rev. St. Mont. § 508, divorce cases are of chancery jurisdiction, and in such cases the decree must proceed from the chancellor, and verdicts or special findings, being advisory in such cases, may be approved or disregarded as the conscience of the chancellor may demand.

2. **APPEAL—ORDER DENYING NEW TRIAL—DECREE PRESUMED IN ACCORD WITH EVIDENCE.**

On an appeal from an order denying a motion for a new trial, there being no evidence before the appellate court, the judgment and decree below will be presumed to be supported by the evidence until the contrary appears.

Appeal from district court, Gallatin county. Divorce.

Vivion & Shelton, for appellant, Mary E. Beck. *Luce & Armstrong* and *J. L. Staats*, for respondent, Alonzo M. Beck.

WADE, C. J. This is an action for divorce. There was a trial before a jury, and a general verdict in favor of plaintiff. The defendant thereupon made a motion for a judgment in his favor, notwithstanding the verdict for plaintiff, and this motion was granted. The appeal is from the judgment, and there is no evidence in the record. Divorce cases are of chancery jurisdiction, (Rev. St. § 508,) and in such cases the decree must proceed from the chancellor. Verdicts or special findings are merely advisory, and may be approved or disregarded as the conscience of the chancellor may demand.

There was a motion for a new trial, and therefore the evidence is not before us. The judgment and decree are presumed to be supported by the evidence, until the contrary appears.

Judgment affirmed, with costs.

(2 Ariz. 239)

FECHET v. DRAKE, Assignee, etc.

(*Supreme Court of Arizona. January 18, 1887.*)

FIXTURES—ELECTRIC LIGHT WIRES—MORTGAGE OF LAND ON WHICH MACHINERY IS SITUATED.

An electric light company, engaged in lighting a city, owned a lot upon which the plant was placed, including boilers, engines, and dynamo. The company erected in the streets 18 masts, and wires were strung thereon, along which the electric current was conducted to the electric lamps. *Held*, that the wires formed an integral part of the machinery situated upon the lot, and passed as fixtures to the mortgagor under a mortgage of the lot, "together with all machinery, including the boiler, engine, and dynamo now situated on said land, and together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining."¹

Appeal from Pima county.

Suit to quiet title to real estate. Judgment for plaintiff. Defendant appeals.

Hereford & Lovell and T. L. Stiles, for appellant. *Alex. Campbell and C. C. Stevens*, for appellee.

¹ As to what are fixtures, see *Kile v. Giebner*, (Pa.) 7 Atl. Rep. 154; *Roddy v. Brick*, (N. J.) 6 Atl. Rep. 806; *Cooper v. Johnson*, (Mass.) 9 N. E. Rep. 33, and note; *McNally v. Connolly*, (Cal.) 11 Pac. Rep. 320; *Nigro v. Hatch*, (Ariz.) 11 Pac. Rep. 177; *Furh v. Winston*, (Tex.) 1 S. W. Rep. 527.

BARNES, J. Plaintiff in this case seeks to quiet title to real estate mentioned in his complaint. He derives his title from a judgment sale under a decree of foreclosure of a mortgage. The mortgage was executed August 8, 1883, and the sheriff's sale under a decree of foreclosure was made June 2, 1885, and, after time of redemption had expired, a deed was executed and delivered. On April 1, A. D. 1885, defendant became the assignee in insolvency of the mortgagee.

The question in this case is whether the property in question passed by the mortgage, or remained in the mortgagor, and passed by the assignment, under the insolvency proceedings, to defendant, Drake. The record shows that an electric light company had been organized, and was engaged in lighting the city of Tucson by that means; that in 1883 the company purchased lot 2, in Tucson, of one Wilkins, for the purpose of placing and constructing an electric plant thereon so as to light said city thereby; that, after the purchase of said lot, such plant was constructed, including boilers, engines, dynamo, and, as a necessary, integral, and ordinary part of such plant, there was erected in the streets of the city 18 masts, and wires were strung thereon, along which the electric light current ran so as to conduct the same to the electric lamps located in the different parts of the city, and so light the same. The said wires, so strung, were attached to the building on said lot, and to the dynamo therein, and thereby the current was completed. To cut the wires, or by any means destroy such connection, rendered the whole plant useless for that purpose. The mortgagee conveyed said lot, "together with all machinery, including the boiler, engine, and dynamo now situated on the said land, and together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining." The only question here is whether, by this mortgage, there passed to the mortgagee the wires so strung along said masts. Defendant insists that the same did not pass, and that he may cut such wires, and treat the same as the personal property of the mortgagor. Plaintiff insists that the whole plant, including the wires so strung, passed by the mortgage.

This raises a very important question. It is urged that the said wires are a fixture to the lot, and as such pass by the mortgage. There is great confusion in the books in the definition of the term "fixtures." It is held to denote "such articles of a chattel nature as, when once annexed to the realty, may not be removed by the party annexing them, as against the owner." Ewell, *Fixt.* 1, and cases cited. On the other hand, just the reverse is held to be the true definition; that is, chattels annexed that may be removed, etc. Ferard, *Fixt.* 2, and cases cited. It is difficult to determine in which of the above senses it is most frequently employed.

"A fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty, became accessory to it, and a part and parcel of it." This definition is sustained by all the authorities. Amos & F. *Fixt.* 11. "Things fixed in a greater or less degree to the realty." 2 Kent, Comm. 345, note *a*. "Anything annexed to the freehold." 2 Smith, *Lead. Cas.* 239, note. In *Teaff v. Hewitt*, 1 Ohio St. 511, the court discuss this whole question: "The term 'fixture,' in the ordinary signification, is expressive of the act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property; and it appears to be not only appropriate, but necessary, to distinguish this class of property from movable property possessing the nature and incidents of chattels."

The fact that there are exceptions to the rule in favor of tenants as against landlords, and in favor of trade, does not change the definition. *Quicquid plantatur solo, solo cedit*, was the maxim of the common law; and, as between vendor and vendee, and mortgagor and mortgagee, remains today unchanged. Co. Litt. 53; 2 Smith, *Lead. Cas.* 114; 2 Kent, Comm. note *a*, 345; *Elwes v. Maw*, 3 East, 57. Whichever definition may be re-

garded best, all concur that, where the chattel is "fixed" or "annexed" physically to the soil, it becomes a part of the realty.

The electric light current was affixed to the soil as firmly as the nature thereof would permit. It was attached physically to it, and became a part of the fixed machinery. To that extent this electric light current is a fixture. But it is contended that, while this is so, yet that a fixture must be on the land, and that that may not be a fixture which is off the land.

A case is cited holding that, where an engine was on one lot, and connected with a machine on another lot, that the machine on each lot is a fixture on the lot on which it is constructed. *McDonald v. Minneapolis Lumber Co.*, 9 N. W. Rep. 765. That is not this case. Here one lot is devoted to the maintenance of an electric light plant. Upon it are erected buildings, and in them are placed motive power and dynamo by which an electric current is to be created, and from the same led by means of wires annexed thereto, and running out of the building, strung on poles set up in the streets of the city, through the city, to points where this light is needed, and, returning by the same means, are so connected with the dynamo as to complete the circuit, and so make effectual the operation of a machine of which it is an integral and necessary part. It has a "right of way" along the streets of the city, which is no more than a mere license, and the license is subject to the public use of the streets, and in no way affects the fee to the same. Such use of the streets is a public use, and the power to grant such use is to be found in the same powers that grant the use of streets to railway companies, gas companies, water companies, and the like. The mortgage or sale of a railway would carry its tracks laid in or across a highway annexed to its tracks, on its exclusive right of way, or even its locomotives and cars thereon. Rolling stock of a railway is a part of the realty where a railroad is mortgaged, though used on lines not included in the mortgage. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, and see note to this case.

The later, and we think the better, doctrine does not require an actual fastening to the soil as essential to making a chattel a fixture. The third rule stated by Mr. Carpenter (2 Wall. 646) is sustained by these authorities: "If the thing be essential to the use of the real estate, and has uniformly been used with it, then it passes, though not fastened to it." *Farrar v. Stackpole*, 6 Greenl. 157; *Snedecker v. Warring*, 12 N. Y. 170; *Pierce v. Emery*, 32 N. H. 484; *Minnesota Co. v. St. Paul Co.*, *supra*; *Railroad Co. v. Thompson*, 103 Ill. 209.

The electric current, including wires, poles, insulators, and appliances, was an essential part of the machine. To sever it was to destroy it. The object of the law is to preserve, and not to destroy. A machine made of many parts, operated for a useful purpose, may have great value. Sever the parts, and they are each comparatively worthless. And it is the duty of the courts, so far as may be, to so construe the law that the usefulness and value of such property be maintained. In *Regina v. North Staffordshire Ry. Co.*, 3 El. & El. 392, Lord COCKBURN held that telegraph apparatus, consisting of posts driven into the ground, and wires passing through sockets annexed to the posts, but which wires might be disconnected from the posts without injury, or displacing them, were a part of the appliances of the defendant railway company, and were fixtures, as they were so attached that it was intended that they should remain permanently connected with the railway, or the premises used with it, and remain permanent appendages to it as essential to its operation. Such is this case.

We have so far considered this as though it were an ordinary conveyance of the lot, but the mortgage conveyed the lot, "together with all the machinery, including the boiler, engine, and dynamo now situated on said lot, and together with all and singular the tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining."

In *Pickerell v. Carson*, 8 Iowa, 544, a sale of "the fixtures and appurtenances contained in the daguerreian rooms," etc., embraced all such property as was used in carrying on the business, such as maps, pictures, stove, carpet, apparatus and furniture, machines and stock, as appurtenances, and skylight, balcony, partition, etc., as fixtures.

The electric current is, then, an appurtenance to the machinery situated on that lot, and is therefore covered by the language of the mortgage, even if not a fixture. Extra rolls in a rolling-mill, removable at pleasure, were held to be a part of the realty as appurtenant to it. *Pyle v. Pennock*, 2 Watts & S. 390. A statue and a sun-dial also. *Snedeker v. Warring*, 12 N. Y. 170; *Wadleigh v. Janvrin*, 41 N. H. 503. A mortgage of a railway, with its appurtenances and franchises, includes its rolling stock, tools, and all movable property used in its operation. *Railroad Co. v. Thompson, supra*.

The ingenuity of invention, creating new appliances for usefulness, constantly brings new facts for the consideration of the courts; and to these established principles must be applied. To determine whether a particular chattel has become a "fixture" or an "appurtenance" we must be guided by authority. A consideration of the authorities leads to the conclusion that in each case it is a mixed question of law and fact, largely to be determined by the intention of the parties, and the uses to which the chattel is devoted. In this case it was the evident intention of the parties to make this electric current a part of the machine mortgaged and attached to the land,—to become a part of the realty. We hold, therefore, that the chattel so attached passed with the mortgage.

The judgment is affirmed.

PORTER, J., concurs.

(4 N. M. [Gld.] 89)

CHISUM and others v. AYERS, Adm'r, and others.

(*Supreme Court of New Mexico. January 20, 1887.*)

ERROR, WRIT OF—HOW TAKEN.

Where, after judgment for plaintiff below, defendant moved, in the lower court, for an order to remove the cause by writ of error to the supreme court, which was granted, and thereupon defendant procured a certified transcript of the record, and filed it in the supreme court, but no writ of error or citation was issued from the supreme court, and plaintiff entered only a special appearance there, *held*, that the supreme court did not acquire jurisdiction, and that the defect was not remedied by a stipulation filed in the lower court that the exhibits should be sent up without printing them.

Appeal from district court, Lincoln county.

Motion to strike from docket.

LONG, C. J. This is a proceeding commenced in the district court for the Third district, sitting in the county of Lincoln, in equity, upon a creditors' bill filed by John Ayers, administrator, Louis M. Baca, and others, as complainants, against John Chisum, James Chisum, and others, as defendants. Such proceedings were had that, on the fourteenth day of November, A. D. 1885, in vacation, at chambers, before the judge of said court, a decision in said case was rendered in favor of the complainants, and against the defendants. On the ninth day of December, 1885, Peter Chisum and the other defendants below filed in the office of the clerk of the Third district court a verified petition, and moved thereon, upon presentation to said judge, that "an order be granted to remove said cause by writ of error to the supreme court for a review of the same." Thereupon, at chambers, on said day, the judge "ordered that such writ of error be and the same is hereby granted." On the same day the following stipulation was entered into:

"It is hereby agreed by and between the undersigned, counsel for complainants and defendants in the above-entitled cause, that the exhibits on file in said cause shall not be printed, and that said exhibits may be sent up to the supreme court, with the printed transcript of the evidence and pleadings in said cause.

GEORGE B. BARBER, of Counsel for Defendants.
W. T. THORNTON, of Counsel for Complainants."

The plaintiffs in error procured a transcript of the proceedings in the court below, and caused the same to be certified by the clerk of the district court for the Third district, and filed the same with the clerk of this court, who docketed the said cause as one pending here.

The defendants in error, who were plaintiffs below, appeared in this cause specially, for the purpose only of the motion made, and thereon "moved the court to strike this cause from the docket as having been improperly docketed in this court, for the reason that no writ of error has ever been issued to bring this cause into this court for review, and that no process has been issued from this court in this cause for service upon said defendants in error; and for the further reason that no steps have been taken by said plaintiffs in error to obtain the issuance of any writ of error from this court." No steps have been taken in the cause by plaintiff in error to get the same properly before this court except those stated. No formal or even informal writ of error issued, tested by any one. No *præcipe* was ever filed. No citation has issued, nor has any been asked for.

In the case of *Kidder v. Bennett*, 2 N. M. 39, on the second day of January, A. D. 1880, the supreme court held: "Under our practice, it is true that a writ of error will not lie in chancery cases,"—and express a regret "that technical differences as to methods of appeal, now abrogated in many states, should continue to exist in New Mexico."

A few days thereafter what is now section 2193 of the Compiled Laws was enacted by the legislative assembly. That section reads thus: "Sec. 2193. All cases, either in law or equity, finally adjudged or determined in the district court, may be removed into the supreme court of the territory for review, either by appeal or writ of error." It may be that the assembly passed this section to meet the point suggested in the foregoing decision. At all events, the statute is in no manner ambiguous. Its terms are clear and definite, and the section carries its own construction. In positive terms, it applies to all cases; and then, to emphasize that expression, adds, "in law or equity." Section 2194 provides the manner in which the cause shall be brought into the appellate court: "The clerk of the supreme court shall issue a writ of error to bring into the supreme court any cause finally adjudged or determined in any of the district courts upon a *præcipe* therefor filed in his office by any of the parties to such cause." Section 2199: "Hereafter no writ of error shall be allowed by the supreme court, except," etc. These are plain provisions, and easily understood; and it was within the power of the legislative assembly to enact them.

Together with rule 5, p. 5, Supreme Court Rules, they constitute a proceeding in nowise difficult to comprehend.

"Rule 5. The clerk of the court to which any writ of error shall be directed, shall make return of the same by transmitting a true copy of the record," etc.

The writ of error issues out of the supreme court by its clerk, on *præcipe* filed. In that way the record is brought in. This record is here without any such writ, so far as appears, upon a mere request by the plaintiff in error.

It is not necessary to consider whether the proceedings taken in this case should operate as a *præcipe* filed, because no writ of error has in fact ever issued. There is an entire absence of such writ. No steps have been taken, by citation or otherwise, to bring the cause or defendant into this court. The case stands this way: A case appears on the docket. Its record was brought

here by the plaintiff, acting on his own motion. There is no general appearance for the defendants,—citation, process, or service of any kind. By what legal means, then, under such a record, can this court acquire jurisdiction to proceed? Not by writ of error and citation, nor by appearance, for they are all absent in this case. It is suggested the stipulation before set out may confer jurisdiction. That stipulation was not in this court. It is no part of the proceedings here; but, on the contrary, a mere collateral agreement between the parties respecting certain exhibits, and does not purport to be a waiver of any writ or citation.

In *Bacon v. Hart*, 1 Black, 38, in the supreme court of the United States, a writ of error was sued out, but citation was not served on the defendants in error, and the writ was therefore dismissed. It is elementary that the court does not take jurisdiction, in the absence of process or appearance, or something equivalent thereto. We hold that for the want of the writ of error, in the absence of citation or general appearance by defendant, that this court has no jurisdiction to look into the record, but must sustain the motion of defendant on his special appearance.

The cause is stricken from the docket.

BRINKER and HENDERSON, JJ., concur.

(4 N. M. [Gild.] 172)

MULVEY v. STAAB and others.

(*Supreme Court of New Mexico. January 24, 1887.*)

1. ACTION—FORM OF—CASE OR CONTRACT.

The complaint alleged that defendants, in pursuance of a design to extend their business, agreed with plaintiff that he should open a store in a certain place, and that they would supply him with goods, to carry on the business; that, in reliance thereon, plaintiff abandoned his other business, and leased a store in the place named, and made other preparations to go into the business proposed, but defendants neglected and refused to perform their part of the contract. Upon the facts stated, *held*, that an action on the case would not lie.

2. PLEADING—DEMURRER—WAIVER.

The right to demur is not waived by calling for a bill of particulars.

Appeal from district court, Bernalillo county.

Trespass on the case. Demurrer to complaint sustained below. Plaintiff appeals.

Bernard Rodey and N. C. Collier, for plaintiff and appellant. *Childers & Fergusson*, for defendants and appellees.

HENDERSON, J. Appellant, Frank Mulvey, filed in the office of the district clerk of the county of Bernalillo a declaration in case in the following words:

"Your petitioner, Frank Mulvey, a resident of the county of Bernalillo, in the said territory, complains of Edward Spitz and Abraham Staab, partners in trade under the firm name and style of Staab & Co., doing business as general merchants at Albuquerque, in said county,—said Spitz being a resident thereof, and said Staab being a resident of the county of Santa Fe, in said territory,—in an action of trespass on the case, for that whereas, the said defendants, as copartners, as aforesaid, on the twenty-fourth day of July, A. D. 1885, and before and at the time of the committing of the grievances hereinafter mentioned, were engaged, at the said town of Albuquerque, in the business of wholesale dealers in general merchandise, and wishing to secure an increase of trade, and to promote their business, through the medium of a tributary branch retail store at the town of Rincon, in the county of Dona Ana, in said territory, and well knowing that the said plaintiff was well acquainted with and accustomed to carrying on the business of general mer-

chandising in all its branches, and in consideration thereof proposed to said plaintiff to secure for him a lease of a suitable store-room or building for the carrying on of such a retail business at said town of Rincon, for the term and space of one (1) year after said store-room should be built and ready for occupancy, (the same then being in course of construction, and expected to be finished and ready for occupancy within thirty days then next ensuing,) and that the said plaintiff should go to the said town of Rincon, and carry on said business, and that they, the said defendants, should supply him with a stock of general merchandise, such as said plaintiff, in his discretion, might require, up to eight thousand dollars, on a credit of forty days on groceries, and sixty days on dry goods and clothing, with renewals on any unpaid portion of any bill at the end of such terms, on interest at twelve per cent. per annum, and to continue thereafter, during such full term, to supply him with such goods, wares, and merchandise as he might require in the carrying on of said business, at a reasonable price, provided that the plaintiff would purchase all the goods, wares, and merchandise which he might require in said business from the said defendants, for and during said full term, and provided, further, that said plaintiff would make payments to said defendants as often as he had in his possession, from the sale of such goods, as much as one hundred dollars,—the said plaintiff to make such profits as he could on the sale of such goods for his own behoof and benefit during such term. To which proposition the said plaintiff, in consideration of the premises, then and there acceded to and accepted, and in pursuance thereof, and at the special instance and request of said defendants, proceeded to said town of Rincon, and for and on account of said defendants there made and entered into a contract of lease for the building or store-room before mentioned, (it being then in course of construction,) with one Atchinson McClintock, for the term of one year from the twenty-fourth day of August, A. D. 1885; and the plaintiff then and there, as preliminary to the taking possession of said store-room and the opening of said business, laid aside all his other business and employment; and devoted all his time and efforts to such preparations as would tend to the success of said business, after the opening thereof, and in that behalf also expended a large sum of money, and has ever since held himself out as ready and willing to begin and carry on the said business in accordance with the terms of said contract and agreement, and has, on sundry occasions since the completion of said store-house or building, and its being made fit and suitable for the carrying on of said business, made sundry demands upon the said defendants to furnish him, the said plaintiff, with the goods, wares, and merchandise to be furnished in accordance with the terms and conditions of said contract and agreement. Yet the said defendants, notwithstanding the said contract, and the terms thereof, and their obligations to furnish the goods as aforesaid, have wholly neglected and refused, and still do neglect to do or perform, any or all of the provisions in said contract by them to be performed; but, on the contrary, did not and would not perform the same, or any part thereof. By reason of which neglect and refusal the plaintiff hath sustained damage in the sum of five thousand dollars; wherefore he brings suit, and asks judgment of this honorable court for said sum of five thousand dollars, his damages, together with costs of suit."

After several motions and rules to plead had been made, the defendant demurred to the declaration, and assigned for cause the following: "(1) That the plaintiff has brought an action of trespass on the case upon the said several supposed promises alleged in the declaration, when such an action is not maintainable upon the said supposed facts in said declaration mentioned; (2) that the said declaration fails to show any consideration for the said several supposed promises in said declaration mentioned; (3) that the said declaration sets forth and alleges an undertaking on the part of the defendants that required more than a year from the making thereof and the performance

thereof; (4) for other insufficiencies and informalities contained in the declaration."

At the return-term of the writ the defendants were ruled to plead. An extension of time in which to plead was granted. Afterwards, at a later term of the court, defendants obtained an order on plaintiff to file a bill of particulars. This was done. Afterwards, in obedience to the rule to plead, defendants filed the demurrer above set out. The demurrer was sustained, and, the plaintiff declining to plead further, or to amend declaration, the cause was dismissed. From the judgment sustaining the demurrer, and dismissing the case, plaintiff appeals.

The action of the court in sustaining the demurrer is assigned as error. Appellant contends that, by calling for a bill of particulars, defendants waived their right to demur. We do not think so. A demurrer is a legal exception to the sufficiency of the opposing pleading to which it refers, and raises an issue of law, and is a pleading within the meaning both of the statutes and common law. 1 Chit. Pl. 661-668. The rule to plead simply required the defendants to oppose by some appropriate defense the alleged cause of action stated in the declaration. This was complied with by saying: "In legal effect you have stated in and by your declaration no legal ground of complaint against us."

The demurrer was sustained without specifying on what grounds. The declaration is in trespass on the case. Our attention has been called, in the briefs and oral arguments of counsel, to many cases, both English and American, in support of and in opposition to the contention that the facts as laid down in the declaration make out a case in tort, or set up a state of facts on which the plaintiff had his election to sue either in case for the tort, or in *assumpsit* for the breach of the contract alleged. In many instances the plaintiff has his election to bring either case or *assumpsit*, but the rule is not universal by any means.

Chitty on Pleadings (vol. 1, p. 134) says that "case will lie against attorneys or other agents for *neglect* or the breach of duty or misfeasance in the conduct of a cause or other business, though it has been more usual to declare against them in *assumpsit*; and, although we have seen that *assumpsit* is the usual remedy for neglect or breach of duty against bailees, as against carriers, wharfingers, and others having the use or care of personal property, whose liability is founded on the common law as well as on the contract, yet it is clear that they are liable in case for an injury resulting from their neglect or breach of duty in the course of their employ. For any misfeasance by a party in a trade which he professes, the law gives an action upon the case to the party grieved against him; as if a smith, in shoeing my horse, prick him, and other like cases. And it seems that, although there be an express contract, still, if a *common-law duty* result from the facts, the party may be sued in tort for neglect or misfeasance in the execution of the contract."

Appellant cites the text in 1 Chit. Pl. 135, as authority for the action. We have examined the case of *Burnett v. Lynch*, 5 Barn. & C. 597, on which the text is founded, to ascertain the facts in that case, and determine therefrom the meaning of the court in the use of the language employed. The facts were, in substance, these: Burnett, in his life-time, had executed a lease for a long term, with covenants to pay rent, and make repairs of the premises. Afterwards he assigned the lease by deed-poll to the defendant Lynch, subject to payment of rent and making repairs. Lynch failed to make repairs, and the executors of Burnett were sued in covenant for the breaches of the covenant contained in the lease. A judgment for a large sum was recovered against them. The executors thereupon brought case against Lynch as the assignee of the lease. The question of the remedy was learnedly discussed. There was no covenant by Lynch under the deed-poll by which he secured the benefit and enjoyment of the lease, and consequently it was determined

that an action of covenant would not lie. It was contended, on behalf of Lynch, that, if he could be held liable at all on the facts stated, the remedy was either covenant or *assumpsit*, as there was an entire absence of every element of tort. There was no express contract, either written or oral, to the effect that Lynch should pay the rent and make the repairs. The court, however, held that there was a *common-law duty* imposed on Lynch, as assignee of the lease, the benefit of which he had enjoyed, to pay the plaintiffs such sum as they had been compelled to pay the lessor on account of the breaches of the covenant.

The court upheld the action on the ground that defendant had committed a breach of duty not growing out of the contract, but out of his situation and relation to the assignor of the lease. It may be stated, as a general rule, that trespass on the case will lie in all classes of contracts, either express or implied, where, by the common law, a duty or obligation is imposed beyond the terms of the contract, and by the failure or refusal to perform such duty, or by reason of the negligent or unskillful performance of which an injury has arisen. The contract, in such cases, may be stated as inducement, and the *gravamen* of the charge the neglect to perform the common-law duty imposed. Where the breach of the contract is the gist of the action, case will not lie. *Legge v. Tucker*, 1 Hurl. & N. 498. Where case can be maintained, the gist of the action must be the tort complained of. *Govett v. Radnidge*, 3 East, 62. Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of *assumpsit*; but, where there is a duty *ultra* the contract, the plaintiff may declare in case. *Legge v. Tucker, supra*.

Here a contract is stated by way of inducement, and the true question is whether, if that were struck out, any ground of action would remain. There is no duty independently of the contract, and therefore it is an action of *assumpsit*. *Williamson v. Allison*, 2 East, 452. An action on the case will not lie for the mere breach of a contract. *Woods v. Finniss*, 7 Exch. 363. The distinction between the two forms of action must be preserved wherever the common-law system of pleading prevails. See *Tinkham v. Heyworth*, 31 Ill. 519; *Hyde v. Moffat*, 16 Vt. 271.

The defendants were merchants, not owing any particular duty or obligation to the plaintiff or the public, independently of their contract duties. They were not of the class of carriers of persons upon whom the common law devolves an obligation or duty, the failure or refusal to perform which would ground an action in tort.

The demurrer was well taken, and the court committed no error in rendering judgment dismissing the cause on the plaintiff's declining to amend or plead further. As the judgment must be affirmed, it will be unnecessary to pass upon the sufficiency of the other ground of demurrer.

Let the judgment be affirmed; and it is so ordered.

(6 Mont. 319)

CHEVRIER v. ROBERT.

(*Supreme Court of Montana*. January 11, 1887.)

STATUTE OF LIMITATIONS—CONFLICT OF LAWS—DEBT.

R. contracted a debt in Canada. Afterwards he removed to Nevada, and there remained until an action would have been barred by the law of Nevada. He then emigrated to the territory of Montana. Held, that the statute of limitations of Nevada constitutes no defense to an action brought against R. in Montana.

Appeal from district court, Silver Bow county.

Action on a judgment. Judgment for defendant on plea of the statute of limitations. Plaintiff appealed.

William Scallion and *W. W. Dixon*, for appellant. *W. F. Sanders*, for respondent.

MCLEARY, J. This appeal is taken on the judgment roll, and presents but one question, viz., whether plaintiff's action is barred by the provisions of the statute of limitations. Rev. St. § 55, p. 50. The action is on a judgment rendered at Montreal, in the dominion of Canada, in favor of the appellant, and against the respondent, on the sixth day of November, 1877. The defendant, by his answer, and the amendment thereto, denied some of the allegations of the complaint, and pleaded the statute of limitations, (section 55, Code Civil Proc.,) claiming that he had resided in the state of Nevada from May, 1876, until November, 1884, and that the cause of action sued on arose in Nevada; that the statute of limitations of Nevada had run against plaintiff's action; and that, being barred there, plaintiff's action was also barred here. The case was tried by the court without a jury, and findings were filed. The court found that all the allegations of plaintiff's complaint had been proved, but found in favor of the defendant on his plea of the statute of limitations, and dismissed the action.

It is conceded by counsel for respondent that the Canadian judgment could have been sued upon in the dominion of Canada at any time after its rendition, and no question is made whether or not a cause of action arose in Canada before the respondent emigrated to Nevada. It is not necessary to consider any question arising under that view of the case.

The only question then arising for discussion by this court is this: Whether, in an action upon a demand arising in Canada, and sued upon in Montana, a defendant can interpose the statute of limitations of Nevada, on the ground that since the cause of action arose, he had resided in Nevada long enough for the statute of limitations of Nevada to bar the demand. This question was decided by the court below in the affirmative, and on this ground alone judgment was therein rendered for the respondent.

Section 55 of the Montana Code of Civil Procedure reads as follows: "When the cause of action shall have arisen in any other state or territory of the United States, or in any foreign country, and by the laws thereof, an action cannot be maintained against a person by reason of the lapse of time, no action thereon shall be commenced against him in this territory." Rev. St. Mont. § 55, p. 50.

It is conceded that the cause of action in this case would not be barred in Canada nor in Montana, except under this section, but that it would have been barred in Nevada during the residence of the respondent in that state. Before we can apply this statute to the case at bar, it is necessary to first ascertain where the cause of action arose.

It is admitted that the cause of action first arose in Canada. Did it arise again in Nevada? If so, it also arose again in Montana, in November, 1884, when the respondent took up his residence here; and it may have arisen in a dozen other states or territories where he may have temporarily resided, since the judgment was rendered in Canada. We do not believe this is a fair interpretation of the law. A cause of action can arise but once; and, when it once accrues, it remains in force until it is extinguished, or satisfied, or barred by statute.

When an action is brought in the courts of this territory, on a cause of action arising beyond its limits, and the statutes of limitation are invoked, it is only necessary to inquire what are the statutes of Montana, and, under section 55 of the Code of Civil Procedure, to inquire, further, what are the statutes of the state or country where the cause of action arose or originated, or, it may be expressed, when the demand was created, and first became enforceable? Any other interpretation of the law would compel the creditor to trail the debtor from one country to another, and ascertain how long he resided in any particular jurisdiction, and to search the statute books of every foreign country through which he may have passed, and wherein he may have tarried, for business or pleasure, to see if, in some one or other of them, his debt had not

been barred. This could not have been the intention of the legislature. *Olcott v. Tioga R. Co.*, 20 N. Y. 226. We believe the legislature intended that the creditor should have the option to say when he would enforce his demand, and that the only statutes he need to regard are those of the former, where he brings his suit, and of the place where the debt was contracted.

And, again, it certainly was not the intention of the legislature of Montana to allow a man incurring a debt here to migrate to Nevada, and remain there during the statutory period, and return to this territory, and, when sued, to set up as a perfect defense the statutes of limitation of Nevada; for it is expressly provided in section 50 of the Code of Civil Procedure that "if, after the cause of action shall have accrued, he [the debtor] depart from this territory, the time of his absence shall not be a part of the time limited for the commencement of the action." To give section 55 the construction contended for by the respondent would make it directly in conflict with section 50 just cited; for, if a cause of action arising in Canada arises again in Nevada, on the removal to that state, the same result would follow in a case where the debt originated in Montana. We must give such a construction to statutes, especially that contained in the same chapter of a Code, as will harmonize them, rather than render them irreconcilably contradictory.

We are cited by the respondent's counsel to the case of *Humphrey v. Cole*, reported in the Chicago Legal News of first December, 1883, on page 98. This case is in conflict with the views herein expressed; but it was decided by the appellate court, which is not a court of last resort; and, besides, the decision of the case is not rested on this ground alone, but on the fact that the instrument sued on was more than 20 years past due, and that a presumption of payment arose from this, independent of the statute, and the further fact that the note stated an indefinite sum, and was on that account not negotiable paper, and suit could not be maintained thereon in the hands of an assignee. For these reasons we cannot regard this case cited as an authority herein.

We are also referred by the learned counsel for respondent to the case of *Osgood v. Artt*, 10 Fed. Rep. 365, decided by Judge BLODGETT in the district court of the United States for the Northern district of Illinois. That case is directly in conflict with our views in the case at bar; but we do not think it was well considered, and the meaning of the opinion is not satisfactory to our minds. A statute similar to ours (section 50) is construed to mean "that the time a defendant is absent from this state, after the cause of action accrues, is no part of the time limited for the commencement of the action, unless the defendant resides in another state or country long enough to bar the action by the laws of such state or country." If the legislature of Illinois meant anything like this, it is passing strange they did not say so. We do not feel at liberty to take anything from or add anything to a statute passed by the legislature of Montana. It is, in our opinion, the province of courts to construe the laws, and not to make them. The case of *Osgood v. Artt*, not having been decided by a court of last resort, and the opinion not being, as we think, based on sound reasoning, cannot be followed.

We are also referred, in support of the ruling of the court below, to the case of *McCormick v. Blanchard*, 7 Or. 235. That case merely decides that the statute of limitations of Oregon, which is similar to ours, began to run on the note sued on at the time the cause of action accrued in Illinois, where the note was given, and not at the time when the debtor arrived in Oregon. If this case is in point at all, it is an authority in favor of appellants.

A further discussion of the cases cited by counsel is unnecessary, as none of them are directly in point; and no court of last resort seems to have decided the point directly at issue.

On all principles of reason, and according to the best-known rules for the construction of statutes, we are forced to the conclusion that there was error in the judgment of the court below, and the same is reversed, and the cause remanded for a new trial.

(36 Kan. 152)

**WALLACE and another, Partners, etc., v. MAHAFFEY and another,
Partners, etc.**

(Supreme Court of Kansas. January 7, 1887.)

1. MORTGAGE—LIEN—REGISTRATION—ATTACHMENT.

The lien of a mortgage executed before the levying of an order of attachment, but not recorded until afterwards, is prior to the lien of the attachment, although the attaching creditor may not, at the time of the levying of his attachment, have had any notice of the mortgage.¹

2. SAME—FAILURE TO RECORD—VALIDITY.

A mortgage duly executed, but not recorded, is not void. It is valid as between the parties thereto, and as to all others who have actual notice thereof; and by such a mortgage a valid interest in the mortgaged property—a valid lien thereon—passes from the mortgagor to the mortgagee, although the records may not show it; and an attaching creditor of the mortgagor can attach only the *real interest* of the mortgagor, and cannot attach the interest in the mortgaged property which has already passed from the mortgagor to the mortgagee.¹

(Syllabus by the Court.)

Error from Anderson county.

Johnson, Poplin & Johnson, for plaintiffs in error. *L. K. Kirk*, for defendants in error.

VALENTINE, J. This was an action commenced in the district court of Anderson county, Kansas, on November 12, 1883, by George T. Wallace and Charles W. Lyman, partners as the Northwestern Forwarding Company, against W. G. Mahaffey, J. C. Slutz, and J. W. Slutz, partners as Mahaffey, Slutz & Co., to recover \$1,707.30. On the same day an order of attachment was issued in the case, and levied upon the N. E. $\frac{1}{4}$ of section 22, township 21, range 19, in said county. On March 3, 1884, Joseph Slutz was made a party to the action, and he then filed his answer, setting forth a note and mortgage executed to himself on March 13, 1883, by J. W. Slutz, for \$800. This mortgage covered the same land as that attached, and was recorded on March 13, 1883, one day after the attachment. The case was tried before the court without a jury, and the court made special findings of fact and conclusions of law, and upon the same rendered judgment in effect that the lien of the mortgage was prior and superior to that of the attachment; and of this ruling the plaintiffs, who are also plaintiffs in error, now complain.

It is admitted by the parties that the only question to be considered in this case is whether the lien of a mortgage executed before the levying of an order of attachment, but not recorded until afterwards, is prior to the lien of the attachment or not. It is claimed that the lien of the defendants' mortgage is the prior lien, while the plaintiffs claim the reverse. The defendants, as authority for their claim, cite the case of *Holden v. Garrett*, 23 Kan. 98, and the numerous cases there cited; while, on the other hand, the plaintiffs cite, as authority for their claim, the following cases: *Brown v. Tuthill*, 1 G. Greene, 190; *Hopping v. Burnam*, 2 G. Greene, 39; *Parker v. Miller*, 9 Ohio, 108; *Holiday v. Franklin Bank*, 16 Ohio, 534; *White v. Denman*, 1 Ohio St. 110; *Bloom v. Noggle*, 4 Ohio St. 45; *Stowe v. Meserve*, 13 N. H. 46; *Carter v. Champion*, 8 Conn. 549; *Coffin v. Ray*, 1 Metc. 212; *People v. Cameron*, 2 Gilman, 468; *Tyrell v. Rountree*, 7 Pet. 465.

The statutes under which the most of the foregoing decisions were made are not like ours, and therefore the decisions cannot be entirely applicable to this case; and the decisions made in the last four cases do not seem to have any application whatever to this case. The decisions made in Iowa and Ohio seem to be the nearest applicable to this case; but the correctness of these decisions has been questioned even in the states where they were rendered.

¹See note at end of case.

The case of *Brown v. Tuthill*, 1 G. Greene, 190, is the first case on the subject decided in Iowa; and the decision in 2 G. Greene follows the former decision. Afterwards comes the case of *Norton v. Williams*, 9 Iowa, 529, 530, in which the court uses the following language: "Appellants rely with much confidence upon the case of *Brown v. Tuthill*, 1 G. Greene, 190. That decision was made under a statute containing this language: 'No instrument in writing that conveys any real estate shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record.' Rev. St. 1843, c. 54, § 31. * * * Now, we incline to the opinion that, under the statute of 1843, the case of *Brown v. Tuthill* is against the current of the decisions."

After the decisions in Ohio in the cases of *Parker v. Miller* and *Holliday v. Franklin Bank*, above cited, were made, the supreme court of that state, in the case of *White v. Denman*, 1 Ohio St. 110, 115, uses the following language with reference to this question, and with reference to these and other cases, to-wit: "If the question involved here had not been determined by adjudication in this state, and affirmed and adhered to for a number of years, a majority of this court would feel constrained to take a different view of it."

In the case of *Stowe v. Meserve*, 13 N. H. 46, the mortgage was a chattel mortgage, and the court decided that it had no validity whatever.

The statute relied on by the plaintiffs is section 31 of the registry act, which reads as follows: "Sec. 31. No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record."

The argument made by the plaintiffs upon this statute seems to be almost conclusive. Their argument, in brief, is as follows: They were not parties to the mortgage in question, and had no actual notice thereof at the time of the levying of their attachment, and the mortgage at that time had not been filed for record. Hence, under the statute, it was void as to them; and hence, when their attachment was levied, they obtained an attachment lien upon the entire estate of the mortgagor, just the same as if no mortgage had ever been executed. On the other side, however, a very strong argument is also made. On the other side, it is said that the mortgage, although not recorded at the time of the levying of the attachment, was not void; that it was good as between the parties, and valid as to all others who had actual notice thereof; that an interest in, and a valid lien upon, the mortgaged property had in fact passed from the mortgagor to the mortgagee, although the records did not show it; and that the attachment lien attached only to the real interest of the defendant held at the time in the mortgaged property, and did not attach to his apparent interest therein. And nearly all the authorities seem to sustain this claim of the defendants.

Mr. Drake, in his work on Attachments, (section 223,) uses the following language: "It is a well-settled principle that an attaching creditor can acquire through his attachment no higher or better rights to the property or assets attached than the defendant had when the attachment took place, unless he can show some fraud or collusion by which his rights are impaired." And in the same work (section 245) the following language is used: "A fundamental principle is that an attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment."

It is admitted that, at the time of the levying of the attachment, the mortgage, although it had not yet been filed for record or recorded, was valid as between the parties, and that a valid lien upon the property had already been transferred by the mortgage from the mortgagor to the mortgagee; and the defendants claim that the attachment lien did not attach to or affect the interest which had already passed to the mortgagee, but attached to and affected only what was still remaining in the mortgagor; that although the mortgage may be considered void except as to the parties thereto, and those having no

tice thereof, still the attaching creditor merely takes under one of the parties, and gets no greater rights or interests than the party had under whom he takes, and for whom he is substituted, and whom he represents, and he takes nothing, and cannot take anything, from some other person who holds adversely to the party under whom he takes. In attaching the property he parts with nothing, and cannot in equity claim more than the person under whom he takes had a right to claim.

The statute of Missouri, requiring instruments in writing affecting real estate to be filed for record in order to be valid, reads precisely the same as the foregoing statute of Kansas does, word for word, except that where the words "register of deeds" occur in the Kansas statute the word "recorder" is used in the Missouri statute. And yet the supreme court of Missouri uniformly holds that the interest transferred or conveyed by an unrecorded deed or mortgage is superior and paramount to the lien of a subsequently attaching creditor. *Reed v. Ownby*, 44 Mo. 204; *Sappington v. Oeschli*, 49 Mo. 244; *Potter v. McDowell*, 43 Mo. 93; *Stillwell v. McDonald*, 39 Mo. 283. See, also, *Davis v. Owenby*, 14 Mo. 170; *Valentine v. Havener*, 20 Mo. 133; *Black v. Long*, 60 Mo. 181.

We also think that the question has been virtually settled and determined in this state by the decision in the case of *Holden v. Garrett*, 23 Kan. 98. In that case, before the mortgage was filed for record, a judgment lien and also an execution lien had attached to the mortgaged property. Afterwards, and before the sale on the execution, the mortgage was recorded; and it was held in that case that the lien of the mortgage was prior to the lien of the judgment and the execution. Now, whatever might be our decision if the question were a new one, and presented to us for the first time, we think it is best to follow that decision; and, in doing so, perhaps it would be proper to quote from the opinion of the supreme court of Ohio in the case of *White v. Denman*, 1 Ohio St. 110, 115, where the court, in giving reasons for following prior decisions which the court did not approve, and which were adverse to the decision which we now render, used the following language: "If the question involved here had not been determined by adjudication in this state, and affirmed and adhered to for a number of years, a majority of this court would feel constrained to take a different view of it. But the decision made is based on a construction given to a statute, has relation to rights of property, and, indeed, has become a rule of property. In determining priority among creditors, stability and certainty in the law are of the very first importance. Hardships may sometimes result from a stern adherence to general rules. This is unavoidable under any system of jurisprudence. Some barrier is essential to guard against uncertainty. If judicial decisions are subject to frequent change, it would disturb and unsettle the great land-marks of property. The certainty of a rule is often more important than the reason of it; and, in the case now before us, we think that the maxim, *stare decisis, et non quieta movere*, is the safe and judicial policy, and should be adhered to. If the law, as heretofore pronounced by the court, in giving a construction to the statute, ought not to stand, it is in the power of the legislature to amend it, without impairing rights acquired under it."

The judgment of the court below will be affirmed.

HORTON, C. J., concurring.

NOTE.

MORTGAGE—REGISTRATION. An unrecorded mortgage is valid between the parties and their heirs, *Westervelt v. Voorhis*, (N. J.) 6 Atl. Rep. 665; *Hoes v. Boyer*, (Ind.) 9 N. E. Rep. 427; *Building Ass'n v. Clark*, (Ohio.) 2 N. E. Rep. 846; and against judgment creditors, *Sigworth v. Merriam*, (Iowa,) 24 N. W. Rep. 4; and a subsequent grantee without consideration, *Merriman v. Hyde*, (Neb.) 2 N. W. Rep. 218; and one who takes with notice, *Rowell v. Williams*, (Wis.) 12 N. W. Rep. 86; *Mueller v. Brigham*, (Wis.) 10

N. W. Rep. 366; but not against subsequent purchasers or mortgagors without notice, *Yerger v. Barz*, (Iowa) 8 N. W. Rep. 769; *Jackson v. Reid*, (Kan.) 1 Pac. Rep. 308. Such mortgages have been held to be void in favor of subsequent purchasers who had notice, *Hoes v. Boyer*, (Ind.) 9 N. E. Rep. 427; *Building Ass'n v. Clark*, (Ohio) 2 N. E. Rep. 846.

The lien of an unrecorded mortgage will be postponed to that of a subsequent judgment, in Massachusetts, *Roane v. Baker*, 2 N. E. Rep. 501; in New Jersey, *Westervelt v. Voorhis*, 6 Atl. Rep. 665; but not to that of a judgment against one of the heirs of the mortgagor, *Id.*

(14 Or. 365)

STATE v. WRIGHT and another.

(*Supreme Court of Oregon*. January 10, 1887.)

1. INTOXICATING LIQUORS—CONSTITUTIONALITY OF LAWS—ACTS OR. 1885; ACTS OR. 1876. § 38, SUBD. 4.

Under section 22, art. 4, Const. Or., providing that no act shall ever be revised or amended by mere reference to its title, but the act revised or amended shall be set forth and published at full length, the Oregon act of November 25, 1885, providing for an increase of the price of liquor licenses to \$300, and prohibiting all incorporated cities and towns from granting such licenses for a less sum, is void, in so far as it attempts to amend subdivision 4, § 38, Acts 1876, granting to the city of Astoria power to license, tax, regulate, and restrain bar-rooms, drinking-shops, etc., in said city, as the former act does not set forth and publish the latter at full length; and a liquor license granted by said city for \$200 is valid. Said act of 1885 is also void under section 20, art. 4, Const. Or., providing that every act shall embrace but one subject, which shall be expressed in its title, as it contains provisions amending the act of incorporation of every city in Oregon.

2. SAME—REVENUE BILLS—POLICE POWER OF STATE—CONST. OR. ART. 4, § 18.

A bill providing for an increase of the amount required for a license for the sale of liquors is not a bill for raising revenue, so that under section 18, art. 4, Const. Or., it must originate in the house, but an exercise of the police power of the state.

3. CONSTITUTIONAL LAW—ENACTMENT AND ENTITLING STATUTE—PEN-STROKE THROUGH THE WORDS “BE IT ENACTED.”

A bill is not void for lack of the enacting clause, when it appears that it was regularly passed, but on the enrolled bill on file in the office of the secretary of state appears a heavy pen-stroke through the words “Be it enacted,” as that was probably the act of some irresponsible party, done without the authority of the legislature.

Appeal from Clatsop county.

T. A. McBride, Dist. Atty., for the State. Raleigh Stott and C. W. Fulton, for respondents, Wright and another.

STRAHAN, J. At the January term, 1886, of the circuit court of Clatsop county, defendants were indicted for the crime of selling spirituous liquors in less quantities than one gallon, without having first obtained a license therefor. The indictment sets out a license issued to the defendants by the city of Astoria, dated January 2, 1886, which purports to authorize them to sell spirituous liquors by retail in said city for one year, for which privilege they had paid the city of Astoria \$200. The defendants demurred to this indictment for the following reasons: (1) The grand jury by which it was found had no legal authority to inquire into the crime charged, because the same is not triable within the county; (2) that the facts stated do not constitute a crime; (3) the court has not jurisdiction over the subject-matter charged as a crime; (4) that the indictment contains matter which, if true, constitutes a legal justification and excuse for the crime charged. The court sustained the demurrer, and the state appealed.

If the license issued to the defendants was a justification of the sale charged in the indictment, then the ruling of the court below was correct; otherwise the same is erroneous.

By the act incorporating the city of Astoria (Sess. Acts 1876, pp. 115-124, § 38, subd. 4) the city of Astoria, through and by its common council, “has the power to license, tax, regulate, and restrain bar-rooms, drinking-shops, theatrical and other exhibitions, shows, public amusements: * * * provided, that no law, or part thereof, authorizing any tribunal or officer of

Clatsop county to grant tavern or grocery licenses shall apply to persons vending liquors within the city of Astoria." It is evident that the object of this proviso was to take from the county court of Clatsop county authority to grant liquor license, and the object of the other portion of the provision quoted was to confer the authority upon the city of Astoria. We therefore conclude that the license set out in the indictment was a complete justification, unless the other matters presently to be noticed rendered such license illegal. But counsel for the state in effect contend that these provisions of the charter of the city of Astoria have been changed by the act approved November 25, 1885, (Sp. Sess. Acts, 38.) That act is entitled "An act to amend section 2 of an act entitled 'An act to regulate the sale of spirituous, malt, and vinous liquors,' approved February 17, 1885." It is provided by said act as follows:

"Section 1. That section 2 of an act entitled 'An act to regulate the sale of spirituous, malt, and vinous liquors,' approved February 17, A. D. 1885, be amended so as to read as follows, to-wit:

"Sec. 2. Every person obtaining a license to sell spirituous or vinous liquors shall pay into the treasury of the county, *city*, or *town* granting such license the sum of three hundred dollars per annum, and in the same proportion for a less period; or two hundred dollars per annum, and in the same proportion for a less period, for a license to sell malt liquors only: provided, that no license shall be granted for a less period than six months. And be it further provided that no license to sell spirituous, malt, or vinous liquors shall be granted by any incorporated *city* or *town* for a less sum than that hereinbefore specified, and that the levy and collection thereof shall be in conformity to the *ordinances*, respectively, of the *cities* or *towns* aforesaid, and the revenue thus collected shall inure to their exclusive use and benefit."

Counsel for the state claim that this act has superseded or repealed the laws and ordinances of the city of Astoria in so far as they fix different amounts for license than those contained in this act, and that the license set out in the indictment is illegal for that reason. This depends on the effect to be given to this act.

Counsel for the defendants claim that, so far as it applies to the incorporated cities and towns of the state, it is in conflict with article 4, § 22, of the constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or amended shall be set forth and published at full length." If valid, the effect of this act is to amend the charter of every incorporated city or town in the state. It must be conceded that the legislature has the unquestioned right to create municipal corporations, and to change or alter them at pleasure; but the manner in which the power may be exercised is limited and regulated by other provisions of the constitution, applicable alike to all legislation whatever. The section of the constitution above quoted is not new, but is to be found in the constitutions of many of the states, and its objects and meaning are well understood. One of the objects to be accomplished by it was to give notice of the contents of the proposed act, and to prevent clauses being inserted of which the title gave no intimation, so that neither the members of the legislature nor the people could be misled by the title.

The first question to be determined, therefore, is whether this act does either revise or amend the charter of the city of Astoria. If it does, there can be no doubt it is in conflict with this provision of the constitution, because it is not claimed that article 4, § 22, of the constitution was complied with in its enactment. In legislation, amendment means an alteration in the draught of a bill proposed, or in a law already passed. Rapalje & L. Law Dict. tit. "Amendment." So that, if this act alters the legal effect of the charter of the city of Astoria in a particular already covered and provided for by the charter, then it is to be taken as an amendment of the charter. This

is not a case where new and additional powers are added by way of supplement, but the change or alteration of an existing power, and I think it is too plain for argument that it is an amendatory statute.

Said this court in *City of Portland v. Stock*, 2 Or. 69: "Manifestly, then, section seven enlarges the powers previously possessed by the city government,—revises and amends them; and, if that section were valid, the city authorities would, after the fifteenth day of October, 1862, perform acts which would not have been lawful previous to that date. We conclude, then, that the act of 1862 is a statute which operates by way of amendment to the charter." And so the act was held to be in conflict with the constitution. In this case the court was considering an act by which the powers of the corporation were sought to be enlarged. In the case now before the court the attempted amendment is by limiting and restricting a corporate power vested in the corporation; but in principle there can be no difference. *City of Portland v. Stock, supra*, was cited and approved by this court in *Dolan v. Barnard*, 5 Or. 390.

If this statute is an amendatory one with respect to the charter of the city of Astoria, than it amends every municipal charter in the state, if valid. The effect would be that each charter must be read as if the provisions in the act above quoted were transferred and copied into the proper section relating to the licensing of the sale of liquors by the corporation; for such would be the legal effect. But this construction would violate section 20, art. 4, of the constitution, which provides: "Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." It will not be contended that it would be competent for the legislature by *one act* to incorporate all the cities and towns in the state. If such an act would violate this provision of the constitution because containing more than *one subject*, would not an act which amends all the municipal charters in the state be open to the same objection? The same rule would have to be applied in each case.

King v. Banks, 61 Ga. 20, is a case involving this principle. There the legislature passed an act incorporating three separate and distinct corporations, or reviving by name three charters which had become obsolete, and the court held said act contained more than one subject, and declared it unconstitutional for that reason. *Ex parte Conner*, 51 Ga. 571, involves the same principle, and was decided in the same way.

Under a like provision in the constitution of Louisiana, from which ours was probably taken, it was held by the supreme court of that state that the second section of an act of the legislature, approved the tenth of March, 1857, entitled "An act relative to the payment of expenses incidental to the prosecution of criminals," which declared that the fines and forfeitures to be collected for the violation of the criminal laws of the state shall be paid into the state treasury, was unconstitutional, because it contained more than one subject. *Parish of Bossier v. Steele*, 13 La. Ann. 438.

The like ruling was also made in *Smalis v. White*, 4 Neb. 353; *Cutlip v. Sheriff of Calhoun Co.*, 3 W. Va. 588; *In re Blodgett*, 89 N. Y. 392; *Stewart v. Father Matthew Soc.*, 41 Mich. 67; *Burlington & M. R. R. Co. v. Board Co. Com'rs Saunders Co.*, 9 Neb. 507; S. C. 4 N. W. Rep. 240; *State v. Everage*, 83 La. Ann. 120; *Ex parte Thomason*, 16 Neb. 238; S. C. 20 N. W. Rep. 812.

In construing a similar provision of the constitution of Louisiana, the supreme court of that state said: "The title of the act of 1868 is 'An act to amend the first section of an act to incorporate the town of Monroe, in the parish of Ouachita, and to provide for the government of the same,' approved eighth of March, 1868. The first section of the act to be amended relates only to the geographical limits of the town. Under the title, therefore, to amend only the first section of the statute of 1866, it was not competent to amend

other sections of the same act,—to abolish the office of town constable, and transfer the duties thereof to the sheriff and his deputies.” *Wisner v. Mayor of Monroe*, 25 La. Ann. 598.

It seems to me manifest that if, under such a title, it was not competent to amend other sections of the same act, for so much the stronger reason it is not competent to amend every city and town charter in the state under a title to amend only a general law, and where none of said charters or acts are in any manner referred to in the title. So much of the act in question, therefore, as affects or changes the charter of the city of Astoria is in conflict with the constitution, and void.

But there is another question, so intimately connected with this matter, and of so much public concern, that I cannot dismiss this subject without referring to it. We do not find it necessary to decide the question at this time, but it may become necessary to further consider it hereafter. The *quære* is whether or not house bill No. 66, to which the act already referred to is amendatory, ever became law, and whether or not it ever passed the legislative assembly. This is a question that, in a proper case, the court must consider and decide. *People v. Mahaney*, 13 Mich. 481.

The constitution, art. 4, § 13, provides: “Each house shall keep a journal of its proceedings. The yeas and nays on any question shall, at the request of any two members, together with the names of the members demanding the same, be entered on the journal.” Section 18 provides: “Bills may originate in either house, but may be amended or rejected in the other.” And section 19 provides: “Every bill shall be read by sections on three several days in each house, unless, in case of emergency, two-thirds of the house where the bill may be depending shall, by a vote of yeas and nays, deem it expedient to dispense with this rule; but the reading of the bill by sections on its final passage shall in no case be dispensed with, and the vote on the final passage of every bill or joint resolution shall be taken by yeas and nays.” The journals are therefore the official records of the proceedings of each house.

The act in question was known as “House Bill No. 66,” and passed the house, February 9, 1885. House Jour. 313. The bill went to the senate on the same day, when the rules were twice suspended, and the bill read a first and second time by title; and the same was then referred to the committee on education, with permission to report at any time. Senate Jour. 274. On February 11, 1885, the committee on education reported the bill to the senate, with a recommendation that it pass; whereupon, on motion, the rules were suspended, and the bill was ordered to be read a third time now, and, the question being “shall the bill pass,” and pending the question, Mr. Siglin moved that the bill be recommitted to the committee on education for amendment, with leave to report at any time, which motion prevailed. Senate Jour. 386. February 13, 1885, the committee on education reported as follows:

“*Mr. President*: Your committee on education, to whom was referred house bill No. 66, with instructions to strike out section 7, have done the same accordingly, and do now report the same back, with a recommendation that it do pass.”

HENRY HALL, Chairman.”

By unanimous consent, house bill No. 66 was amended as follows: “In line 7 of section 4 strike out the word ‘cost.’ In line 9 of section 5 to strike out all the balance of the section commencing with the second ‘and’ in the line;” whereupon Mr. Hare moved a call of the senate. Senate Jour. 418. When the bill was next before the senate, the following proceedings were had: “House bill No. 66 being a special order for this hour, Mr. Siglin submitted the following amendment thereto, which, by unanimous consent, was adopted, to-wit: ‘Amendment. In section 3, line 5, strike out the words “and signatures;” also in line 7 of section 5 strike out the word “signature;” also in line 2 of section 1, after the word “state” insert the words “in less

quantities than one quart." Mr. Hare moved the previous question on the passage of the bill, and the question was: "Shall the main question be now put?" The motion prevailed. The question being, "Shall the bill pass?" the roll was called, with the following result: Yeas, 20; nays, 6. So the bill passed." Senate Jour. 421, 422.

The bill was returned to the house, February 14, 1885, and accompanying it was the following communication:

"Mr. Speaker: I am directed by the president to inform you that the senate has passed H. B. No. 66, with sundry amendments, which are herewith transmitted; and the same is herewith returned.

"J. W. STRANGE, Chief Clerk.

"The amendments: Amend H. B. No. 66 as follows: Strike out section 7. Section 4, line 7, strike out the word 'cost.' Section 5, line 9, commence with the word 'and,' and strike out balance of the section. In section 5, line 8, strike out the words 'and signatures.' In section 5, line 9, strike out the word 'signatures.' Make sections 8, 9, 10, and 11 read 7, 8, 9 and 10. In section 1, line 2, after the words 'state,' insert 'in quantities less than one gallon.'

"*Mr. Wilcox* moved to concur in the senate amendments to House Bill No. 66, which motion prevailed. Yeas, 44; nays, 3." House Jour. 476, 477.

It thus appears from the senate journal that that body ordered section 1 to be amended after the word "state," in the first section, by inserting the words "in less quantities than one quart." As reported to the house, and inserted in the bill, the words are: "In quantities less than one gallon." This discrepancy goes to the substance of the bill, and it is difficult to see how it can be disregarded. It does not appear from the journals of the two houses that they agreed upon this bill in the present form, but, on the contrary, that they disagreed. The senate required a license to sell in quantities less than one quart; the house in quantities less than one gallon. It may therefore be well questioned whether this bill ever became a law. At the argument, the court suggested this point to the learned district attorney, who appeared in behalf of the state, and he was disposed to concede that most serious doubts exist on the question. We do not think it necessary to decide the question at this time, but have deemed it proper to point out these seeming irregularities in the passage of this bill, in order that the legislative assembly might, if thought necessary, take steps at the coming session to obviate them.

Upon the argument, counsel for the respondents claimed that the amendatory act of house bill No. 66 was a bill for raising revenue, and that it should therefore have originated in the house. Const. art. 4, § 18. This is not a bill to raise revenue, but an exercise of the police power of the state, for the purpose of regulating a business that is detrimental to the public morals. *State v. Hudson*, 78 Mo. 302; *Braun v. City of Chicago*, 110 Ill. 186; *Fletcher v. Oliver*, 25 Ark. 289; *City of East St. Louis v. Wehrung*, 46 Ill. 392.

It was also argued that said bill was without an enacting clause, and was void for that reason. We have examined the enrolled bill in the office of the secretary of state, and there appears a single, heavy pen-stroke through the words, "Be it enacted;" but this was doubtless done surreptitiously by some irresponsible party, and not by the authority of the legislative assembly, and no legal effect could be given to such unauthorized act. If the bill was without an enacting clause, it could not be a law; but the mutilation of that part of the bill could not destroy or defeat the legislative intent if it were in other respects free from constitutional objections.

The judgment of the court below will therefore be affirmed.

LORD, C. J., concurs in the result upon the last point discussed in the opinion.

(14 Or. 353)

BENDER v. BENDER.

(Supreme Court of Oregon. January 10, 1887.)

1. EQUITY—DECREE—VARIANCE.

A party must obtain his decree on the grounds stated in his pleading, and the proofs must tend to establish the material allegations therein; and therefore, when a wife brings suit against her husband to obtain a decree rescinding a sale of land made to him by her, alleging that the land belonged to her at the time of her marriage, and that her husband induced her to convey it to him by threats, solicitations, and undue influence, she cannot obtain the relief sought on proof that the property was paid for from the joint earnings of husband and wife, deeded to her in her own name, and conveyed by her to him without consideration.

2. HUSBAND AND WIFE—DIVORCE—COSTS.

In a suit in equity for divorce, involving a question of title to community property, when both parties are in fault, and the property stands in the husband's name, costs will be taxed against him, although the wife does not prevail in the suit.

Appeal from Clatsop county.

F. D. Winton, for appellant, J. F. Bender. *C. W. Fulton*, for respondent, C. C. Bender.

STRAHAN, J. This is a suit for a divorce. It was referred to J. Q. A. Bowlby, Esq., to take the evidence and report the same, with his findings of fact thereon, to the court. Upon the filing of the referee's report, the same, having been excepted to by the plaintiff, was set aside, and the court proceeded to find the facts, and make a final decree in said suit. The findings of fact by the court touching the ground for divorce were that the plaintiff had failed to establish by the evidence any sufficient cause for a divorce, and that the conduct of each of the parties towards the other had been improper. The court, therefore, dismissed the complaint, so far as concerned the prayer for a divorce, from which part of the decree no appeal has been taken, and no question touching the divorce is now before us on this record.

The plaintiff's complaint, after stating her causes for a divorce, further alleges, in substance, that prior to her marriage with the defendant she was the owner in her own right of an undivided half of about 160 acres of land, in Clatsop county, which land is particularly described; and that on the _____ day of _____, 187_____, the defendant, by employing threats, solicitations, and undue influence, caused the plaintiff to convey, or attempt to convey, to him her interest in said premises, and that on said day she executed and delivered to defendant a deed which purported to convey to him her undivided half interest in said land; that said deed was executed without consideration, while said marriage relation existed; and that the defendant is the owner of the other half of said tract of land, and of personal property of the value of \$100. All of the allegations of the complaint are specifically denied by the answer. The court found, as a fact, that out of the joint earnings of the plaintiff and defendant the real property now in controversy was purchased; that said real property was deeded to the plaintiff in her own name, and afterwards, at the request of the defendant, was deeded to him by the plaintiff without consideration, in order that he might hold the same in his own name, and thereby entitle him to become a legal voter in his school-district, where said property was situated. Upon this finding of fact the court made a decree requiring the defendant, within 60 days from the date of the decree, to convey said property to the plaintiff; and, in default of such conveyance, then that said decree operate to transfer to the plaintiff said real property, and stand in place of said deed. From this part of the decree this appeal is taken.

The part of the complaint relating to plaintiff's claim to the real property, though clearly bad on demurrer, (*Richardson v. Hittle*, 31 Ind. 119,) was not questioned in the court below, and it will therefore be assumed to be sufficient to support a decree, if sustained by the evidence. The facts are colorably

stated, but not in that clear, distinct, and issuable form required by the Code. But the complaint alleges one state of facts which it is assumed would authorize a decree in favor of the plaintiff, namely, that she owned this property at the time of her marriage, and that the defendant, by employing threats, solicitations, and undue influence, caused her to convey it to him, whereas the court found that the property was purchased by the joint earnings of the plaintiff and defendant, and that said real property was deeded to the plaintiff in her own name, and then conveyed to the defendant without consideration. Here the plaintiff made one case in her pleadings, and has succeeded in obtaining a decree on another and different state of facts, involving the application of entirely different principles of law. "The maxim that the decree must be *secundum allegata* as well as *secundum probata*," says Chief Justice MARSHALL in *The Hopper v. U. S.*, 7 Cranch, 389, "is essential to the due administration of justice in all courts." The rule is founded in sound reason and good sense, and is, no doubt, fully applicable to our present system of pleadings. *Van Santv. Pl.* 787, 788; *Gregory v. Haworth*, 25 Cal. 653; *Benedict v. Bray*, 2 Cal. 251. This rule requires that a party must obtain his decree on the grounds stated in his pleading, and that the proofs must tend to establish the material allegations therein, and its observance by the courts is absolutely essential to the due administration of justice.

In the examination of this case, therefore, we must be limited to the allegations of threats, solicitations, and undue influence alleged in the answer; and we reach the conclusion, after a careful examination of the evidence, that these allegations are not proven, nor does the evidence tend to prove them.

We have not considered the question as to whether an implied trust exists in favor of the defendant in the real property in controversy or not, for the reason there are no facts in the pleadings presenting that aspect of the controversy. A decree will be entered here reversing the decree of the circuit court, and dismissing the complaint as to the claim for the land, without prejudice. This being a suit between husband and wife, and it appearing to the court that the defendant was not free from fault in the inception of the controversy, and also that he has the property which came to him during the marriage in some sense by the aid and assistance of the plaintiff, and it not appearing that the plaintiff has any means applicable to their payment, the defendant will be required to pay the costs and disbursements of this suit in the court below as well as in this court.

(All concur.)

(4 N. M. [Gild.] 1)

ILFELD and others v. STOVER.

(Supreme Court of New Mexico. January 5, 1887.)

PRINCIPAL AND AGENT—EVIDENCE OF AGENCY—GRATUITOUS PERMISSION TO TAKE OUT LICENSE IN DEFENDANT'S NAME.

S., the defendant, a member of a firm of grocers in Albuquerque, took a conveyance of a store from E., in satisfaction of a debt. E. had a stock of liquor in the building, and requested S. to let him take out a license in S.'s name, in order to retail the same, to which S. consented, and the license, when so taken out, was posted conspicuously on the premises. S.'s permission was gratuitous, and he had no interest in the business; and he never ratified any act of S. as his agent. I. & Co., the plaintiffs, were another firm of grocers in the same town, and their place of business was within two blocks of defendant, and connected with his firm by telephone. E. purchased a bill of goods of plaintiffs, representing himself as the agent of defendant, S., and the bill was entered in plaintiffs' books as sold to S. The bill was not presented to S. for more than a year after it was bought. Held, no agency, express or implied, was shown as existing between E. and S., on which plaintiffs could recover against S. for the goods sold by them to E.

Appeal from district court, Bernalillo county.

Bell & Field, (Neill B. Field, of counsel,) for appellants, Ilfeld & Co.

Wm. H. Whiteman, for appellee, Stover.

HENDERSON, J. Appellants, Ilfeld & Co., brought *assumpsit* against appellee, Stover, in the district court of Bernalillo county, to recover the price of a bill of goods, consisting of groceries, liquors, etc., sold and delivered by them to one William Eront, as the agent of Stover. The amount claimed was \$363. The jury having been discharged under a stipulation filed in the cause before the conclusion of the trial, the issue was tried by the court, with a finding and judgment for the defendant. The finding for the defendant is assigned as error, and presents the only question for our consideration.

The facts may be stated, in substance, as follows: On the fifteenth day of June, 1883, William Eront purchased a bill of goods from the plaintiffs, Ilfeld & Co., representing himself as the agent of defendant, Stover. The bill was entered in the books of appellants as sold to Stover. Some time prior to this purchase Eront was doing business in Albuquerque, under the name of Pedro Montanio. The building in which the business was carried on originally belonged to Eront. He had, however, contracted a debt with Montanio, to secure or pay which he executed some kind of conveyance. Afterwards, and before the date of the purchase of the good from Ilfeld & Co., the debt due Montanio was paid, but in the mean time Eront had contracted a debt of several hundred dollars with the firm of Stover, Crary & Co., of which appellee was a member. By the consent of Eront, Montanio conveyed the building to Stover in payment of or security for the debt due Stover, Crary & Co. The record does not distinctly disclose the nature of these conveyances. At the date of the conveyance from Montanio to Stover, a quantity of beer remained in the house, which still belonged to Eront. Stover did not know there was any beer in the house. He did not claim it as embraced in the sale from Montanio. Eront applied to Stover, as a gratuitous favor, to permit him to take out a United States retail liquor license in Stover's name, in order to sell off the beer profitably to himself, and thereby pay his debts. After some hesitation, Stover gave him permission. Both United States and territorial liquor licenses were procured in Stover's name by Eront, and posted conspicuously in the place of business run by him. The exact nature of this business does not appear, further than as indicated by the beer on hand, and the kind of goods purchased from Ilfeld & Co.

Eront swore on the trial that he was Stover's agent. Stover swore that he was not. There was not a single fact or circumstance testified to by Eront making it probable that he was appointed Stover's agent for any purpose. Stover had no interest whatever in the business carried on by Eront. He had no use for an agent. If an agency, such as testified to by Eront, was created by Stover, it can rest upon no other reasonable foundation than that Stover, without interest to himself, or expectation of any benefit whatever, undertook to set Eront up in business on his capital and credit. This is unreasonable. It is conceded in argument that Stover is a highly reputable citizen, and worthy of credit as a witness. His testimony is reasonable, and we think in entire harmony with the other facts shown in the case. This disposes of the contention in favor of an express agency created by the act of Stover.

The main proposition discussed in the brief of counsel for appellants is that, conceding as true that Stover did not, by any express words, constitute Eront his agent, he nevertheless must be treated as a principal on account of his acts in suffering Eront to assume the relation he did, under the circumstances stated. It is assumed that the claim of agency asserted by Eront, coupled with the further fact that he was doing business in Stover's house, with liquor licenses in Stover's name, was a sort of open proclamation or announcement, repeated by Stover from day to day, to the effect that the business conducted by Eront was his, and that as between himself and third

persons dealing with Eront, within the scope of his *apparent authority*, Stover will be concluded or estopped to deny the fact of agency, or to avoid his liability, by showing any fact inconsistent with it. An agency may be implied or inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment. It may be presumed from the repeated acts of the agent, if they were adopted and confirmed by the principal previously to the making of the contract or the doing of the act in relation to which the question is raised. *Commercial Bank of Buffalo v. Warren*, 15 N. Y. 577; *Sweetser v. French*, 2 Cush. 309; *Jones v. Booth*, 10 Vt. 268; *Bank of Kentucky v. Brooking*, 2 Litt. 41; *Gulick v. Grover*, 33 N. J. Law, 469; *Kountz v. Price*, 40 Miss. 341.

We will see what force there is in the argument in favor of estopping Stover to deny the agency of Eront. Stover never knew of Eront's claim that he was his agent. He never ratified an act of Eront's done under any claim or pretense of agency. He never engaged his services to do any work. All the parties in anywise interested in this suit lived in the same town, and were engaged in mercantile pursuits. The stores or places of business of appellants and appellee were located within two blocks of each other, and connected by telephone. The bill was not presented to Stover for payment for more than a year after it was bought. Stover, Crary & Co. and Ilfeld & Co. were both engaged in the same line of business. Estoppels are not favored. The principle invoked here is never applied, except in cases of clear and manifest necessity, in the interest of justice. There is neither a legal nor even moral necessity for the application of that rule in this case.

The simple fact that Stover, Crary & Co. were doing a grocery business, and presumably quite as well able to supply Eront with goods as the appellants, was sufficient to put them upon a more diligent inquiry touching the pretenses of Eront. If there was culpable negligence on the part of either, it was on appellants.

Counsel cite the case of *Banner Tobacco Co. v. Jenison*, 48 Mich. 459, S. C. 12 N. W. Rep. 655, as in point and on all fours with this. Without undertaking to restate the whole of that case, it will suffice to say that Luman and Lucius Jenison were partners as millers in the state of Michigan. B. F. Emery was a merchant at Whitehall, in the same state. Emery became indebted to the Jenison firm in the sum of over a thousand dollars. Emery was in failing circumstances, and, without the knowledge of L. & L. Jenison, executed and put of record a chattel mortgage to them, covering his stock of goods. He then telegraphed L. & L. Jenison to come to Whitehall. Luman Jenison went. He and Emery entered into an arrangement by which the entire stock of goods was turned over to L. & L. Jenison; a sign placed upon the store-house to indicate proprietorship in L. & L. Jenison. Emery was appointed as agent for the firm, and left in charge, with power to sell off the goods in the usual way, and to keep the stock up by purchases, as he might think best. Luman Jenison admitted the agency thus created, but denied that Emery was authorized to buy goods on their credit. Emery testified that he did have power to buy on time, and pledge the credit of the firm of L. & L. Jenison. The agency began in 1875, and the business closed out in 1879. Emery bought a bill of cigars from the Banner Tobacco Company. The tobacco company brought a suit against L. & L. Jenison to recover the price of the bill of cigars sold to them through their agent. The point chiefly discussed by COOLEY, J., in delivering the opinion, was as to the liability of Lucius Jenison, who denied having knowledge of the agency created by Luman Jenison, his partner. The proof was not very clear that Lucius Jenison had knowledge, but it was said by the judge that there was evidence to go to the jury that he did have such knowledge. It was further held that slight circumstances of knowledge or assent on the part of Lucius were sufficient, under the evidence in that case, to charge the firm. In that case

Emery had been the active managing agent of the firm, conducting their business for more than four years, and the inference is very strong that both members of the firm had actual notice of the agency of Emery, and the powers exercised under it.

In this case no agency whatever, either general or special, has been shown. The facts on which an implied agency is attempted to be raised are not sufficient, either on principle or authority, to ground this contention as a rule of law. No case has fallen under our observation pushing the doctrine of implied or presumed agency to the extent claimed here. The cases cited from the supreme court of the United States do not apply. Finding no error in the decision and judgment of the court, it is affirmed.

LONG, C. J. I concur.

(4 N. M. [Gild.] 149)

DEEMER v. FALKENBURG.

(*Supreme Court of New Mexico. January 22, 1887.*)

1. APPEAL—ASSIGNMENT OF ERRORS—WAIVER OF OBJECTION.

An assignment of errors cannot be objected to by appellee, because contained in appellant's printed brief, after he has treated it as a good assignment by filing a joinder thereto.

2. SAME—PRINTING RECORD—COMP. LAWS N. M. § 2201.

A judgment in ejectment for land, the value of which is not shown, and for money damages in a less sum than \$1,000, does not make a case within Comp. Laws N. M. § 2201, requiring the record on appeal to be printed, if the amount of the judgment or value of the property in controversy exceeds \$1,000.

3. EJECTMENT—DEFECTIVE TITLE—POSSESSION THEREUNDER.

Defendant in ejectment bought a lease of the premises from plaintiff's tenant, but, after entering, repudiated the tenancy. Plaintiff had prior possession under a deed from one who had located a mining claim including the premises. Defendant not setting up any different title, held, that plaintiff's title must prevail over defendant's possession, whether or not the proceedings for the location of the mining claim were valid.

4. CONTINUANCE—STATEMENT OF EVIDENCE—LAW AND FACT.

A statement in an application for a continuance that a witness will prove that he located the land in controversy as a mill-site, in connection with a mining claim, does not state "particular facts, as distinguished from legal conclusions," as required by Comp. Laws N. M. § 2049; as whether a mining claim has been located so as to sustain the location of a mill-site in connection therewith is a question of law, depending on certain facts.

Appeal from Sierra district court.

Fielder & Fielder, for appellant. *Elliott, Pickett & Elliott*, for appellee.

BRINKER, J. This was an action of ejectment for a town lot in Kingston. Plaintiff recovered judgment below. In this court appellee moves to dismiss because appellant failed to file an assignment of errors on the first day of the term, as provided by section 2189, Comp. Laws. On the first day of the term appellant filed a printed brief, signed by counsel, on the last page of which, and after the signature of counsel, appears an assignment of errors, also signed by counsel. Without determining whether this is sufficient under the statute, we hold that appellee cannot take advantage of it, because he has treated it as a good assignment by filing a joinder thereto. The motion to dismiss for want of an assignment of errors is denied. In another motion, heard at the same time as the last, appellee asks us to strike out the record, because it was not printed as required by rule 28, and because the amount involved exceeds \$1,000 in value. Section 2201, Comp. Laws, says: "Appellant or plaintiffs in error shall not be required to print the record, nor any part thereof, unless the amount of the judgment or the value of the property in dispute shall exceed one thousand dollars."

This was an action of ejectment for a town lot and improvements. Plea, not guilty. The judgment was for the recovery of the premises described in the declaration, to-wit, one lot in Kingston, (describing it,) and \$250 damages. The judgment, or rather that portion of it adjudging the payment of money, is for less than \$1,000. There is no finding as to the value of the premises in question, and we are unable to ascertain from an examination of the record what their value is. In order to justify the enforcement of the rule for printing the record, it should clearly appear that the money judgment, or the value of the property in controversy, exceeds \$1,000. Neither of these facts appearing, the second motion is overruled.

Upon the merits, the record discloses the following facts: Holt and Fraser located a mining claim, and laid off the surface ground into town lots, and sold on September 26, 1882, by quitclaim deed to plaintiff, one of the lots so laid off, and put him in possession. This is the lot in question. The mining claim was never patented, but Holt and Fraser regularly worked the assessments upon it. After his purchase, plaintiff, by written lease, demised the lot to Wiggins and Richardson, who, before their lease expired, sold to Like. After the expiration of the first lease, plaintiff leased the property to Like for two years from March 10, 1884, who agreed to and did pay plaintiff \$25 per month ground rent. Before the expiration of his term, Like, with plaintiff's permission, sold out to Boone, who took possession and paid rent to plaintiff. Boone sold out to defendant some time in 1885, and before the expiration of the Like lease, and defendant took possession, and, according to plaintiff's testimony, paid rent for several months to Jack Wilson, as plaintiff's agent. Defendant, however, denies having paid rent, but says, in his direct examination, in answer to the question whether he had paid any rent: "When I went there Boone told me that he owed some back rent, or something to that effect, and he gave me the money to pay it, and I paid it to Jack Wilson. I didn't know to whom it was to go, nor for what purpose." His counsel then asked him: "When you say that Boone requested you to pay rent to Wilson, did you know what that rent was for,—whether that house, or some other house?" "I do not. I don't know what house it was for; not of my own knowledge."

A witness testified that he went to defendant, by request of plaintiff, and tried to sell the lot, as plaintiff's property, to defendant, and that defendant then offered to buy the lot of plaintiff, and pay \$100 down and give a mortgage to the bank for the balance. Defendant denies this, and says, when this witness called on him, he told witness that he did not know plaintiff or his title; that he had been informed that the lot was on unsurveyed government land. The suit was commenced after the expiration of the lease to Like. The court directed a verdict for plaintiff.

Before the trial defendant asked for a continuance on the ground of the absence of a material witness, and in his application stated that he expected to prove by the absent witness "that the mining location made by Holt and Fraser was not a valid location, because the land on which the location was made was non-mineral land; that the witness had located this land as a mill-site in connection with a mining claim which did contain mineral," but did not state how this mine was located, nor what was done in order to make a valid location. This application was refused, and we think properly.

The statute (section 2049, Comp. Laws) requires applications of this kind to state "what particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove." This application contained none of these essentials. Whether a mining claim has been located so as to sustain the location of a mill-site in connection therewith is a question of law, arising upon certain facts, and, before the court can determine whether such location has been made in conformity with law, the facts necessary to constitute such location must appear. In the view which we take of this case, it is unnecessary for us to decide whether defendant sustained the relation of tenant

to plaintiff or not. Defendant did not prove, or offer to prove, that he held by any other right or title than that derived from Boone, nor did he offer to prove that there was any outstanding title in any other person superior to plaintiff's. Plaintiff, having had the prior possession under a deed for a valuable consideration, is entitled to recover, unless defendant shows a title better than mere subsequent possession. This he did not do. *Bradshaw v. Treat*, 6 Cal. 172; *Corryell v. Cain*, 16 Cal. 567; *English v. Johnson*, 17 Cal. 115.

The instruction given was proper, and the judgment should be affirmed. It is so ordered.

LONG, C. J. I concur.

(71 Cal. 124)

CROGHAN v. SPENCE. (No. 9,611.)

(*Supreme Court of California. September 28, 1886.*)

STATUTE OF LIMITATIONS—ADVERSE CLAIM.

Action to determine adverse claim to land held barred.

Department 1. Appeal from superior court, Humboldt county.

J. J. De Haven, for respondent, Croghan. *J. D. H. Chamberlain*, for appellant, Spence.

BY THE COURT. There was no evidence of an actual adverse possession by defendant of any part of the premises described in the complaint. The finding against the defendant on his plea of the statute of limitations was proper.

To the cross-complaint of the defendant the plaintiff pleaded in bar sections 343 and 338 of the Code of Civil Procedure. For all purposes necessarily involved in the disposition of this case it may be conceded that defendant is entitled to a decree against the plaintiff charging him as trustee of the legal title for defendant's benefit if the defendant would have been entitled to a like decree against Minor, the grantor of plaintiff, had Minor not parted with his title.

The defendant's cause of action against plaintiff, if any he has had, arose, at the latest, August 13, 1877, when the commissioner of the general land-office adjudged (in the language of appellant's brief) that defendant "had the better right to pre-empt the land, and that Minor had acquired his patent by fraud and perjury." That was more than five years before the present action was commenced, and nearly six years before the defendant herein filed his cross-complaint. If the cross-complaint be treated as a bill for relief on the ground of fraud, the facts constituting the alleged fraud were known to the defendant long before the adjudication by the commissioner of the general land-office above mentioned.

Whether, therefore, the four-years limitation of section 343, or the three-years limitation of section 338, of the Code of Civil Procedure applies, the cause of action set forth in the cross-complaint was barred.

Judgment and order affirmed.

(70 Cal. 582)

PEOPLE v. MYERS and another. (No. 20,189.)

(*Supreme Court of California. August 31, 1886.*)

1. CRIMINAL LAW—TRIAL—EVIDENCE—ROBBERY—FOOT-PRINTS—OTHER SIMILAR FOOT-PRINTS.

On the trial of an information against men for robbery, evidence having been introduced tending to show that a peculiar boot-track had been traced from the scene of the robbery to the house of one of the defendants, it was error to exclude evidence offered by the defense to show that two men, other than the defendants, had

been seen on the third day after the robbery within three days' foot-travel of the place of the occurrence, one of whom wore a boot which left precisely similar marks to those traced to the defendant's house.

2. SAME — THE JURY — "TREATED" BY SHERIFF — SHERIFF SEEKING REWARD FOR CONVICTION OF DEFENDANTS.

Where a reward has been offered for the conviction of the parties committing a crime, and the sheriff, in hopes of obtaining it, has paid out considerable money in and about the trial, with no expectation of being repaid except in case of conviction, it is an irregularity for such sheriff, while in charge of the jury, and during the trial, to take them to saloons, and furnish them with liquors at his expense; and such irregularity is not counterbalanced by the fact that the jury was also "treated" by one of their number, and by one of the attorneys for the defendants.

In bank. Appeal from superior court, Fresno county.

Information for robbery.

Grady & Merriam and *P. Reddy*, for appellants. *The Attorney General*, for the People.

MYRICK, J. The defendants were accused by information of the crime of robbery. For two reasons the conviction must be set aside, and a new trial ordered, viz.:

1. The accused were convicted on circumstantial evidence only. The fact of the robbery was clearly proved. As a circumstance tending to show that the defendants were present at the robbery, and were the persons who committed it, the prosecution gave evidence that certain boot-marks, of peculiar characteristics, were found, the day after the robbery, at the place, and were traced from that point along a trail for about eight miles to a gate leading into a *corral* at the place of residence of defendant Myers. In no other way was a boot of that description traced to the defendants. The defendants offered to prove that on the third day after the robbery, at a place more distant than Myers' residence, but within three days' foot-travel, two men, other than the defendants, of about the same stature and of similar complexion, were seen, and that a boot worn by one of them left marks precisely similar to those found on the trail. This evidence was objected to. We copy from the transcript:

"*The Court.* If you say your object in introducing this testimony is to identify or show that it was the defendants, or either one of them, that was there at that time, the court will permit the evidence.

"*Defendants' Counsel.* That we were there with that peculiar track? No, we don't do that. Our purpose is to show that it was not the defendants who robbed the stage.

"*The Court.* Taking that view of it, the court will certainly sustain the objection."

In other words, if needed in order to more clearly present the ruling, if the evidence offered would tend to show the guilt of the defendants, it was admissible; but if to show their innocence it was inadmissible.

2. The jury was during the trial placed in charge of the sheriff. A reward had been offered for the conviction of the defendants, and the sheriff hoped to obtain the reward. He paid out some considerable money in and about the trial, and had no expectation of being repaid therefor except in case of conviction. During the trial, and while the jury was in his charge, on at least two occasions the sheriff conducted the jurymen to public saloons in the town, and furnished them liquors at his expense. This manifest irregularity is not counterbalanced by the fact that the jurymen on one occasion were "treated" by one of their own number, and on another occasion by one of the attorneys for the defendants.

The judgment and order are reversed, and the cause remanded for a new trial.

We concur: MORRISON, C. J.; MCKEE, J.; SHARPSTEIN, J.; THORNTON, J.

(71 Cal. 545)

PEOPLE v. COPSEY. (No. 20,229.)

(Supreme Court of California. January 17, 1887.)

1. JURY—CHALLENGES—HYPOTHETICAL QUESTIONS BASED ON THE THEORY OF THE PROSECUTION, ADMISSIBLE.

Where, on an information charging defendant with an assault with intent to commit murder, the defendant's counsel, in challenging the jury, has put to them hypothetical questions based on his theory of the case against the objection of the district attorney, the district attorney may, in cross-examining them, ask hypothetical questions based on his theory of the case.

2. WITNESS—IMPEACHMENT OF—RELIGIOUS BELIEF—CONST. CAL. ART. 1, § 4; CODE CIVIL PROC. CAL. § 1879.

A question put by defendant's counsel to a prosecuting witness seeking to impeach him by showing him to be an atheist may well be objected to under Const. Cal. art. 1, § 4, and Code Civil Proc. Cal. § 1879.

Commissioners' decision. In bank.

Appeal from superior court, Lake county.

The information in this action charged the defendant with committing an assault upon the person of one Fred. Sonsberry with a deadly weapon, with intent to commit murder. At the trial the district attorney, after defendant, against his objection, had put hypothetical questions based upon his theory of the case, asked each juryman, during his examination on *voir dire*: "If you saw your brother struggling with a stranger, and your brother was sitting on the ground, and that the stranger was face down in his lap, and your brother had his arm across the neck of the stranger, holding him down so that he could not move, and your brother had a pistol in his right hand, and the stranger had no weapon, and an officer of the law was standing over both in such a position that neither could do the other harm, that you would have the right to go up and shoot him?" Each juror stated he did not think he had the right to shoot under the circumstances. Before the district attorney made his opening speech, defendant objected to and challenged the entire panel on the ground that the district attorney had stated to each juror his theory of the facts of the case, and had obtained an expression of the opinion of each juror on such statement, which challenge the court denied, and the defendant duly excepted.

In cross-examination of the prosecuting witness, the defendant's counsel asked him if he was not an atheist, and an unbeliever in any God, or anything of that sort; counsel stating he expected to prove thereby, and by other witnesses, that such witness was an atheist, and did not believe in any future state. Upon objection by the district attorney that such evidence was immaterial, the court refused to allow the question. Judgment of conviction was rendered, from which defendant appeals.

E. C. Marshall, Atty. Gen., for the People. *R. W. Crump*, for appellant.

Foote, C. The defendant was found guilty, by the verdict of a jury, of an assault with intent to commit murder. From the judgment of conviction, and an order refusing him a new trial, he has appealed.

The first error assigned by the defendant is that the court did not sustain his challenge to each and all of the entire panel of trial jurors, on the ground that they were biased against the defendant. The existence of this bias was alleged to have been shown from the fact that the jurors had each stated, on their *voir dire*, that if certain hypothetical facts related to them by the district attorney, as his theory of the case, were true, they would not regard the defendant as innocent of the crime charged against him.

It appears that the jury had previously had put to them by the defendant's counsel hypothetical questions based upon his theory of the case, and had been permitted to answer them, over the objection of the district attorney, in a manner favorable to the defendant. The cross-examination, therefore,

by the district attorney was, as it seems to us, strictly legitimate, and we perceive nothing in the record which warrants even a suspicion that the jury were in any way prejudiced or biased against the defendant. The different theories of the case hypothetically put to them by each side—that on the part of the defendant first, and on the part of the people last—left the jury perfectly free to determine the guilt or innocence of the prisoner on trial before them, under the fair and clear instructions of the court, from the facts and circumstances adduced in evidence before them.

As to the objection made that the evidence did not warrant the jury in convicting the defendant, because it showed an absence on his part of all *intent to commit murder*, we have simply to say that the jury, with the evidence before them, have determined the issue submitted to them against him, and upon reviewing that evidence we are not disposed to question the justness of their verdict.

The defendant sought to impeach the witness Sonsberry, by showing him to be a person who entertained no religious belief. To a question put to the witness on the part of the defendant, with that purpose in view, the court sustained an objection, of which the former complains. But his contention is not based upon any meritorious ground, as we think a reference to the constitution of California, art. 1, § 4, and section 1879, Code Civil Proc., abundantly demonstrates.

The judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 552)

DECLEZ v. SAVE. (No. 11,494.)

(*Supreme Court of California. January 18, 1887.*)

1. APPEAL—WEIGHT AND SUFFICIENCY OF EVIDENCE—VERDICT.

Where, in the trial of a cause, there is a substantial conflict in the evidence, the verdict will not be disturbed upon the ground of insufficiency of evidence to justify it.

2. NEW TRIAL—WEIGHT OF EVIDENCE—VERDICT AGAINST LAW.

Where the weight of testimony is with a party applying for a new trial, but it is not so clearly in his favor as to warrant the conclusion that, in view of the testimony and under the instructions, the verdict is against law, an order of the trial court denying the application will be sustained.

Commissioners' decision. In bank.

Appeal from superior court, Los Angeles county.

George J. Denis and Chapman & Hendrick, for appellant. *J. Brousseau*, for respondent.

SEARLS, C. This is an action to recover damages in the sum of \$5,000 for slanderous words alleged to have been spoken by the defendant of and concerning plaintiff. Defendant had a verdict and judgment, from which judgment, and from an order denying a new trial, plaintiff appeals.

Objection is made by respondent to the statement on motion for a new trial, in that it fails to contain a sufficient specification of the errors relied upon. In the view we take of the case, this objection is not of practical importance. There was such substantial conflict in the evidence that the verdict cannot be disturbed upon the ground of insufficiency of the evidence to justify the verdict.

The main objection to the verdict is that it is against law, in that it is in disregard of the admissions of the pleadings and the instructions of the court. The answer is a general denial of each and every allegation of the

complaint, and no justification is pleaded. The contention of appellant is that the slanderous words are in effect admitted by defendant's testimony,—no justification attempted. There being no dispute as to how the words uttered by defendant were understood by those who heard them, and the court having instructed the jury as to the slanderous character of the language, the verdict is against law.

A verdict in disobedience to the instructions of the court upon a point of law is a verdict "against law." *Emerson v. Santa Clara Co.*, 40 Cal. 545; *Bunten v. Orient Mut. Ins. Co.*, 4 Bosw. 262.

The complaint shows that the plaintiff and defendant were directors of an association engaged in publishing a newspaper in Los Angeles. The association was in possession of a part of Merced Hall as sublessees thereof. Plaintiff, by authority of the board of managers or directors, and with the knowledge of defendant, contracted for and procured the construction of a partition through the hall, at an expense of \$75.86, which sum was paid therefor. At a meeting of the directors held thereafter and on the fifth day of January, 1885, the defendant, in speaking of the partition, accused the plaintiff with having pocketed the money, and averred the partition had not cost what plaintiff claimed it had, etc. The complaint contains apt words showing that defendant meant to charge, and was understood by those who heard him to charge, plaintiff with embezzling the funds of the association, etc.

The testimony on behalf of the plaintiff tended to establish substantially, but not very accurately, the charges as laid.

On behalf of defendant there was testimony tending to show that a portion of Merced Hall was occupied by a club, of which plaintiff was an officer; that plaintiff, defendant, and a third person were appointed to put up the partition in question, and, after measurement and estimates, concluded it could be done for \$45 to \$50, and thereupon defendant told plaintiff to have the job performed at an expense not exceeding that sum; that the partition was made different from the proposed plan for the benefit of the club, and at a greater expense than was necessary; and that the substance of defendant's charge was that plaintiff had taken the money of the newspaper company, and expended it for the benefit, not of that company, but of the club.

The parties are Frenchmen, and the testimony was in the French language, and may have suffered in the translation. At all events, it is lacking in explicitness and certainty; and, while we may think the weight of testimony was with the plaintiff, we cannot say that it was so clearly in his favor as to warrant the conclusion that, in view of such testimony and under the instructions of the court, the verdict is "against law."

The instructions were correct as propositions of law, and applicable to the case as presented.

The judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 594)

WALKER v. MCCUSKER. (No. 9,720.)

(Supreme Court of California. January 25, 1887.)

1. MORTGAGE—FORECLOSURE—RIGHT OF PURCHASER TO RENTS AND PROFITS—CODE CIVIL PROC. CAL. § 707.

The purchaser of real property at a sheriff's foreclosure sale, from the time of the sale until a redemption, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof, by section 707, Code Civil Proc. Cal. This right on the part of the purchaser is not lim-

ited to cases where there has been a redemption, but begins at the time of the purchase, and continues until a redemption is made, or, if there be no redemption, until the time allowed for redemption has expired.

2. SAME—ASSUMPSIT FOR USE AND OCCUPATION.

In an action by the purchaser at a mortgage foreclosure sale against a defendant as tenant in possession to recover the value of the use and occupation of the mortgaged property from the time of sale to the expiration of the period of redemption, where it appears that, at the time of the sale, the defendant was the owner in fee and in possession of the property, and that she had been joined as defendant with the mortgagor in the foreclosure suit, *held*, that the owner in fee was a tenant in possession, within the meaning of section 707, Code Civil Proc. Cal., and liable to the purchaser in *assumpsit* for the rents and profits, or the value of the use and occupation of the property, and not as a trespasser.

3. SAME—PARTY PLAINTIFF.

Where a person bids in property at a mortgage foreclosure sale, and receives the certificate of sale and the sheriff's deed in his own name, and thereby becomes the purchaser, he may bring suit in his own name against the tenant in possession of the property to recover the value of the use and occupation thereof from the time of sale to the expiration of the period of redemption, and without alleging or proving that he bid in the property as trustee for a third person.

Commissioners' decision. Department 2.

Appeal from superior court, Monterey county.

N. A. Dorn and *T. H. Laine*, for appellant. *A. S. Kittredge*, for respondent.

BELCHER, C. C. Franklin McCusker executed a mortgage upon certain real property to the Bank of Watsonville. The money being unpaid, the bank foreclosed its mortgage, making the defendant a party to the action, and, under the decree obtained, caused the mortgaged property to be sold. The plaintiff was the purchaser at the sale, and in due time obtained a sheriff's deed. The purchase was, however, not made for himself, but at the request and for the sole use and benefit of the bank. At the time of the sale, defendant was the owner in fee and in possession of the property, and she retained the exclusive possession of it until the sheriff's deed was executed.

This action was commenced to recover from the defendant, as tenant in possession, the value of the use and occupation of the property from the time of the sale until the expiration of the time allowed for redemption. In the court below the plaintiff recovered judgment, and from that judgment the defendant has appealed.

1. In this state the purchaser of real property at a sheriff's sale from the time of the sale until a redemption, and a redemptor from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. Section 707, Code Civil Proc. This right on the part of the purchaser to receive the rents and profits, or value of the use and occupation of the property sold, is not limited to cases where there has been a redemption. It begins at the time of the purchase, and continues until a redemption is made, or, if there be no redemption, then until the time allowed for redemption has expired. Several cases of this character have been maintained in this court where there had been no redemption of the property. *Reynolds v. Lathrop*, 7 Cal. 43; *McDevitt v. Sullivan*, 8 Cal. 592; *Harris v. Reynolds*, 13 Cal. 514; *Hill v. Taylor*, 22 Cal. 191; *Webster v. Cook*, 38 Cal. 423.

2. In *Page v. Rogers*, 31 Cal. 293, it was held that, during the period which elapses between the sale of land on execution and the expiration of the time for redemption, the statute regards the purchaser as the owner in equity of the land, subject only to the right of redemption, and gives him the rents and profits, or the value of the use and occupation; in short, the entire beneficial interest, except the actual possession.

In *Harris v. Reynolds*, *supra*, it is said: "The phrase 'the tenant in possession' is a generic term, intended to designate the class of persons from

whom the purchaser was to receive the rents. The language is not that, when a tenant of the debtor is in possession, the tenant shall pay the purchaser, or that the debtor, when in possession, shall not, but the phraseology designed evidently to fix a general right, applying to all cases of tenancy, for none are excluded." And in that case it was held that the judgment debtor was a tenant in possession, and required to pay the rents and profits to the purchaser; the court further saying: "The owner in fee in possession is no less, in legal contemplation, a tenant, than the man who occupies under him. The definition of tenant is: 'One that holds or possesses lands or tenements by any kind of title, either in fee, for life, years, or at will.'"

It has also been held that the mortgagee of the judgment debtor, the trustee and his successor in interest under a trust deed from the judgment debtor, and the administrator of the estate of the judgment debtor, when they were in possession after a sheriff's sale, were tenants in possession, and liable to the purchaser for the rents and profits or value of the use and occupation of the property. *Knight v. Truett*, 18 Cal. 113; *Shores v. Scott River Co.*, 21 Cal. 135; *Walls v. Walker*, 37 Cal. 425.

In this case it does not appear when or from whom the defendant obtained the title to the mortgaged property; but, as she was a party to the action of foreclosure, it was conclusively determined by the judgment that she held the title subject to the payment of the mortgage debt. After his purchase the plaintiff was the owner in equity; and thereafter, subject to her right of redemption, she held the title for him. Holding, then, the legal title for plaintiff, and having the exclusive possession, she was, within the meaning of those words, as used in the statute, the "tenant in possession" of the property, and liable to account to plaintiff for the value of its use and occupation.

But it is said there was no contract relation between the parties, and the defendant, if liable at all, was liable as a trespasser, and should have been sued as such, and not in *assumpsit*. The answer is that the defendant was not a trespasser in any sense. She was rightfully in possession, and could not be treated as a tort-feasor. Her liability is statutory, and the law implies a promise on her part to comply with its requirements. It is true, the action for use and occupation is founded on privity of contract, but it will lie as well upon an implied as upon an express contract. *Osgood v. Dewey*, 13 Johns. 240; *Stockett v. Watkins*, 2 Gill & J. 326.

3. It is further argued for the appellant that plaintiff is not the real party in interest, and no facts are stated in the complaint showing him to be the trustee of an express trust, and, therefore, his action cannot be maintained. We think the complaint sufficient, and the action properly brought. A trustee of an express trust is a person with whom, or in whose name, a contract is made for the benefit of another, and he is authorized to sue without joining with him the persons for whose benefit the action is prosecuted. Section 369, Code Civil Proc.

The plaintiff bid in the property, and received the certificate of sale and sheriff's deed in his own name, and thereby became the purchaser. As between him and the bank, he was a trustee of an express trust, but that fact did not concern the defendant. As to her he was the real party in interest, and might sue without alleging or proving his trusteeship. It has been so held in several analogous cases. *Corcoran v. Doll*, 32 Cal. 90; *Walsh v. Soule*, 66 Cal. 443; S. C. 6 Pac. Rep. 82; *Lewis v. Adams*, 11 Pac. Rep. 833; *Hoagland v. Trask*, 48 N. Y. 686. And see Pom. Rem. §§ 175-178.

It follows that the judgment should be affirmed.

We concur: SEARLS, C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(71 Cal. 568)

FLOYD and others v. FORBES and others. (No. 9,503.)

(Supreme Court of California. January 24, 1887.)

CHARITIES AND CHARITABLE USES—DEED—CREATING ONE FUND—SEVERAL TRUSTS—INVESTMENTS.

A deed of trust conveying property in trust for the following purposes: "First, to enter into possession of, have, receive, and recover the property and rents and profits thereof, (except as herein excepted,) and to let and lease, (until sale,) and to sell, convey, and dispose of the same, and to convert the same into money (except as herein excepted) as rapidly as judicious management will permit, and out of the proceeds to make the payments hereinbelow directed;" then designating various payments to be made by the trustees and some expenditures; and, third, to expend the sum of \$700,000 for the purpose of purchasing land, and erecting thereon a powerful telescope and observatory, and to turn over the same, when completed, together with any surplus left of the said sum of \$700,000, to the regents of the University of California: held, that the proceeds of the trust property constituted one fund, out of which the trustees were to execute several trusts specified in said deed, and that the profits arising from investments of money in their hands were to be treated as a part of such fund, and not as accruing for the benefit of any of said trusts in the execution of which a definite sum is required to be paid or expended, so as to increase the amount of such payment or expenditure.

In bank. Appeal from superior court, city and county of San Francisco. *John B. Mhoon and McAllister & Bergin*, for appellants. *Cope & Boyd* and *Jarboe & Harrison*, for respondents.

TEMPLE, J. This action was instituted to obtain the construction of a deed of trust made by James Lick to certain trustees, the plaintiffs herein. The deed was executed September 21, 1875, but the trustees were changed, and those now acting were selected in April, 1876.

James Lick died in October, 1876. After his death the heirs manifested a disposition to contest the validity of the deed. This led to a compromise, the validity of which compromise was tested in a suit brought for that purpose, which was decided in December, 1879. The complaint in this suit was filed in August, 1884. Judgment was entered answering the various questions propounded by the trustees, and from that judgment this appeal is taken by the board of regents of the University of California. All the other beneficiaries of the trust seem to be satisfied with the judgment.

The deed conveys the property in trust for the following purposes: "First, to enter into possession of, have, receive, and recover the property, and rents and profits thereof, (except as herein excepted,) and to let and lease, (until sale,) and to sell, convey, and dispose of the same, and to convert the same into money (except as herein excepted) as rapidly as judicious management will permit, and out of the proceeds to make the payments hereinbelow directed." The deed further proceeds to designate various payments to be made by the trustees and some expenditures. Some of the payments were to be made at once, and in the eighteenth subdivision the trustees are directed, "after discharging the trusts and making the payments hereinbefore mentioned, in the order hereinbefore set forth, (except as herein otherwise directed,) to make over and transfer the residue of the proceeds of the property hereby transferred and conveyed, and intended to be, in equal proportions to the California Academy of Sciences and the Society of California Pioneers."

The third subdivision is the one in which the appellant is specially interested, and reads as follows: "Third. To expend the sum of seven hundred thousand dollars (\$700,000) for the purpose of purchasing land, and constructing and putting up on such land, as shall be designated by the party of the first part, a powerful telescope, superior to and more powerful than any telescope ever yet made, with all the machinery appertaining thereto and appropriately connected therewith, or that is necessary or convenient to the most powerful telescope now in use, or suited to one more powerful than any yet

constructed, and also a suitable observatory connected therewith. The parties of the second part hereto, and their successors, shall, as soon as said telescope and observatory are constructed, convey the land whereupon the same may be situated, and the telescope and the observatory, and all the machinery and apparatus connected therewith, to the corporation known as the 'Regents of the University of California;' and if, after the construction of said telescope and observatory, there shall remain of \$700,000 in gold coin any surplus, the said parties of the second part shall turn over such surplus to said corporation, to be invested by it in bonds of the United States, or of the city and county of San Francisco, or other good and safe interest-bearing bonds, and the income thereof shall be devoted to the maintenance of said telescope, and the observatory connected therewith, and shall be made useful in promoting science; and the said telescope and observatory are to be known as 'The Lick Astronomical Department of the University of California.'

The portion of the judgment to which the appellant objects is the fourth instruction, which reads as follows: "*Fourth.* That the proceeds of the trust property constitute one fund, out of which the trustees are to execute the several trusts specified in said deed, and that the profits arising from investments of money in their hands are to be treated as a part of such fund, and not as accruing for the benefit of any of the said trusts, in the execution of which a definite sum is required to be paid or expended, so as to increase the amount of such payment or expenditure."

The appellant denies the correctness of this construction. It asks the court to say that the evident intention of James Lick was that the trustees should proceed with reasonable diligence to sell the property, and, as soon as sold, as much of it as was required should be appropriated to the different specific benefactions; that, where the beneficiary could not at once receive the amount, (as was the case with the appellant,) it would constitute a fund which might have been put at interest for the advantage of the beneficiary; that, for instance, there should have been a fund created, for the purposes of the trust set out in the third subdivision of the deed, of \$700,000; that this amount, if not immediately required in performance of such trusts, could have been placed at interest for the benefit of the fund; on the contrary, the property was not sold when it ought to have been, and thereby large amounts have been received as rents and profits; that, under the construction placed upon the deed by the court below, the residuary beneficiaries will receive the increment, some portion of which in justice and equity ought to have gone to the other beneficiaries; that now, in view of this fact, the court should regard that as done which ought to have been done, and, by a just division of such increment, place the parties as near as may be in the position they would have been in had the trustees faithfully and diligently performed their duty.

Some of the donations have to be paid immediately. Such beneficiaries would certainly have better grounds for insisting upon the equitable principle contended for than the appellant. We understand that as to them the trusts have been fully performed. At all events, they make no complaints. We shall consider the matter solely with reference to the rights of the appellant.

A very large amount of property is involved in the trusts, which are quite numerous, and vary greatly in character. The trustees were to pay the debts of the donor then existing, and whatever debts he might require in his support, expenses; and the improvement of his homestead. They were to erect a group of bronze statuary, well worth \$100,000, and various monuments. They were to expend, under the direction of certain named persons, \$150,000 in the erection and maintaining free baths. They were to found an institute called the Old Ladies' Home at a cost of \$100,000. They were to found and endow, at a cost of \$540,000, the California School of Mechanical Arts, under the direction of certain named persons. It will be seen that they were directed to expend the sum of \$700,000 for the purpose of purchasing land, and con-

structing and putting up a powerful telescope, superior to and more powerful than any ever yet made, and all the machinery appropriate or convenient to the most powerful telescope now in use, or suited to one more powerful than any yet constructed, and also a suitable observatory. When constructed, all should be conveyed to the regents of the university; and, if there should remain of said \$700,000 in gold coin any surplus, it should be turned over to the regents, to be by them invested.

It is evident, in the first place, that the active duties here enjoined upon the trustees could not be performed within any definite period, and certainly the donor must have known that it would require many years to accomplish the difficult task imposed upon them. Yet he directs a precise sum in gold coin to be expended, and, when the work shall have been performed, he directs that the surplus, if any remaining of that sum, be turned over. This, evidently, would not have justified the trustees in expending more than that precise sum, under the claim that there was a fund which was entitled to share an increment. The direction to turn over the surplus remaining of the precise sum in gold coin is not in apt language if the desire was that the surplus remaining from a fund should be turned over. Although he must have known that it would be a long time before all this money could be expended, yet no language is used indicating that it is to be invested so that any increment will accrue until the entire work is done; and then he expressly directs that the surplus, if any, shall be invested so as to produce an income.

It is also a significant circumstance in this connection that, as to the residuaries, the deed directs that, after discharging the trusts and making the payments in the order named, the residue be transferred to the residuaries. If the construction contended for by the appellant were the correct one, there appears no good reason why the residuaries should not receive their residue as soon as the property was sold, and the different funds created. It is evident that the donor intended that the entire property should remain as security for the different trusts in the order named. We therefore think the judgment should be affirmed.

It may be well to remark, however, that this judgment is only a construction of the trust deed. It does not pass upon the question whether, if there has in fact been unnecessary or great delay, in consequence of which the residuaries had received profits which, upon a proper performance of the trust, would have been received by the specific beneficiary, a court of equity cannot make a fair adjustment of the matter. The trustees did not admit delay, and ask for instructions in view of such fact. The appellant in its answer did not charge there had been such delay. Should such a controversy ever arise, the only effect of this judgment would be that the right of the beneficiary complaining to be compensated would be determined in view of the construction here given the deed. Judgment affirmed.

We concur: MCKINSTRY, J.; McFARLAND, J.; PATERSON, J.; THORNTON, J.

(71 Cal. 599)

COMSTOCK v. YOLO Co. (No. 11,641.)

(*Supreme Court of California. January 25, 1887.*)

WAYS—LEVY OF ROAD TAX—COUNTY BOARD OF SUPERVISORS—MODE OF PROCEDURE—CALIFORNIA COUNTY GOVERNMENT ACT, § 25, CL. 1, SUBDS. 4, 13, 35.

Subdivisions 4, 13, and 35, cl. 1, § 26, California county government act, providing that the county boards of supervisors have jurisdiction to levy taxes upon taxable property of any district for the construction and repair of roads and highways, "provided, that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors, and received a majority of all the legal votes cast upon such proposition, and to do and perform all other acts and things required by law not in this act enumerated, or which may be neces-

sary to the full discharge of the duties of the legislative authority of the county government," held to authorize the board of supervisors to adopt any suitable mode of procedure in making the levy of a tax for road purposes; the levying of the tax being one of the duties of the legislative authority of the county government.

Commissioners' decision. In bank.

Appeal from superior court, Yolo county.

A. L. Hart, for appellant. *Frank S. Sprague*, for respondent.

BELCHER, C. C. This is an action to recover a sum of money which was paid by plaintiff, under protest, to prevent the sale of his property in satisfaction of an alleged illegal tax. The appeal is by the plaintiff from a judgment in favor of defendant, and rests upon the judgment roll.

The tax in question was levied in pursuance of the supposed authority given by the county government act, which provides: "The boards of supervisors in their respective counties have jurisdiction and power, under such limitations and restrictions as are prescribed by law, to lay out, maintain, control, and manage public roads * * * within the county; to levy taxes upon the taxable property of their respective counties for all county purposes, and also upon the taxable property of any district for the construction and repair of roads and highways and other district purposes, provided, that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors of such district, and received a majority of all the legal votes cast upon such proposition; and to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." County Government Act, § 25, cl. 1, subds. 4, 13, 35; St. & Amend. Codes 1883, p. 304.

On the twenty-eighth day of August, 1884, the board of supervisors of Yolo county, by a resolution duly passed and entered upon its minutes, ordered that a proposition to levy a tax upon the taxable property of road-district No. 1, in that county, for the construction and repair of roads and highways therein, sufficient in amount to raise the sum of \$9,000, and to be levied according to the value of the property as shown by the assessment roll of the county for that year, be submitted to the qualified electors of the district at an election to be held for that purpose on the thirteenth day of September, 1884. By the resolution, polling-places were duly fixed, inspectors and judges of the election were appointed, and the clerk of the board was ordered to issue a proclamation, under his hand and the seal of the board, calling an election in accordance therewith, and to cause a copy of such proclamation to be published in the Woodland Daily Democrat, a newspaper published in the county, and to be posted at each place fixed for holding the election, for at least 10 days before the day of said election.

In pursuance of the resolution the clerk of the board issued a proclamation, setting forth all the matters required, in due and proper form, and caused the same to be published and posted as directed. At the time named an election was held, and a majority of all the legal votes cast upon the proposition were in favor of levying the said tax. The returns of the election were duly made to and canvassed by the board of supervisors on the sixth day of October, 1884, and thereupon the board, finding that a majority of all the votes cast were in favor of the tax, proceeded to levy the same. It was ascertained by computation that to raise the sum of \$9,000 on the taxable property of the district, as shown by the county assessment roll for that year, would require the rate of taxation to be 87 cents on the \$100, and the board then, by its order, duly fixed and determined upon that as the rate. The county auditor then computed the tax at the rate named upon all the taxable property of the district, and entered the same upon the assessment roll of the county; the tax so entered against the plaintiff being \$35.30.

It is now contended, on the part of the appellant, that the tax was illegal and void, because—*First*, there was no provision made by law for the submission to the qualified electors of a road-district of a proposition to levy a special tax for road purposes; and no election for any purpose can be held unless the time and manner of calling and holding it have been authoritatively designated in advance, either by law or by some means which the law has prescribed; and, *second*, the board of supervisors had no authority to adopt the assessment made for state and county purposes as the basis upon which to levy the tax.

It is not denied that the board of supervisors had full power to levy the tax in question, but the contention is that the power could not be exercised for the want of further legislation prescribing the mode of its exercise.

In the Code of Civil Procedure it is provided that when jurisdiction is conferred on any court or judicial officer, and the course of proceeding is not specially pointed out by the Code or the statute, any suitable mode of proceeding may be adopted. Section 187. Under this provision it has been held that, in a proper case, the probate court may set apart a homestead, though the manner in which it is to be set apart is not provided by statute. *Mawson v. Mawson*, 50 Cal. 539.

In the county government act, as has been seen, it is provided that the board of supervisors may “do and perform all other acts and things * * * which may be necessary to the full discharge of the duties of the legislative authority of the county government.” As the levying of the tax in question was one of the “duties of the legislative authority of the county government,” we think this provision sufficient to authorize the board to adopt any suitable mode of procedure in making the levy.

It is not questioned that the mode of procedure adopted was suitable and proper, if authorized, and it follows, therefore, that the judgment should be affirmed.

We concur: FOOTE, C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(2 Ariz. 248)

**TERRITORY *ex rel.* SHERMAN v. BOARD OF SUP'RS OF MOHAVE CO.
and others.**

(*Supreme Court of Arizona. January 27, 1887.*)

1. COUNTIES—COUNTY-SEAT ELECTION—DELEGATION OF LEGISLATIVE POWER.

It is not a delegation of legislative power to provide for the selection of a county-seat by vote of the people of the county.

2. SAME—MANDAMUS—To CONTEST ELECTION.

Mandamus against the board of canvassers is not a proper remedy by which to contest a county-seat election, when the board has declared the result, and the county officers have acted thereon.

**3. ELECTIONS—WHETHER CASE MADE OUT FOR CONTEST—QUALIFICATION OF VOTER—
POLLING PLACE—RETURNS.**

A case for a contest of an election is not made out by an allegation that persons voted who were not citizens, and that qualified voters voted in other precincts than those of their residence, as, by Comp. Laws N. M. 1214, one who has declared his intention to become a citizen is qualified to vote, and a qualified voter may vote in any precinct; nor by an allegation that some of the polling places were on an Indian or Military reservation, it not being shown that any objection was made, or that the election there was interfered with; nor by an allegation that returns were improperly transmitted, without alleging that they were tampered with.

4. SAME—VALIDITY—IRREGULARITY.

An election is not invalidated by an irregularity which is not shown to have affected the result.

Petition for *mandamus* to have the returns of an election re-canvassed, and its validity otherwise inquired into.

E. M. Sanford, for petitioner. *Rush, Wells & Howard*, for respondents.

BARNES, J. By statute approved February 25, 1885, it was enacted that the qualified voters of Mohave county should, at the next general election, designate by ballot the locality for the county-seat of said county; that at said election any voter might designate upon his ballot a place for such county-seat, and that all such votes should be received, counted, and returned as other votes; and that the place receiving the highest number of votes should be the county-seat. All acts in conflict with that act are hereby repealed.

The petition, on the relation of Charles E. Sherman, alleges that at the last general election votes were cast in Mohave county on the question of the location of the county-seat, and that the board of canvassers canvassed the votes cast, and declared that Kingman had received a majority, and that thereupon the county officers—the sheriff, county judge, and others—removed their offices and the records of the county to Kingman. The petition alleges that many votes were cast by persons not citizens, and therefore not legal votes; that many votes were cast by persons who resided in precincts other than where the votes were cast, and so were illegal votes. Many irregularities in making up, certifying, and in transmitting the returns are alleged. The petition asks for a writ of *mandamus* requiring the board of canvassers to again canvass the returns of said election. It also asks the court to inquire, by issues prepared and sent down to the district court, into the legality of the votes alleged to be illegal, and to purge the returns of said election of all illegal votes and irregularities before the board of canvassers be required to canvass such returns. In short, it is sought by this proceeding to contest this election.

One question we must dispose of at the threshold. It has been urged with great force and ability that the law authorizing the election is invalid, in that it attempts to delegate legislative powers to the voters of Mohave county. The location of a county-seat should be determined by the people of a county. Their interests and convenience should alone be consulted. So, in most of the states, laws have been enacted by which a vote of the people should determine the question. No case has been cited that decides such laws to be invalid. They have been acquiesced in by courts and the law-makers too long now to question their validity. The case of *Calaveras Co. v. Brockway*, 30 Cal. 326, treats such a law as valid. So do the cases of *State v. Stearns*, 11 Neb. 104; S. C. 7 N. W. Rep. 743; *Boren v. Smith*, 47 Ill. 482. It has been held that where the fact of an enactment becoming a law is made to depend upon a popular vote, the law is invalid. *Barto v. Lovett*, 8 N. Y. 483, where a school law made dependent upon the adoption by the people, and *Ex parte Wall*, 48 Cal. 279, where a prohibitory law made dependent upon adoption by vote, are cases that held such laws to be void.

Much authority may be found *pro* and *con* upon this vexed question, yet the tendency of authority and practice is evidently towards a recognition of their validity. Fence laws, stock laws, liquor laws, in fact a great number of local option laws, have been enacted and sustained by the courts. But the law in this case is not made dependent upon a vote. It enacts that the county-seat shall be where the voters designate, and repeals all laws in conflict therewith. We are compelled to hold that the law is valid.

The next question to be considered is whether *mandamus* is the proper remedy. The purpose of this remedy is to require public officers to perform their official duties when, by inaction or misconduct, they refuse to act. When the duty is purely ministerial, the court may direct how the duty shall be performed. When, however, the officer has any discretion or judicial power, the court can only direct him to act, but not how he shall act. Had the board

of canvassers refused to canvass the votes cast at the election on the location of the county-seat, this remedy might have been invoked to require such canvass. Had the county officers failed to remove, the court would have had the power to direct the removal. But the petition shows that the canvassers performed their duty by canvassing the votes, and the officers by removal. The case stands as if a person had been declared elected to an office, and he had been inducted into the office, and this remedy was asked to require him to surrender the office, and the canvassers to reconvene, and again canvass the returns and declare the result. This cannot be sustained by authority. High, Extr. Rem. § 49. "The rule may now be regarded as established by an overwhelming current of authority that, where an office is already filled by an actual incumbent, exercising the functions of the office *de facto* and under color of right, *mandamus* will not lie to compel the admission of another claimant, nor to determine the disputed question of title." McCrary on Elections is to the same effect, (section 317 *et seq.*;) and see cases cited by both authors; *State v. Churchill*, 15 Minn. 455, (Gil. 369;) *People v. Detroit*, 18 Mich. 337; *Clark v. McKenzie*, 7 Bush, 523; *Burke v. Monroe Co.*, 4 W. Va. 371; *People v. New York*, 3 Johns. Cas. 79. *State v. Stearns*, 11 Neb. 104, S. C. 7 N. W. Rep. 743, was a case where canvassers were directed to canvass all the returns, and not exclude a part of them. *Glencoe v. People*, 78 Ill. 389, is a case where, by *mandamus*, the town officers were directed to call an election required by law. *State v. Walker*, 5 S. C. 263, is a case where *mandamus* was held to be a proper remedy to compel a sheriff to keep his office at a county-seat. But no case has been cited which holds that in *mandamus* the court may go behind the certificate of the board of canvassers, and contest the election. Our statute seems to have codified the law of this subject. *Mandamus* may be issued "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled."

But the petition fails to make out a case for a contest of the election. It is alleged that certain persons voted who are not shown to be citizens on the great register. In this territory a person who has declared his intention to become a citizen is a qualified voter. Comp. Laws 1214. By the laws of this territory a qualified voter may vote in any precinct in the county. Comp. Laws 1214. If the polling place of an election be on an Indian or military reservation, where the place was well known, and no interference with the election be alleged, it cannot invalidate the election. True, the election at that place might have been prevented by the officers in charge, but there is no allegation that objection was made. Allegations that the returns were not properly transmitted cannot avail, without allegation that they were tampered with. It is the object of elections to ascertain a free expression of the will of the voters, and no mere irregularity can be considered, unless it be shown that the result has been affected by such irregularity. McCrary, Elect. 128, and Brightly, Elect. Cas. 448, and cases cited.

For these reasons the petition is denied.

PORTER, J., concurs.

(14 Or. 375)

VINCENT v. UMATILLA Co.

(Supreme Court of Oregon. January 14, 1887.)

1. REVIEW, WRIT OF—CLAIM AGAINST COUNTY—ORDER OF COUNTY COURT.

A writ of review to an order of a county court, refusing to allow a claim against the county, is not a proper method of litigating disputed questions of fact, arising between the county and a person having a claim against it.

2. SAME—PLEADING—STRICT CONSTRUCTION.

In such case, as the proceeding in the county court is *ex parte*, the rule requiring all the facts necessary to the creation of a valid claim to be made to appear, will be enforced with more strictness than usual.

8. MILITIA—EXPENSES OF—CLAIM AGAINST COUNTY.

Under Gen. Laws Or. p. 668, § 18, providing that arms, accouterments, and military stores may be issued by the adjutant general to any militia company, upon the application of the commanding officer, "such application being first submitted to the county judge, and receiving his approval," and other requirements complied with, and section 19, making it the duty of the county court, upon like application, to provide an armory for a company, and to audit and allow "the necessary expenses of the same," it is discretionary with the county judge whether or not to approve an application for arms and stores, it is not his duty to furnish an armory, if arms are not first issued with his approval, and he cannot be required to audit and allow a claim for expenses incurred by a company in regard to these matters, on its own responsibility, without previously making any application to the court.

Lord, C. J., dissenting.

Appeal from Umatilla county.

Proceeding to have claim against a county allowed and ordered paid. Judgment for petitioner. The county appeals.

L. B. Cox, for appellant, Umatilla Co. *John J. Balleray*, for respondent, Vincent.

STRAHAN, J. This proceeding was instituted in the circuit court of Umatilla county, Oregon, by the respondent, for a writ of review to be directed to the county court of said county. The purpose of the writ was to bring before the circuit court for review the record of the county court of Umatilla county, rejecting and refusing to audit or allow an account against said county, presented on behalf of Company B, First regiment, Third brigade, O. S. militia. The amount of the account presented was \$662.81, and the items are mainly for rent of armory, for drill, etc., and for expenses for armorer, and some other small items, all apparently incurred in and about the care and store of the arms of the company, its drill, etc. The first item in the account is in December, 1884, and the last in March, 1886.

The petition for the writ alleges, in substance, that on the eighth day of April, 1886, the plaintiff made and filed in the county court of Umatilla county his petition, duly verified, of which the following is a copy, to-wit:

"IN THE COUNTY COURT OF THE STATE OF OREGON, FOR UMATILLA COUNTY.

"The undersigned, your petitioner, respectfully represents that on July 29, 1884, Company B, First regiment, Third brigade, Oregon state militia, was organized in Umatilla county, Oregon, according to the laws of the state of Oregon, and was listed in the office of the adjutant general of the state, and has continued ever since said date a part of the organized militia of said state of Oregon; that your petitioner, F. A. Vincent, was elected and duly commissioned captain of said company, and as such gave and *tendered* the necessary bonds required by law; that he has ever since, and is now, such captain, duly qualified and commissioned according to law; that from the time of its organization until the first day of April, 1886, the county court of Umatilla county, Oregon, had paid nothing to said F. A. Vincent, as captain of said company, or any one else, for necessary expenses of said company; that your petitioner represents that, since the organization of said company aforesaid, said company has incurred, as necessary expenses in procuring armory and armorer, and other incidental expenses, the sum of \$662.81, an itemized statement of the same being herewith submitted, and attached hereto, and made a part of this petition, and marked 'Exhibit A.' Wherefore your petitioner prays that your honorable body make an order that said sum of \$662.81 be paid to your petitioner out of the funds of Umatilla county, for the purposes set forth in the petition and itemized statement.

"F. A. VINCENT, Petitioner."

This statement is verified by Capt. Vincent to the effect he believes it to be true.

The petition for the writ of review then alleges that said county court disallowed said claim on the thirteenth day of April, 1886, and refused to audit or allow, or cause to be paid, said account, and, without cause, disallowed the same. After setting out copies of the order in the county court disallowing the claim, the petition proceeds: "And your petitioner further shows that there was no other evidence before the court than the said petition, and that there was no controversy or dispute about the matters and things set forth in said petition; and that said county court erred in refusing to audit, allow, or pay said account, and in disallowing the same, for the reason that said court had no jurisdiction to disallow said petition, because it is the duty of said court to audit, and to cause to be paid, the necessary expenses of a duly-organized volunteer company of the state. Wherefore your petitioner prays that a writ of review issue, made returnable at the May term of the above court; that the matters herein complained of as being erroneous may be reviewed by such circuit court.

F. A. VINCENT, Petitioner."

The petition is properly verified by an attorney of this court. Based on this petition, the writ was ordered to issue, and upon its return, the amount claimed before the county court was reduced in one or two unimportant particulars, and then allowed and ordered paid by the county. From that judgment this appeal is taken.

The proceeding by writ of review is not adapted to litigate or determine disputed questions of fact arising between a county and a person having a claim against such county. When the facts are all admitted, and the sole question at issue is one of law, the writ may furnish a cheap and expeditious remedy to the claimant, and no objection is perceived why he may not resort to it; but the practice of allowing parties to make and file *ex parte* statements against a county, upon which large claims are founded, is one that rests on no principle, is dangerous in practice, is capable of great abuse, and ought not to be encouraged. It is much safer, ordinarily, for parties having disputed claims against a county to resort to an action, when a jury trial can be had, and all the facts fully elicited, and where the trial court will be able to assist in the proper solution of the question by giving the necessary instructions. But the plaintiff is not without precedent in this court for the present proceeding, and I will therefore proceed to examine the case upon its merits. In doing so, it is proper to state, however, that the facts and all the requirements of law necessary to the creation of a valid claim must be made to fully appear. This would be the rule in any case, but I think a somewhat stricter rule ought to be applied in a case where the original proceeding instituted in the county court is wholly *ex parte*.

Section 19, p. 668, Gen. Laws Or., provides: "It shall be the duty of the county court of each county in which there shall be one or more organized volunteer companies, upon application of the captain or commanding officer of the same, to provide, for each company in said county, an armory, safe and suitable for the drill of squads in the school of the soldier, and an armorer to take charge of the same, and said court shall also, at each of its sessions, audit and allow, and cause to be paid, the necessary expenses of the same: provided, that the total amount for all the purposes above mentioned shall not exceed fifty dollars in money per month for each company."

Section 18 provides, among other things, that certain military stores may issue to any volunteer company which shall be organized according to law, on the application of the commanding officer thereof to the commander in chief, through the proper military authority, such arms and accoutrements or stores as may be required; *such application being first submitted to the county judge, and receiving his approval, which shall be indorsed thereon.*" Said section continues: "If the commander in chief shall approve such applica-

tion, or any part thereof, he shall give an order, upon the back thereof, directing the issue by the adjutant general, who shall immediately notify the officer making such application, *and the county judge who approved it*, that the arms and accouterments or stores, mentioned in such application or any portion thereof, are ready for issue; and thereupon it shall be the duty of such officer to give such bonds and security as may be *deemed requisite by the county judge* to secure the county from loss on account of use or misapplication of such arms, or equipments, or other stores; and on due notification *from such county judge* that such bonds have been given to his satisfaction, and on receiving triplicate receipts from such officer, the adjutant general shall make the issue."

Section 22 of the same act is as follows: "It shall be the duty of the secretary of state to charge the value of all arms, equipments, and military stores, issued as above provided, to the *counties* in which such public property shall be issued, and all expenses of damage and defects, as provided in the foregoing section, and double the value of any arms, accouterments, and military property which such *counties*, or such military companies, shall have failed to return to the state on the demand of the governor. At the close of each fiscal year he shall settle the account of each *county* with reference to such issues and military charges, and the amount so found due shall, on the requisition of the secretary of state, be assessed at the time of the next annual assessment as a part of the *county taxes*, *and be collected in such county in the same manner as the ordinary taxes*, and shall be paid into the state treasury as a part of the military fund of the state."

Sections 20 and 21 also recognize the agency of the counties in the matter. Under the constitution and laws of this state, the several county judges are at the head of the fiscal affairs of their respective counties, and, together with the commissioners provided by law, they constitute the county court when it sits for the transaction of county business.

Section 18 has confided to the county judge a discretionary power in this matter. He may, on behalf of his county, assume the liability provided for in the act, or he may decline to do it. The law has wisely left it to his judgment. If, in looking at the fiscal affairs of his county, he should be of the opinion that the liabilities imposed by the act ought not to be assumed, he need not approve the application for arms or accouterments, in which case they cannot be regularly issued, and no liability is incurred. So, also, if the arms are not issued to the company with the approval of the county judge, the county is not bound to furnish or provide either an armory or armorer, nor to audit or allow the necessary expenses of the same; nor are any of the liabilities incurred by the county which are specified in section 22 of the act, without the approval of the county judge mentioned in section 18.

This construction of the act renders the approval of the county judge mentioned in section 18 one of the essential and necessary facts to be averred and shown in order to fix the liability of the county under section 19. So, also, under section 19, before the county could be made liable, it is necessary, not only to show that the antecedent part of the act has been complied with, but it must also be specially shown that the captain or commanding officer of the company made application to the county court to provide for such company in said county an armory safe and suitable for the drill of squads in the school of the soldier, and an armorer to take charge of the same. Without these requirements are in substance complied with, it is not perceived on what principle the county could be held liable. It was never designed by this act to involve the several counties in debts and liabilities, without the consent of the civil authorities of such counties, at the mere will and pleasure of those who might associate themselves together in military companies or organizations.

Mountain v. Multnomah Co., 8 Or. 470, is relied upon by the respondent to sustain the judgment of the court below. That case, in many of its features,

ures, is like the one now before the court; but it appears from the facts in that case that, from the time of the organization of the Portland Light Battery, in May, 1872, to the first day of July, 1879, Multnomah county had paid \$50 per month on account of said company, and that since that time nothing has been paid. These facts tended to show that the county of Multnomah had become liable under this statute, and had, through its county judge, given the necessary "approval" to fix its liability. The payment of money from time to time is a fact which implies that the liability has been assumed by the county. But no such facts are made to appear in this case. The main facts upon which the county's liability depends under the statute are not alleged. It is true, many facts are alleged which are requisite, but the statement falls short. The essential and ultimate facts upon the existence of which the law adjudges the county liable are wanting. We cannot supply these by inference or intendment. The intemments are against the plaintiff, rather than in his favor. The law presumes that the plaintiff has made as full a showing of facts in his favor as was possible, and, if he has failed in his statements, the court is powerless to assist him.

It follows that the judgment of the court below must be reversed, and the writ dismissed.

LORD, C. J., (*dissenting.*) The facts stated in the application, and which are undisputed, must be taken as admitted and true. These facts show that the company was organized when the application was made, and how long prior thereto, and which entitled it to the benefit of the provisions of section 19, Misc. Laws, 668. There is no pretense that any of the charges are exorbitant or unnecessary. The court simply makes an order of disallowance upon the assumption that the whole matter lies within its absolute discretion. Upon the admitted facts, as disclosed by the record, it is difficult to perceive how this ruling can be upheld. The statute makes it the duty of the county courts to audit, allow, and cause to be paid the necessary expenses of organized volunteer companies in their respective counties. The facts alleged are within the purview of the statute, and upon all fours in principle with the case of *Mountain v. Multnomah Co.*, 8 Or. 473. In that case the court say: "The petition was the only evidence before the county court, and it appears there was no controversy or dispute about matters and things set out therein. It appears that the county court, after hearing the petition, made an order disallowing the whole of said account." The account there, as here, was for the same identical matter. The court then, after citing the provisions of section 19, proceeds to say: "It will be seen, by the provisions of this section, it is made the special duty of the county courts to audit, allow, and cause to be paid the necessary expenses of organized volunteer companies within their respective counties." Unless this case is to be overruled, it seems to me to be decisive of the facts here. I think, therefore, the judgment ought to be affirmed.

(4 N. M. [Gild.] 181)

STONEROAD *v.* STONEROAD.

(*Supreme Court of New Mexico.* January 28, 1887.)

PUBLIC LANDS—MEXICAN GRANT—SUBSEQUENT SURVEY—PRESTON BECK GRANT.
In 1823 the Mexican government conveyed certain lands in New Mexico by grant calling for specific boundaries. On the cession of the territory to the United States the holder of the grant presented his claim to the surveyor general of the territory for investigation and decision, under the act of congress of July 22, 1854. The surveyor general, in a report which followed the boundaries called for by the grant, recommended that congress confirm the grant, and by act of congress approved June 21, 1860, the same was confirmed according to the report of the surveyor general. The surveyor general afterwards had the grant surveyed, and the survey was approved by him, but no notice of this survey was given to the claimants, some of whom were minors and married women. The survey called for boundaries which

did not correspond with those of the grant, but were far within the lines. Held, that the courts were not concluded by the survey from determining the extent and validity of the grant by the Mexican government by specific boundary calls, and afterwards duly examined into, approved, and confirmed; and that the persons holding title under the grant might maintain an action of ejectment to recover lands lying outside the boundaries shown by the survey, but within the boundaries of the grant.

Error to district court, San Miguel county. Ejectment.

Catron, Thornton & Clancy and H. M. Atkinson, for defendants in error.

HENDERSON, J. The defendant in error, George W. Stoneroad, brought an action of ejectment against the plaintiff in error, James P. Stoneroad, to recover possession of two pieces or tracts of land, alleged to be within and constituting a portion of a larger tract known as the "Preston Beck Grant," situated in San Miguel county. The two pieces of land occupied by defendant at the date of the commencement of this suit, and held adversely by him, lie within the boundary calls of the Preston Beck grant, but without the limits of a survey thereof, made by the government without notice to the owners, and in which the claimants have never acquiesced. The cause was tried at the August term, 1885, which resulted in a verdict for the plaintiff, under direction from the court.

Upon the trial the defendant in error introduced in evidence a true copy of the original and official translation of the original *expediente* of said grant, and of all proceedings had, and papers and documents filed, before and with the United States surveyor general for New Mexico, and the decision of the surveyor general approving the grant; a map (Exhibit B) showing the location of the objects given as boundary calls, and the location thereon of the two pieces so held by the plaintiff in error. He also introduced oral evidence, showing that the land sued for was within the boundary calls of said grant. The plaintiff in error admitted that he was in possession. He also admitted and stipulated to the correctness of the location of the "Pecos river," a boundary call in the grant, and of the pieces of land held adversely by him, as shown by Exhibit B; and that defendant in error had an undivided one-third of all the right and title of the original grantee in said grant; that said grant was duly confirmed by congress under the act of June 21, 1860; and that the same had been surveyed without notice to the claimants, and at the time of such survey some of the said claimants were minors and married women, and had not acquiesced in the same. Plaintiff in error offered nothing in evidence.

On the sixth of December, 1823, Juan Estevan Pino petitioned the governor of the province of New Mexico for a grant of lands in this territory, now a portion of San Miguel county, bounded as follows: On the north by the landmarks of the farm or land of Don Antonio Ortiz, and the table-land of the Aguage de la Yequa; on the south by the Pecos river; on the east by the table-land of Pajarito; and on the west by the point of the table-land of the Chupaines; and on the twenty-third of the same month and year the political chief or acting governor, by direction of the most excellent deputation, made the grant, reciting in the granting decree the same boundaries as set out in the petition of Pino, and directing that the said Pino, as the grantee, be put into possession by the alcalde, which was accordingly in due form done. Pino occupied the land until his death, and subsequently thereto his heirs sold to Preston Beck, who presented the claim to the surveyor general of the territory on May 10, 1855, for investigation and decision, as required by the eighth section of the act of congress of July 22, 1854.

After taking testimony, and after a due consideration of the case, the surveyor general recommended that congress confirm the grant to Preston Beck, Jr.; and by act of congress, approved June 21, 1860, the same was confirmed according to the report of the surveyor general as No. 1. The surveyor general had the grant surveyed, and the said survey approved by him, November,

1860. No notice, however, of this survey was given to the claimants, so far as the records show. The act of congress of June 21, 1860, confirmed the grant as reported.

Plaintiff in error assigns the following: (1) That the verdict of the jury in said cause was against the evidence, and the weight of the evidence, in said cause; (2) that the court erred in instructing the jury to find a verdict for the plaintiff below in said cause; (3) that the court erred in refusing to instruct the jury in said cause to find a verdict for the defendants; (4) that the court erred in refusing to instruct the jury as asked by the defendant below.

The single question, under the facts stipulated and proven in this case, is, does the survey, made after the grant was confirmed, conclude the court from determining the extent and validity of the grant made by the Mexican government by specific boundary calls, and afterwards, under the act of congress of 1854, duly examined into and approved by the surveyor general, approved by the land department of the United States, and confirmed by act of congress. That the plaintiff in error was in possession and holding two parcels of land embraced within the limits of the Preston Beck grant, as confirmed by congress, if the boundary calls are to govern as to extent, is admitted. It is also admitted that these lands so held by him are without the limits of the survey, but near the line. It is further shown that the pieces so held, as shown by the map, lie some 10 or 12 miles within the limits of the grant, provided the grant is to be upheld as petitioned for and granted by the Mexican government, and of which he was put into judicial possession by the duly-authorized officer of the Mexican government. The surveyor general pursued the same description in his report, and the act of congress confirmed it as reported.

It is conceded by both parties that, where lands are to be surveyed by our government, the rules adopted by the interior department in surveys of grants like the one in question, where boundary calls are given, is to draw a straight line north and south, or east and west, through such point, on the side of the tract of which it constitutes such boundary, to the intersection of the boundaries on the other sides; and where the call is a meanderable object, such as a river, *mesa*, mountain, or arroyo, it should be meandered, to the extent that it constitutes such boundary, within the projected lines of the other sides. See *Ortez Mine Grant*, 2 Copp, Pub. Land Laws, 1276; *U. S. v. Soto*, 1 Hoff. L. Cas. 68; *Tyler*, L. Bound. 29, 187, 188.

It is not shown in the record that Preston Beck, or any person holding under him, ever applied to the government to have a survey made, or for a patent. It has not been urged that there is any act of congress making it obligatory upon the confirmation of a grantor, or those holding under him, to have the grant surveyed, or to call for a patent; nor is it insisted that there was any regulation of the executive department, having the force of law, making it obligatory on the surveyor general to survey such grants after confirmation, in operation at the date of the survey, in 1860.

If we apply the rule above stated, governing the survey of a Mexican or Spanish grant, it is obvious that the plaintiff in error was in possession of lands belonging in part to the defendant in error at the date of the institution of this suit.

The contention on behalf of plaintiff in error is that, after the survey, the defendant in error, and all other claimants under the grant, are concluded by the survey; and that, in an action of ejectment, the survey estops the plaintiff from asserting title to a greater quantity of land than is included in it. In support of this position the case of *Gallagher v. Riley*, 49 Cal. 473, and *Boyle v. Hinds*, 2 Sawy. 527, are cited.

In *Boyle v. Hinds* the Mexican government, in 1839, granted a *rancho*, called "Estero Americano," to Edward Manuel McIntosh. The grant was for two square leagues, within certain designated boundaries, embracing six

or more square leagues. It contained the usual provision for measuring the land, and leaving the surplus to the nation. The grant was approved by the departmental assembly. Afterwards, judicial possession was given by the alcalde of the jurisdiction within which the land was situated. The judicial possession was regular in all respects. This possession embraced six instead of ten square leagues. Prior to 1850, McIntosh conveyed his grant to O'Farrell, who, in 1852, presented the grant for confirmation, and it was subsequently confirmed to the extent of two leagues only. It was surveyed and patented for about two leagues. O'Farrell took his patent without objection, and placed it on record in the recorder's office of the county in which the lands were situated. The lands in question lie within the judicial possession given to McIntosh, but without the limits of the final survey and the patent issued to O'Farrell. The patent was issued to O'Farrell after the final decree of confirmation. After that decree the government patented the lands in controversy to Hinds, as a pre-emptor, who was in possession when the suit was brought. In delivering the opinion, SAWYER, J., said: "The plaintiff claims that McIntosh had a perfect Mexican title, and that it was unnecessary for his grantee, O'Farrell, to present his claim for confirmation; that, his title being perfect, congress had no constitutional power to deprive him of his land in case of his failure to present his claim under the act of 1851. Under the view I take, it may be conceded that it was unnecessary to present the claim; but the claimant did present his grant, and submit it to examination, and asked its confirmation under the act of congress. The question as to the genuineness and extent of the grant were litigated between the government and the claimant before a tribunal having jurisdiction to determine them. The grant was confirmed to the extent of two square leagues, and no more. The juridical possession was put in evidence, and the extent of the land to which the claimant was entitled in fact determined. The claimant did not appeal, and the determination became final. He had a right of appeal under the act, and could have gone from court to court, and ultimately had the question directly adjudicated by the supreme court of the United States in that proceeding, whether he had a title to the full extent of the juridical possession or not. The same court would then have passed upon his title in a direct proceeding to establish his claim to the whole that are now called upon to determine the same question collaterally. The law afforded him tribunals to determine this very question between him and the United States. The owner of the grant availed himself of the right afforded by the act of congress, and the question between him and the United States was litigated and determined. If the claimant chose to accept the decision of the inferior tribunal, he is bound by it." It was also held that, by the fifteenth section of the act of 1851, the adjudication between the government and the claimant became final, and must, for that reason, be considered as *res adjudicata*.

The proceedings in the case, ending in a decree limiting the conformance to two leagues, was clearly judicial, and was final and binding on the parties. In that case the survey and patent but carried out the decree of confirmation. It was for these reasons held that the patent was the final authentic record of the proceedings, and was conclusive evidence between the parties of the extent of the grant, and the correctness of the location. There is nothing in this case to guide or control us in reaching a correct conclusion on the facts presented in the transcript before us. In the case above quoted the owner of the grant submitted his claim to a court of competent jurisdiction, and actually litigated with the United States upon the very question of the extent of his grant under the title derived from Mexico, and the act of juridical possession. The way was open to him, upon an adverse decision, to appeal finally, if necessary, to the supreme court of the United States. He submitted to an adverse decision without appeal, and thereby waived or lost the right to dispute with the government or its grantee the title to any por-

tion of the lands lying without the terms of the decree, survey, and patent.

Gallagher v. Riley, *supra*, goes no further than to declare that in Mexican grants, where no juridical possession is given, and the grant is of a quantity of land as distinguished from a particular piece, by specific boundaries, a survey after confirmation by congress is necessary, and is made so by the thirteenth section of the act creating the board of land commissioners, (1851.) WALLACE, C. J., in delivering the opinion, said: "In excluding the proffered evidence, the court below erred. If the survey had become final, as the plaintiff proposed to prove, it was conclusive of the boundaries of the Rancho Laguna de San Antonio. The court below was mistaken in supposing that the confirmation to Bartolome Bojorques was for a 'specific piece of land.' The quantity confirmed was six leagues in superficial area. The land confirmed was to be hereafter surveyed, located, and set apart to the confirmee by the proper authorities of the United States; and if the survey had become final, as the plaintiff offered to show, it was conclusive evidence in the action of the boundaries of the tract confirmed." In the latter case it was agreed that the defendant had possession of lands lying within the *diseño* or map, describing the extent of the grant, but without the survey.

The quantity confirmed in the California grant was six leagues in superficial area, "being the same on which the said petitioner resides, and bordering towards the north-east on lands known in November, A. D. 1845, as the lands of Juan Martin, towards the north-west on Los Dos Piedros; towards the south-west on Los Tomales; and towards the north-east on lands known at the date of the last mentioned grant, as the lands of Juan Miranda,—the said premises being of the extent of six square leagues." The plaintiff offered to prove that the survey, plat, and field-notes made by the surveyor general of the state of California of said Rancho Laguna de San Antonio, was filed in the office of said surveyor general on the tenth day of March, 1859, and approved by him on said day; that said surveyor general immediately thereafter, to-wit, on the fifteenth day of March, 1859, gave due notice by publication, according to law, that said claim had been surveyed, and a plat thereof made and filed as aforesaid; that no objection had been made; and further offered to show that said survey had become final. The court simply said that if the plaintiff could have proved that the survey was made as required by the statute in force in that state at that time, after due and proper notice to all persons interested in the grant, and that no objection had been made, and the survey was final, it conclusively settled the boundaries of the grant. It will be noticed that the decision was rendered after the act of 1851 was passed, and the parties in interest had submitted to the decision of a tribunal clothed with ample authority to finally settle disputed claims between grant owners and the government of the United States, and as between conflicting or adversary claimants. After the land-board had rendered judgment in cases like the one considered in *Gallagher v. Riley*, it became necessary, and was a part of the system adopted, to have a survey made, and assign the quantity to which the claimant was entitled, thereby segregating his claim from the public domain. The final survey became a necessary part of the proceedings in cases of quantity grants, in order to accurately locate the boundaries. Notice of such survey was, however, necessary. The act expressly conferred the power upon the surveyor general to do what he did in that case. His act, done in pursuance of such expressed authority, and upon notice, ought to have bound the claimants. There was no expressed duty imposed by the terms of the act of congress of 1854, creating the office, and defining the duties of the surveyor general of this territory. There is no evidence before us that any notice was ever given by the surveyor general of the territory of his survey in 1860. The stipulation on file shows that no such notice was ever given.

The grant in the case before us was a perfect one, made in 1823, by the Mexican government. This is admitted by plaintiff in error; or, at all events,

he does not offer any objection to it on account of not conforming to some requirement of the laws of Mexico. It covers all the lands lying within certain named and well-known boundaries. The grant or patent made by Bartholome Baca, acting superior political chief of the province of New Mexico, after reciting the power conferred on him, and the previous consent of the most excellent provincial deputation of the territory, proceeds as follows: "I have granted, and by this patent do grant, in the name of the supreme government of the nation, to Don Juan Estevan Pino, the land he solicits on the Gallinis river, which shall be called the 'Hacienda de San Juan Baptista del Ojito del Rio de las Gallinis,' recognizing the boundaries: On the north, the land-marks of the farm of Don Antonio Ortiz, and the table-land of the Aguage de la Yequa; on the south, the Pecos river; on the east, the table-land of Parjarito; and on the west, the point of the table-land of the Chupaines,—on which fixed points you will place formal and well-constructed boundaries, so that in all times to come the dividing line of the land granted to him may be known." The alcalde, in obedience to directions from superior authority, and in strict conformity to law, put the grantee into the juridical possession of the lands embraced in the grant, as lying within the boundaries given. The surveyor general reported this grant for confirmation, following the description contained in the petition of Pino, and the grant from the Mexican government. The act of congress confirms the grant as reported.

In *U. S. v. Halleck*, 1 Wall., at page 455, FIELD, J., in passing upon a question of survey in that case, said: "The material question for determination is whether the survey approved conforms to the decree of confirmation. There must be a reasonable conformity between them, or the survey cannot be sustained." The survey here is not, by many miles, in conformity with the boundary calls of the grant and act of confirmation. It is at one point some 10 miles within the line of the grant, when drawn as prescribed by the rules of the interior department. There is no reasonable conformity, and the result is that the survey cannot be sustained, unless for reasons hereafter stated.

In *U. S. v. Pico*, 5 Wall. 536, the court said: "Were there any doubt of the intention of the governor to cede all the land contained within the boundaries designated by him, it would be removed by the juridical possession delivered to the grantees. This proceeding involved an ascertainment and settlement of the boundaries of the lands granted by the appropriate officers of the government, specially designated for that purpose, and has all the force and efficacy of a judicial determination. It bound the former government, and is equally binding upon the officers of our government." Such is the purport of the recent decision in the case of *Graham v. U. S.*, 4 Wall. 260. See, also, *Leese v. Clark*, 18 Cal. 567; *Page v. Scheibel*, 11 Mo. 187.

In *Graham v. U. S.*, 4 Wall. 259, Mr. Justice FIELD, in speaking of the effect of the juridical possession, used this language: "By this proceeding, called, in the language of the country, the delivery of the juridical possession, the land granted was separated from the public domain, and what was previously a grant of quantity became a grant of a specified tract. The record of the proceeding of this nature must necessarily control the action of the officers of the United States in surveying land claimed under a confirmed Mexican grant."

In the grant to Pino, juridical possession was delivered to him by the description and boundary calls, above stated. The south line was the Pecos river. The survey does not follow the specific and well-defined natural objects named in the grant and act of juridical possession as boundary lines and calls. If the record made by an officer, after delivering possession, is binding upon the officers of our government, it follows that the act of delivering such juridical possession, by such clearly and distinctly defined boundary lines as in

this case, ought to be equally obligatory and binding upon the officers of our government. Had it been uncertain what lands the government of Mexico intended to convey to Pino, or the grant had been of a quantity within defined exterior limits, it would have been necessary for the officer to have measured the lands and fixed boundaries, and to have made some record of the act; otherwise a new survey by our government would have been necessary to separate the granted lands from the public domain. The boundaries given, and the rule for measurement ascertained, it is mathematically certain what lands were granted.

Mr. Justice DAVIS, in *Ryan v. Carter*, 93 U. S. 82, in speaking of the act of congress confirming lots and lands in the territory of Missouri to the inhabitants of certain towns and villages, under the act of 1812, said: "It does not require the production of proofs before any commission or other tribunal established for that special purpose, but confirms, *proprio vigore*, the right, title, and claims to the lands embraced within it, and operates as a grant to all intents and purposes. Repeated decisions of this court have declared that such statute passes the title of the United States as effectually as if it contained, in terms, a grant *de novo*, and that a grant may be made by law as well as by a patent pursuant to law."

In *Tameling v. United States Freehold, etc., Co.*, 98 U. S. 644, Mr. Justice DAVIS, in passing upon the effect of an act of congress confirming a Mexican grant, said: "Congress acted upon the claim as recommended for confirmation by the surveyor general. The confirmation being absolute and unconditional, without any limitation as to quantity, we must regard it as effectual and operative for the entire tract." The court reaffirmed the doctrine that an act of confirmation passes the title of the United States as effectually as if it contained in terms a grant *de novo*, and that a grant may be made by law as well as by a patent pursuant to law.

The act of June 21, 1860, confirmed to the claimant, Preston Beck, Jr., the entire tract, as recommended by the surveyor general, without any limitation as to quantity, or other condition whatever.

Plaintiff in error cites *U. S. v. Flint*, 4 Sawy. 61, as supporting his position in favor of the validity of the survey. In concluding the opinion, Justice FIELD of the supreme court said: "The courts can only examine into the correctness of a survey when, in a controversy between parties, it is alleged that the survey made infringes on the prior rights of one of them, and can then look into it only so far as may be necessary to protect such right." The right here alleged is a prior one, and we are asked to look into the survey only so far as to protect such prior right. The attorney of record for the plaintiff in error filed no brief. The only authorities presented were submitted by the United States attorney. The facts stated in the record were stipulated and filed in the court below. We have had our attention called to no case of a similar character arising under the act of July 22, 1854. The decision of the courts referred to under the California acts of 1851 and 1860 afford us very little aid in construing the powers of the surveyor general of New Mexico under the act of 1854. We have kept in view the fact that, at the date of the survey, November, 1860, some of the claimants were minors, while others were married women, who would not be bound by the act of the surveyor general to their prejudice, unless it was the evident and very clear intention on the part of congress of the United States to give the survey the effect claimed here. We do not think it was the intention of congress to confer any such power by the enactment of that statute.

Finding no error in the record, the judgment of the court below will be affirmed.

LONG, C. J., and BRINKER, J., concur.

(4 N. M. [Gild.] 196)

TERRITORY v. O'DONNELL.

(Supreme Court of New Mexico. January 27, 1887.)

1. CRIMINAL LAW—APPEAL—EXCEPTION NOT PROPERLY TAKEN—INSTRUCTIONS.
Where the record fails to show any objection or exception to the instructions of the court, taken in the trial court, an exception to the charge, taken for the first time in the supreme court on appeal, will not be considered.
2. SAME—TRIAL—INSTRUCTIONS—REQUEST.
Where a party is not satisfied with the instructions given on any point, he must offer a proper instruction covering that point.
3. SAME—INTRODUCTION OF EVIDENCE—REBUTTAL.
The admission of evidence in chief after the defendant has closed his defense is a matter purely in the discretion of the court, and will not be reviewed on an appeal, especially if the defendant is permitted, after the introduction of such testimony, to rebut it.
4. SAME—APPEAL—INSTRUCTIONS—REMARKS TO COUNSEL—WARNING TO JURY.
Where the trial judge makes remarks to counsel during the progress of the trial, in the presence of the jury, expressing an opinion on the weight of portions of the evidence, but afterwards warns the jury that these remarks were made to counsel, and were not intended to be heard or regarded by them, and that they should disregard them, and determine the cause solely upon the evidence, and the instructions of law thereafter to be given, the caution and warning rob the remarks of their objectionable character, and the supreme court will not reverse the judgment, on appeal, because of them.
5. SAME—LANGUAGE USED BY JUDGE—TONE OF VOICE—MANNER.
On appeal, the court can only consider the language used by the trial judge, and cannot consider the tone of voice, the manner in which the remarks were made, and the effect produced upon the jury thereby.
6. HOMICIDE—INDICTMENT—MURDER—FIRST DEGREE.
An indictment for murder in the first degree need not charge the defendant with the crime *in hoc verba*, but is sufficient if it charges him with that crime, setting forth all the facts necessary to constitute it with great particularity, and with all the qualifying words used in approved precedents.
7. APPEAL—WEIGHT OF EVIDENCE—PROVINCE OF JURY.
The jury are the sole judges of the weight of the evidence and the credibility of the witnesses.

Appeal from Third district court, Grant county.

Fielder & Fielder, for appellant. *Wm. Breeden*, Atty. Gen., for the Territory.

BRINKER, J. The defendant was convicted of murder in the first degree for the killing, on the third of October, 1885, of Sergeant Alonzo Bowman. The following is the substance of the evidence:

Dr. Hubbard testified that he was a surgeon in the army, stationed at Fort Bayard, and that on the third of October he was called upon to attend the deceased, at Central City. He reached him about half past 12 o'clock at night; found him suffering from a gunshot wound through the neck. He died within 23 hours after he was shot, from the effects of the wound with which he was suffering. The course of the ball passed behind the trachea or wind-pipe and carotid artery and jugular vein, and tore through the smaller arteries, and cut across the cords of the neck. He bled to death. After his death the witness removed a section of the spinal column, and found that death resulted from the hemorrhage caused by the gunshot wound. Deceased was a sergeant in Troop L, United States cavalry.

Salome Gonzales, who resides at Silver City, testified "that she was in Central City on the day of the killing, and was present when the deceased was shot, and in the same room. She stated that defendant came into the door that opens into the saloon; that deceased was in the room with her [witness] and another woman. There were two bedsteads in the room, and deceased and the other woman were sitting on one of the beds. When defendant came in witness stated that she was washing her face at the table.

Defendant opened the door, and came in, and said, 'Are you here?' and then fired the shot, which hit deceased in the neck."

Maggie Hays, another witness, who at that time resided in Central City, states "that she was present in the room where deceased was killed; that defendant knocked at the door, and Salome opened it. Defendant came in, and said, 'You are here,' and fired, and shot Sergeant Bowman in the neck. This was in a room at Mike Cary's house. Deceased made no reply to the remark of defendant. The shot was fired immediately after the remark was made. At the time the shot was fired deceased was sitting on the bedstead by the side of the witness. This occurred in the room which opens into the dance-hall. When defendant came into the door, and made the remark mentioned, he drew a pistol from his pants, and fired at deceased."

James Sullivan, another witness, testified that he was a member of Troop L of the Sixth cavalry of the United States army, a private; that he knew the defendant by sight, and had known him for three months, and had known the deceased a little over a year. The witness was not present at the shooting, but was present and heard a conversation which took place between the deceased and defendant the day before the shooting, at the company's head-quarters at Fort Bayard. They were talking about a woman. Deceased said he was going to stay with the woman. Defendant said he would bet deceased that he could not stay with her. Deceased said: "Wait until night, and after we get our pay I will let you know whether I can stay with her or not." Defendant then said to witness that if deceased ever bothered that woman he would kill him. The woman is called Bud Hays' wife. Witness pointed out Maggie Hays as the woman. This conversation occurred at Fort Bayard, and the shooting took place at Central City, which is a little over a mile from Fort Bayard. Deceased and defendant were sitting down when the conversation occurred about the woman. Deceased then got up, and left, and defendant remained seated about 10 minutes or more after deceased left. Witness did not communicate to deceased what the defendant said. This conversation occurred about 9 or 10 o'clock on the day before the killing. Witness was friendly to both deceased and defendant. The conversation between the deceased and the defendant about the woman was carried on in a friendly manner. Did not know whether they were friends or not.

James Lane testified that he was at Cary's place, on the porch, when defendant passed, and went into the house. He immediately afterwards heard a shot fired, and ran in to see what was the matter. Found the deceased on the floor; picked him up; put him on the bed; asked him if he had any statement to make; deceased could not speak. Witness then went out on the porch. Saw defendant lying on the porch, crying like a baby, saying he had shot the best friend he ever had in the world, accidentally.

William Wilson testified that he lived at Fort Bayard; was trumpeter in the United States army; that, shortly before the homicide,—one or two days,—he, deceased, and defendant were in Cary's saloon. Witness said to defendant, (referring to deceased:) "I would like to be in that man's boots, because he will be a free man in about three weeks. His time in the service will be out then, and he will be free." Defendant said: "If he don't keep away from a certain woman, he will wish to God he was not;" that "he would not be a free man." Witness, on being asked to whom the defendant referred, stated he did not know; that defendant said "if he didn't keep away from a certain party in town he would not live to see his time out." Witness didn't remember how many persons were present besides himself, deceased, and defendant. Witness did not communicate these remarks to deceased. Defendant made the remark in "a hang-dog" or sullen manner. Witness was friendly both to deceased and defendant.

Lewis Elliott, on the part of the defendant, testified that he resided in Central City, and had for about three months on the day of the shooting. Was

managing a restaurant in Mike Cary's saloon. Was acquainted with defendant slightly. Was not acquainted with deceased. At the time of the shooting, witness was in the kitchen getting breakfast for the defendant. When defendant came in he came to the kitchen and ordered his breakfast. This was about 9 or 10 o'clock in the morning. Defendant said to witness: "When you get my breakfast, call me." He then asked witness if there were any women in the room. Witness told him he thought there were. Defendant then went into the room. Witness heard a shot, and in three or four seconds heard the defendant say: "My God! I have shot my friend." In about a minute after the shot was fired, Judge Givens came to the door, and called witness to pick up the deceased, and put him on the bed. Defendant and witness picked up the deceased, and placed him on the bed. Deceased commenced to gasp after they put him on the bed. Then the defendant gave way, and laid down on the other bed for perhaps 10 seconds. He then laid down on the bed where the deceased was, and put his head on deceased's breast, and became covered with blood. He then rolled over behind deceased on the bed, and soon fell on the floor. Joe Donnelly then came in, and witness noticed defendant was breathing heavily, like he was choking. Witness and Donnelly took a silk handkerchief and a piece of paper out of his throat. They choked the paper out of his mouth. Witness smelled something scorching, and saw a hole in defendant's pants on the right side of the waist-band, between the first and second suspender button. It looked like a bullet hole. It was scorched on the inside. Donnelly helped witness take the defendant out of the room, and take the stuff out of his mouth. The hole in defendant's pants was perhaps three-quarters of an inch in diameter, on the right front side, at the upper edge of the waist-band. Witness first discovered this hole in defendant's pants five or ten minutes after the shot was fired. When they noticed defendant on the floor, he was struggling and moaning. They dragged him out to the dance-hall, and, after hard work, got the paper and handkerchief out of his mouth. The roll of paper was oblong, and about an inch to an inch and a quarter in diameter. Witness squeezed the paper out of defendant's mouth by running his finger along his gums, and pried his jaws open.

Thomas Jennings, witness for the defendant, testified that he was acquainted with the defendant, and had been for eight months; had been acquainted with deceased for 10 years in the army; that he knew Salome Gonzales, a witness for the territory; that between the fifteenth and twenty-fifth of November, 1886, he had a conversation with her in Mrs. Cary's dance-house, in Central City, and in that conversation she said that defendant was a dirty, low-down cavaron, and if her word would go, and she could make it stick in court, she would hang him. Witness saw defendant in charge of the officer after the shooting. Defendant asked witness to lift up defendant's coat; that he (defendant) came near killing himself. Witness looked at the coat, saw it was powder-burnt, and saw a round hole in the waist-band of defendant's pants. The hole was about the size of a quarter or half dollar.

James Thompson, witness for the defendant, testified that he was acquainted with the defendant; was not acquainted with the deceased; that he saw defendant about 8 o'clock in the morning before the killing; that defendant had a pistol which belonged to witness, and which witness had loaned him 10 or 15 days before. The pistol was a 45-calibre, octagon barrel. Witness always considered the pistol tricky. Sometimes it would stand half-cocked; sometimes it would not. When defendant came into the saloon of witness, he and witness went to bed together. Before going to bed, defendant laid the pistol on the stand. He had six cartridges in it. Witness told him he was foolish to carry it around loaded in all chambers. Witness then took one of the cartridges out, and placed the hammer of the pistol on the empty chamber. Next morning witness got up about sun-up. Defendant

slept until 9 or half past 9 o'clock. Witness didn't see defendant any more until after the shooting. On Monday morning, after the shooting, defendant called witness to one side, and told him about the shooting, and showed him a hole in his (defendant's) pants, which he said was made when the shot went off.

Joe Donnelly, witness for defendant, testified: Lived in Central City. Was acquainted with deceased and defendant. Immediately after the shooting he was told that defendant had shot deceased. Witness went to the house, and went to the room where the shooting occurred. Saw deceased lying on the bed, and defendant lying on another bed. Deceased was gasping, and wanted to be raised up. Witness assisted some one else in raising him up, and placing a pillow under his head. Witness then discovered defendant under the bed, stretched out, with his face to the floor. Witness told him to get up and get out of there. Receiving no answer, he then heard defendant sobbing and moaning, and noticed a kind of choking sound in his throat. Lewis Elliot then dragged him out to the dance-hall, and witness put his hand in defendant's mouth, and pulled out a silk handkerchief, after much difficulty. Witness noticed that that didn't relieve defendant; that he was getting black in the face. Defendant commenced coughing. Witness put his fingers down defendant's throat, and pulled out a newspaper. Witness saw nothing of a hole in defendant's pants.

O. F. Jay, a witness for defendant, testified that he knew William Wilson, one of the witnesses for the territory; that about three weeks before the trial he heard Wilson say of defendant: "I am going to see that the son of a bitch is hung. I have a grudge against him. I will do all I can against him." Wilson was drunk at the time. Witness knew Maggie Hays. About two weeks before the trial Maggie Hays stated, in the presence of witness, that defendant, at the time of the shooting, had the pistol by his side, trying to put it into his pants, when it went off.

Ed. Hawkins, a witness for the defendant, testified that he knew William Wilson. Witness was present at the conversation with Wilson testified to by Jay, and heard Wilson say that he (Wilson) had a grudge against defendant, and now he thought he had a chance to get even with him.

Defendant was sworn as a witness in his own behalf, and testified that he knew deceased; that the night before the killing he (defendant) was up nearly all night; that he and deceased were at a dance together that night; danced in the same set; took several drinks together. Defendant went to Thompson's saloon about 3 o'clock. Went to bed. Before going to bed he laid the pistol on the table. Thompson told him he was a fool; that he was liable to kill himself with that pistol, with six loads in it; that it was a treacherous pistol, and would not stand half-cocked. Defendant then went to bed. Slept until 9 o'clock next morning. Got up, washed, and got ready for breakfast. Went into Mike Cary's saloon; then through the saloon into the kitchen, and ordered his breakfast. Asked the cook if there were any women in the other room. Cook said there were. Defendant heard some women talking in there a little while before. He then ordered his breakfast. Told the cook when he got it ready to call him. Then started towards the room where the women were. Before he got to the door of the room he put his hand in his pocket to get a match to light a cigar. He was then near the door of the room. When he put his hand in his pocket he felt the cartridge that had been taken out of the pistol when he went to bed. He took the cartridge out of his pocket; opened the side-piece of the pistol, put the cartridge in the chamber; that in inserting the cartridge he must have pulled the hammer clear back, without knowing it. He knocked at the door. One of the women opened it. As the door was opened, he had the pistol in his hand, and was in the act of putting it in his pants, when it went off. For a second he didn't know what to think, or what was the matter. He then put the pistol in his pocket. Started over

to where deceased was sitting on a low bed. When he got half way to deceased, deceased fell off the bed. Then defendant exclaimed, "My God! I have shot the best friend I have in the world;" and asked deceased what was the matter with him. Deceased told him to put him on the bed. Defendant tried to put deceased on the bed, but could not. He then got help, and put him on the bed. He then discovered the wound in deceased's neck. Judge Givens was the first man to come into the room after the shot was fired, and defendant handed Givens his pistol, and told him he had shot the best friend he had on earth, accidentally. After defendant saw the wound it shocked him so that he gave way, and knew nothing of what took place afterwards until he found himself lying on Cary's porch; that he carried the pistol because he had been threatened with violence by a man named Hutchinson; that he and deceased were the very best of friends. Defendant denied the conversation testified to by the witnesses Wilson and James Sullivan. At the time of the shooting defendant was trying to put the pistol inside of his pants, under the waist-band, when it fired accidentally; that in putting the pistol inside of his pants he inserted the muzzle first, and then undertook to put the balance of the pistol underneath his pants, by pressing the cylinder and the handle downward. This brought the weapon into nearly a horizontal position, and in this position the shot was fired.

Maggie Tuttle, a witness for defendant, testified that Hutchinson told her he would kill defendant, and she informed defendant what Hutchinson said.

J. Crockett Givens, a witness for the territory, in rebuttal, testified that he was present at the house of Cary on the day of the shooting. He was not in the room where the shot was fired, but in another portion of the house. He heard the shot, and immediately went to the room where it was fired. Saw deceased lying on the floor. Defendant was standing near deceased's head. Defendant had a pistol in his right hand. Witness got hold of the pistol, and took it away from defendant before defendant knew he was in the room; that when defendant first came to the house he came into the bar-room; that defendant didn't go to the kitchen, but went directly from the bar-room to the room where the shooting occurred. Witness followed him. Defendant passed into the room, and shut the door, and immediately a shot was fired. When witness got into the room he found defendant, Maggie Hays, Salome Gonzales, and deceased. Maggie was standing in the door, on the south side of the room. Deceased was lying on the floor, with his left foot on one of the beds. Defendant was standing over deceased, near his shoulders and head. Salome was standing near a large bed near the door where witness entered. When witness took the pistol away from defendant it had one empty shell in it and five loads.

Dr. Hubbard testified, on rebuttal, for the territory. This witness described the wound and the course of the ball. He said the ball entered the middle of the neck, on the right side. The general direction of it from the point of entrance to the point of exit was downward and forward. Its exit was further towards the front of the neck than its entrance. The day after the shooting, and while the defendant was in the guard house, witness had a conversation with him about the killing. Witness said to defendant, "What on earth did you shoot Sergeant Bowman for?" Defendant replied: "I don't know. I came into Mike Cary's saloon, and inquired if any one was in the room. I was told that two girls were in there. I went in, and found Bowman in there. I said to him 'Dogon your skin, are you here?' I then hesitated, and drew my pistol, and shot him, not knowing what I did." "I had no motive in killing him, because he was my friend." The witness also testified that when he first saw deceased his face was powder-burnt.

Maggie Hays was recalled, and testified that defendant was about four steps from deceased when the shot was fired; that the bed on which the deceased was sitting was two feet and a half high. This witness denied the conversa-

tion testified to by Jay; and stated that what she said to Jay was that defendant drew the pistol from his side, pointed it at deceased, and fired.

Salome Gonzales testified, in rebuttal, for the prosecution, that she saw the pistol when it was fired; that she didn't see it until it was drawn and fired; that defendant held it out, and shot it off.

Defendant was then permitted to take the stand, and denied the conversation testified to by Dr. Hubbard.

Idus L. Fielder, attorney for defendant, testified that Maggie Hays told him that, at the time of the shooting, defendant had the pistol down by his side when it went off.

To reverse the judgment, defendant contends that the court erred in giving improper instructions to the jury; in refusing to give proper instructions requested by defendant; in permitting testimony descriptive of the wound, and the course taken by the ball with which deceased was killed, to be introduced by the prosecution after the evidence for the defense was closed; in expressing an opinion, in the presence of the jury, upon certain portions of the evidence, to which exception was taken; in overruling the motion in arrest of judgment; in refusing to set aside the verdict, because, as alleged, it is not supported by the evidence.

The record fails to show any objection or exception to the instructions. "Exception to the decision of the court, upon any matter of law arising during the progress of the cause, or to the giving or refusing of instructions, must be taken at the time of such decision." Section 2197, Comp. Laws. This section is found under the head of "Civil Procedure" in the Compilation 1834; but a reference to the original act will show that it was not intended to be limited to civil causes. The act is entitled "An act to regulate the practice in the district court," approved March 1, 1882. Acts 1882, c. 4, p. 19, § 5, is the section quoted above as section 2197, Comp. Laws.

In the case of *Territory v. Yarberry*, 2 N. M. 391, decided in 1883, it was said, on page 454: "The prisoner, by his counsel, excepts to each and every part of said charge, and does not except to any particular error of law in said charge. Our rules require that he should specify distinctly the several matters in law to which he excepts; otherwise this court will not consider such general exceptions." Yarberry was indicted, tried, and convicted of murder in the first degree, in May, 1882, after the act *supra* had gone into effect, and we must presume that, when the court say the rules require that the exceptions must be distinctly specified, it had in mind the law then in force, and the rules of practice prescribed by that law.

In *Leonardo v. Territory*, 1 N. M. 291, decided in 1859, the court held a law which provided "that, in any suit in the district court, the judge should give his instructions to the jury in writing only," to apply to criminal as well as civil causes. The court in that case also say that the objection to the charge cannot be considered, unless the record shows it to have been excepted to when delivered. The section under consideration is but the legislative adoption of a familiar rule, which has been universally observed, in both civil and criminal cases.

In *Martin v. People*, 13 Ill. 341, Judge TRUMBULL, speaking for the court, says: "The only way for a party to avail himself in this court of objections to instructions in the court below is to except to the decisions of the court, in giving or refusing them, at the time they are made." To the same effect are the following cases: *Kennedy v. People*, 40 Ill. 488; *Sedgwick v. Phillips*, 22 Ill. 184; *Leigh v. Hodges*, 3 Scam. 15; *Hill v. Ward*, 2 Gilman, 285; *State v. Miller*, 23 Minn. 352; *Com. v. Child*, 10 Pick. 252; *State v. Hascall*, 6 N. H. 360; *Kolle v. Foltz*, 74 Ind. 54; *Garrison v. Young*, 22 Ind. 270; *Hyatt v. Clements*, 65 Ind. 12; *Griffin v. Pate*, 63 Ind. 273; *Railroad Co. v. Parker*, 73 Ill. 526; *Gibbons v. Johnson*, 8 Scam. 61; *Williams v. Thomas*, 9 Pac. Rep. 356; *Coleman v. Bell*, ante, 657, (decided at this term;) *U. S. v. Breitling*, 20 How. 252; *Murray v. State*, 26 Ind. 141; *Wood v. Weimar*, 104 U. S. 786.

These citations might be greatly multiplied, but the above are sufficient to show that the rule prescribed in the statute is so well known that an omission to except to the giving of the instructions at the time must be held as indicating entire satisfaction with such instructions, and as precluding any exception to them for the first time here.

The position that the court refused proper instructions requested by defendant cannot be sustained, for the very sufficient reason that the record shows that the court gave all the instructions asked by him.

But it is insisted that the court should have given instructions covering the theory of defense adopted by defendant. The instructions given presented the case fairly to the jury, and if defendant was not satisfied with those, and desired any particular point presented to the jury prominently, he should have offered a proper instruction covering that point. *Thomp. Char. Jury*, § 81, and cases cited; *Express Co. v. Kountze*, 8 Wall. 343.

There was no error in allowing the prosecution to introduce evidence in chief after the defendant closed his defense. That was a matter purely in the discretion of the court, and cannot be reviewed. 1 Greenl. Ev. § 341. But, if this were not so, defendant cannot complain, because the court permitted him, after this testimony was introduced, to rebut it.

Defendant complains of remarks made by the trial judge to counsel, during the progress of the trial, in the presence of the jury, expressing an opinion upon the weight of some portions of the evidence. The record shows that certain remarks were made which, if the jury had not been warned against, we should hold were error. But the court said to the jury that those remarks were made to counsel, and were not intended to be heard or regarded by them, and that the jury should disregard them, and determine the case solely upon the evidence, and the instructions of law thereafter to be given them. This caution and warning, we think, robbed the remarks of their objectionable character. To hold otherwise would be to subject the administration of justice to the peril of being obstructed by every unguarded utterance made during the progress of a trial, even though it was withdrawn, as in this case, at once, and its effect removed by prompt and proper admonition to the jury to ignore it.

But counsel say that, while the record may disclose the language used, it cannot give the tone of voice nor portray the manner in which it was said, nor its effect upon the jury. This argument is not new. It was used as long ago as 1829. In *Com. v. Child*, 10 Pick. 253, PARKER, C. J., in answering it, said: "It is said the tendency of the judge's remarks was to affect the jury unfavorably to the defendant's side of the case. The next step will be to move for a new trial on account of the expression of countenance of the judge. These things, if evils, are unavoidable. Confidence must be reposed in the integrity of the judge. If an unjust partiality is shown, the remedy must be in one of the modes pointed out in the constitution. Though an undue influence may be exerted upon the jury by the manner of the judge, yet the law presumes intelligence in the jury; and, if they perceive any improper attempt of the kind, they will be more likely to find a verdict against the opinion of the judge than in accordance with it. * * * If the evidence in such case does not sustain the verdict, a new trial will be granted."

The motion in arrest of judgment was properly overruled. The indictment was well enough. It was drawn after the form which has been sustained by all courts of common law for ages. The contention that it did not charge the defendant with murder in the first degree *in hoc verba* is untenable. It did charge him with that crime, by setting forth all the facts necessary to constitute it with great particularity, and with all the qualifying words used in approved precedents.

The evidence was conflicting, but was sufficient to sustain the verdict, if true, and its truth or falsity was a matter to be determined by the jury. They

were the sole judges of the weight of the evidence, and of the credibility of the witnesses, and, if they believed from the evidence that any witness had sworn falsely, they could disregard his testimony. In determining what weight should be given to the testimony of the witnesses, the jury could consider their manner and conduct in court, means of knowledge, character, habits of life, and, in fact, any other matter surrounding the witnesses, likely or calculated to influence them one way or the other. Nearly every witness sworn in the case was contradicted by some other witness, and, while there was no effort made to impeach any of them by evidence of general reputation, it seems to have been taken for granted that the two women were prostitutes. This fact was proper for the consideration of the jury in passing upon their credibility, but the jury was not bound to disregard their testimony on that account. The evidence would have justified a verdict of conviction or acquittal, but for us to say which it should have been would be an invasion of the province of the jury. The testimony for the territory, if believed, showed a most wanton and unjustifiable murder, committed after most thorough and cold-blooded premeditation, arising from the reflection that defendant had been supplanted in the unholy affections of an abandoned woman, whose wares were upon the market for all who were base enough to give her patronage. It follows that there was no error in denying the motion for a new trial. The judgment must be affirmed, and the proper officer directed to carry it into execution.

LONG, C. J. I concur.

(6 Mont. 323)

TERRITORY v. HARDING.

(*Supreme Court of Montana*. January 10, 1887.)

1. **JURY—GRAND JURY—QUALIFICATION OF JUROR—AFFIDAVIT—REV. ST. MONT. § 780.**
An affidavit in a criminal case which alleges that one of the grand jurors finding the indictment was not, at the time, a citizen of the United States, does not show any illegality in the proceedings, without further alleging that the juror had not declared his intention of becoming a citizen, as Rev. St. Mont. § 780, p. 571, only requires citizenship, or declaration of intention, as a qualification for service on the grand jury.
2. **SAME—WAIVER OF OBJECTION—REV. ST. MONT. § 121, PAGE 305.**
Under Rev. St. Mont. § 121, p. 305, providing that a person held to answer for an offense shall be brought into court before the grand jury is sworn, and be informed of his rights in regard to challenging the jury, and that if he "then fails to challenge the grand jury, or any member thereof, he shall be deemed to have waived all objection to the same," a defendant who is shown to have expressly waived his right of challenge cannot afterwards object that one of the grand jurors was not a citizen of the United States, although he did not learn that fact until after the indictment was found and returned into court.
3. **CRIMINAL LAW—SPECIAL PROSECUTING ATTORNEY—POWER TO APPOINT—SIGNATURE TO INDICTMENT—REV. ST. MONT. §§ 57, 156.**
The district court of Montana, being a court of general criminal jurisdiction, may, in the absence of the district attorney, appoint a special prosecuting attorney for a particular case, whose signature to the indictment will be sufficient, although Rev. St. Mont. § 57, p. 414, declaring the duties of the district attorney, requires him to sign "all bills of indictment;" section 156, p. 309, providing, with regard to the requisites of an indictment, that it must be signed by "the attorney prosecuting."
4. **CONTINUANCE—CRIMINAL CASE—ABSENCE OF WITNESSES—STATE'S ADMISSION REGARDING THEIR TESTIMONY.**
Defendant in a criminal case has no right to a continuance on account of the absence of material witnesses if the prosecution is willing to admit that, if the witnesses were present, they would testify as set forth in the affidavits, and to allow the statements in the affidavits to be read in evidence as and for the testimony of the absent witnesses. BACH, J., dissenting.

Appeal from Beaverhead county, Second judicial district.

Indictment for murder. Conviction below. Defendant appeals.

Campbell & Duffy, for appellant, Harding. *Robert B. Smith and C. W. Turner*, for the Territory.

WADE, C. J. This is a case of murder, and the defendant is under sentence of death. He asks to have the judgment against him reversed for the following reasons, viz.: *First*, that one of the grand jurors who composed the grand jury that found and returned the indictment against him was an alien; *second*, that the indictment was not signed by the district attorney of the Second judicial district; and, *third*, that the court erred in overruling his motion for a continuance.

1. In support of the proposition that the indictment was found by a grand jury not legally constituted, the defendant made and filed an affidavit setting forth that one Lambert Eliel, who was a member of said grand jury, was not, at the time he so acted as such, a citizen of the United States, and that the defendant did not have knowledge of this fact until after such indictment had been found and returned into court. The territory does not controvert this statement by the defendant, and, for the purposes of this case, it must be taken as admitted that the said Eliel, at the time of so serving on said grand jury, and the finding and return of said indictment, was not a citizen of the United States, and that this fact was unknown to the defendant at that time.

A person who is not a citizen of the United States, and has not declared his intention to become such, cannot lawfully serve as a grand juror in this territory, if advantage of this disability is taken at the proper time. But our statute provides that any male person of lawful age, who is a citizen of the United States, or who has declared his intention to become such, who is a tax-payer, and a *bona fide* resident of the county, shall be competent to serve as a grand or trial juror. Rev. St. § 780, p. 571. The defendant does not question the validity of this statute.

It does not appear in the record, and there is no intimation or claim anywhere, that this grand juror had not declared his intention to become a citizen. The presumption is that the board of county commissioners, whose duty it is to select grand jurors, performed their duties according to law, and selected grand jurors having the qualifications prescribed by the statute, until the contrary is made to appear. Therefore, if a defendant proposes to attack the competency of a grand juror, he must cause his incompetency to appear. The record in this case is an admission that the grand juror Eliel had declared his intention to become a citizen, and therefore that he was a competent grand juror.

Aside from all this, it conclusively appears from the record that the defendant, in pursuance of the statute, was given an opportunity to object to said grand jury, and thereupon waived all challenges to the panel and polls of said jury. The record recites "that, at the impaneling of the grand jury aforesaid, the defendant was personally present in open court, and was also then and there represented by counsel, and then and there waived all challenges to the panel and the polls of said grand jury." Our statute provides that "when a party has been held to answer for an offense, and is in custody of the officer, it shall be the duty of the judge presiding, before the grand jury is sworn, to direct the sheriff of the county to bring such person into court, and there notify him of his rights in relation to the challenging of the jury, and, if necessary, to appoint counsel for him. If such person then fails to challenge the grand jury, or any member thereof, he shall be deemed to have waived all objection to the same." Rev. St. § 121, p. 305.

The defendant knew for what he was brought into court; for he answered and said that he waived all objections to the panel and to the polls of the grand jury. Having had this opportunity, and failing to exercise his right of challenge, the statute declares that he thereby waives all objections to the grand jury. If, after failing to exercise his right of challenge,—if, after look-

ing upon the grand jury, and thereafter waiving all objections to the same,—he thereby declares himself satisfied with the grand jury, and asserts his willingness that each and every member thereof should examine his case, and he thereby promises to abide the result of such examination; if, after looking upon the array of grand jurors, and making no objection to any one of them, and he thereafter ascertains that one of the grand jurors is not a citizen, or has not declared his intention to become such,—his after-acquired knowledge conclusively shows his neglect and laches in making the proper inquiries at the time the opportunity was given him of exercising his right of challenge. At that time the very least amount of diligence and care would have prompted the inquiry of each of the jurors if they were citizens of the United States, or if they had each declared their intention to become such. And so, if the defendant was indicted by an incompetent grand jury, it was his own request that brought about this result; and having in effect declared, before the grand jury was sworn, that he was satisfied with each member thereof, and content to have them investigate and pass upon the charge against him, so far as to say whether or not he should be formally accused of crime, it is now too late for him to object to said grand jury, and his right is gone.

2. The statute provides that "each indictment must be signed by the attorney prosecuting." Rev. St. § 156, p. 309. Objection is made to this indictment for that it was not signed by W. Y. Pemberton, the district attorney for the Second judicial district, or by C. J. Walsh, the deputy district attorney for that district, but that it was signed by "Robert B. Smith, special district attorney for Second judicial district, Montana territory, appointed by the court to prosecute in the above-styled cause," and therefore that said indictment is void.

The authority of Robert B. Smith in the premises came from an order and appointment by the court, as follows:

"IN THE DISTRICT COURT OF MONTANA TERRITORY, COUNTY OF BEAVERHEAD.

"Territory of Montana vs. Thomas H. Harding.

"ORDER OF COURT.

"At a regular term of the district court of Beaverhead county, Montana territory, it appearing to the court that W. Y. Pemberton is absent from the county of Beaverhead, and that there is no qualified or acting prosecuting attorney for the territory now present at court, it is therefore ordered by the court that Robert B. Smith, Esq., be, and he is hereby, appointed to represent the territory in the above-entitled cause, and to prosecute the same both before the grand jury and on the trial thereof."

The statute also provides that the district attorney for each district shall be public prosecutors in their respective districts, and shall sign all bills of indictment that may be found by the grand jury. Rev. St. § 57, p. 414. It is further provided that the indictment shall be sufficient if it can be understood therefrom that the indictment was found by the grand jury of the county in which the court is held; that the defendant is named or described in the indictment as a person whose name is unknown to the grand jury; that the offense was committed within the jurisdiction of the court, or triable therein; that the offense charged is clearly set forth in plain and concise language, without repetition; and that the offense charged is stated with such a degree of certainty that the court may pronounce judgment upon conviction, according to the right of the case. Rev. St. § 170, p. 311. The statute also provides that the indictment shall be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases: When it is not found indorsed or has not been presented as prescribed by this act; (criminal probate act;) where the names of the material witnesses examined

by the grand jury are not inserted at the foot of the indictment, or indorsed thereon; when any person has been permitted to be present during the session of the grand jury while the charge embraced in the indictment was under consideration, except those allowed by law. *Id.* § 205, p. 315.

The expression of these particulars would seem to be the exclusion of all others; and if the indictment contains what the statute requires, and is not obnoxious to any of the particulars above named, then it cannot be attacked by a motion to quash, or, if it is, such a motion ought to be overruled. The failure of the district attorney to sign an indictment would not, therefore, seem to be a fatal omission; but, be this as it may, the indictment in this case was signed by Robert B. Smith, the attorney prosecuting, deriving his authority so to do from the foregoing order of court; and this presents the inquiry whether the court possessed the power and authority to make such an order. There seems to have been no objection to the appointment of Smith. The necessity for such an appointment appears in the order. The recitals therein are like the findings or judgment of a court, and cannot be attacked by a mere affidavit after the fact. If the district attorney had been present, or if his attendance upon court could have been procured, the fact ought to have been made known pending the appointment of Smith. This seems to have been the situation: The district attorney was absent from the county, and there was no one present qualified to act as prosecutor for the territory. Thereupon the court appointed Robert B. Smith to represent the territory, and to prosecute this cause.

No doubt, it is the duty of the district attorney to attend court, to sign indictments, and to prosecute for the territory. But if he fails to do his duty; if he absents himself from the county, or is present, but disqualified from acting, either from sickness, or for any other reason,—must the wheels of justice stop, and the administration of the criminal law be suspended? Is the court powerless if one of its officers fails to perform his duty? We think not. We believe that if a court, having general common-law jurisdiction, is established by law, and a judge is lawfully elected or appointed to preside over such a court, such judge has the inherent right and authority to do every act proper and necessary to set such court in motion, and to bring causes to trial and judgment. He may provide grand and trial jurors, and have them summoned into court; he may issue processes for witnesses; he may appoint an executive officer to serve processes and orders; he may appoint a clerk to authenticate such acts with his seal of court, and to keep the records; and he may appoint a prosecutor to represent the territory or commonwealth in criminal causes, to sign indictments, and to prosecute before a trial jury. All these powers necessarily flow from the establishment of a court of general jurisdiction according to law, and the lawful appointment or election of a judge to preside over such court. The legislature must have had these powers in contemplation; and also the fact that criminal cases might arise in which the public prosecutor might, for some reason, be disqualified or disabled; for in the making and enactment of the criminal practice act, in many sections, it is expressly provided, not that the district attorney shall sign indictments, but that the "attorney prosecuting" shall sign them. Why authorize the "attorney prosecuting" to sign indictments, if in all cases indictments must be signed by the district attorney? Suppose it became necessary to indict the district attorney. He could not be removed or compelled to resign because he had been bound over to await the action of the grand jury. Must the indictment and prosecution against him fail because he refuses to sign the indictment and prosecute himself? In such a case, or in the absence of the district attorney, the court is clothed with power to meet the emergency, and to appoint a prosecuting officer, who, for the time being, becomes the "attorney prosecuting," and thereby authorized to sign indictments. By the organic act of the territory, the district courts are given common-law and

general criminal jurisdiction. This jurisdiction they are bound to exercise. They are bound to try and to determine criminal causes, and this can only be done through the instrumentalities of grand juries, indictments, and attorneys prosecuting for the territory.

In the case of *Clawson v. U. S.*, 114 U. S. 487, S. C. 5 Sup. Ct. Rep. 954, the supreme court of the United States says: "A *venire* to summon jurors is a writ necessary to the jurisdiction of the court, and agreeable to the principles and usages of law, where it is not forbidden or excluded, and where the affirmative provisions of law have, so far as they extend, been first observed. In the case of *U. S. v. Hill*, 1 Brock. 156, Chief Justice MARSHALL, speaking of the law as it then existed, says: 'It has been justly observed that no act of congress directs grand juries, or defines their powers. By what authority, then, are they summoned, and whence do they derive their powers? The answer is that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are therefore given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential.'

If a court, having general criminal jurisdiction, which it is bound to exercise, and is charged with the duty of trying criminal causes, which duty can only be performed, or jurisdiction exercised, through the instrumentalities of grand juries, and the law fails to provide such instrumentality, has, by necessary and indispensable implication, to provide and summon grand juries, then, in such a case, and by a similar implication, when the necessity arises, and the district attorney is absent or disqualified, and the law fails to provide for such an emergency, the court has the power to appoint an attorney to prosecute, and to represent the territory, so that the jurisdiction conferred, and which is bound to be exercised, may not fail. This power comes from the law which has created our district courts, and invested them with general criminal jurisdiction, which they are bound to exercise, and which can only be done through the instrumentality of prosecuting attorneys. This implied power can only be exercised in cases of necessity, and in cases for which the law has failed to provide; and then it is co-extensive with the jurisdiction to which it is essential. If the district attorney had been present, and not disqualified, no necessity would have arisen to call into exercise this implied power of the court; but in his absence, and in the absence of any one authorized to prosecute for the territory, and the law failing to provide for such a case, it was the exercise of lawful authority for the court to appoint a suitable person to represent the territory, and prosecute the action, who, for the time being, and for the case in hand, became the "attorney prosecuting."

3. After the indictment had been returned, the defendant arraigned, and his plea entered, he made a motion for a continuance until the next term, because of the absence of material witnesses, whose testimony, or what was expected to be proved by such witnesses, was set forth in affidavits made by the defendant, accompanying said motion. Thereupon the prosecution admitted that, if said witnesses were present, they would testify as set forth in said affidavits, whereupon said motion for a continuance was overruled, the cause went to trial, and said affidavits were read in evidence to the jury, on behalf of the defendant, as and for the testimony of said absent witnesses. Under those circumstances, the defendant says that the overruling of his motion for a continuance was error, and his counsel in their brief maintain that the defendant was entitled to the personal attendance of his witnesses, to be examined orally in court, and to confront them with those called to impeach their evidence. This branch of the case is precisely parallel to

that of *Territory v. Perkins*, 2 Mont. 470, decided by this court more than 10 years ago, and to which decisions in the district courts since then have conformed. We see no reason for disturbing or modifying that decision in any respect, and confirm it.

The accused has the right to confront his accusers, but it does not follow therefrom that the witnesses for the defendant have the right to confront the witnesses for the prosecution. It is safe to say that a defendant will make a much better case for himself in his affidavit for a continuance than he could with his witnesses in court; and if, notwithstanding what he says he can prove in his affidavit, the territory is willing to go to trial, and to admit that his witnesses would, if present, testify as he sets forth, no injury could be done to the defendant. If his witnesses were not myths, if they really had being and existence, he would generally gain more than he would lose by not exhibiting them before the jury. It is easy enough for a defendant to set forth in an affidavit the names of witnesses who are absent from the territory, and in a foreign country, as in this case,—and the higher the crime the further away the witnesses are generally declared to be; and, if such showing can compel the continuance of criminal cases, then there can be no more criminal trials in this territory. The defendant should be given a reasonable opportunity to prepare for trial, and to procure the attendance of his witnesses, if the court is satisfied that he has any witnesses, and that his application for a continuance is not a sham. The trial court should exercise a sound and legal discretion in this regard. No guilty man is ever ready for trial. Every continuance of his cause brings him so much nearer to an acquittal. The trial court must judge whether his application for continuance is made merely for delay, or in good faith, to the end that justice may be done, and, unless there is a legal discretion in this regard, appellate courts will not interfere.

We do not think the rule in the *Perkins Case* could ever work an injustice or hardship to a defendant, and, generally, in its operation it would give him a very great advantage. If his witnesses are out of the territory, or in a foreign country, he could not compel their attendance upon his trial, and he would be obliged to take their depositions, which he would have the right to do; but which, when taken, would be no better than the testimony set forth in his affidavit for a continuance. If the affidavit should state the truth, the deposition would, in effect, be just like it, and one would be no more beneficial than the other to the defendant.

A different rule prevails in Texas and some other states, but in those states they have no statute similar to our own, under which the *Perkins Case* was decided.

The defendant had a fair and impartial trial under the statutes and decisions of this territory. After a full consideration, the trial court refused a new trial, and, finding no error in the record, the judgment is hereby affirmed.

BACH, J., (*dissenting.*) In the case at bar I dissent, on the ground that it was error for the court below to refuse the motion for a continuance. I have consulted all the authorities accessible to this court, both text writers and digests, and I have been unable to find any application of the rule *stare decisis* to sustain an erroneous decision in a criminal case. In discussing that principle, the courts and the writers always declare that the reason for the principle is that it is better to have a wrong but fixed interpretation of the law than to have a varying rule, because contracts are made under and titles depend upon the interpretation of the law by the courts; and it is further stated that to destroy the rule of law already established would be to do injustice to acts done in the past under the impression that the rule established would be permanent; and, further, that, when it becomes necessary to destroy such a rule because it is erroneous, the legislature is the proper authority to do so, because it can repeal the rule, and save all intervening rights. I cite no authorities

upon this point, because there is absolutely no authority to the contrary. But, as between the state and the citizen, surely such reason should not hold the court to a strict adherence to decisions. There is no wrong done to any individual save Perkins by reviewing the rule in the case of *Territory v. Perkins*; neither is there the sacrifice of any right acquired by any person under and by virtue of that decision. The party invoking that rule is the state, whose duty it is, whose wish it is, to allow to every person accused of crime an opportunity to establish his innocence. The state would not lose the right to try any person already accused of crime, if the rule in the *Perkins Case* was set aside.

In *Mead v. McGraw*, 19 Ohio St. 55, this distinction is drawn. The court say, (page 61:) "On the trial the court was asked to charge the jury that, if they believed that the plaintiff had knowingly sworn falsely to any material fact or circumstance, it not only affected his credibility, but it was their duty to reject and disbelieve his entire testimony. This was refused." The opinion then recites the charge given, and the court say, (page 62:) "The charge asked is substantially the third proposition laid down in the syllabus in *Stoffer v. State*, 15 Ohio St. 47. The charge given is in conflict with it. The state of the evidence justified a charge from the court on the subject. We are therefore called upon either to reaffirm or overrule the decision made upon this question in *Stoffer v. State*. We have not felt satisfied with the ruling in *Stoffer's Case* upon the case now in question. * * * This is not a case in which we should forbear to correct the error on the principle of *stare decisis*. It is not a rule of property that is involved, but a rule affecting the practical administration of justice, and which, if wrong, ought at the earliest opportunity to be corrected."

I dwell fully upon the doctrine of *stare decisis*, because I wish to express my respect for that principle, and the eminent judges who constituted this court when the *Perkins Case* was decided, even in the act of adversely commenting on that case. The case has never, as far as I can find been reaffirmed in any case in our court.

In the *Perkins Case*, 2 Mont. 470, the learned judge says: "The statute provides that the court may grant a continuance for 'good cause,' and that 'any cause which would be considered a good one for a continuance in a civil case shall be considered sufficient in a criminal action.' The party who desires the continuance must file his affidavit 'showing good cause therefor.' A motion to postpone the trial of a civil case on account of the absence of evidence must be made upon affidavits showing that the testimony is material, and that due diligence has been used to procure it. If the adverse party admits that the evidence which the moving party expects to obtain be considered as actually given on the trial, the trial shall not be postponed." "It will be seen that the legislative assembly has made these provisions of the civil practice act applicable to criminal proceedings."

I cannot agree with the learned judge that the "legislative assembly has made these provisions of the civil practice act applicable to criminal proceedings." I think the learned judge has confused the expression, "any cause which would be considered a good one for a continuance in a civil case," as found in the criminal practice act, with that clause of section 244 of the civil practice act which provides for the refusing of a continuance of a civil action. Section 244, which the learned judge refers to, does not enumerate, does not specify, what are grounds for a continuance in civil causes. It merely declares what the practice shall be when the grounds for a motion for a continuance are "the absence of evidence." In such case it declares that the motion "shall only be made upon affidavit showing" certain facts required by that section. It in no way, except by inference, declares that "absence of evidence" shall be considered good grounds for a continuance. It merely declares the practice in that particular kind of application for a continuance, and

then provides that, when the application is made upon that ground, the court may require the moving party to state the evidence which he expects to obtain, and that, further, if the opposite party makes certain admissions, then the "time shall not be postponed." It is certainly evident that section 244 of the civil practice act merely declares the practice in motions for a continuance, and does not provide what the grounds shall be; that it provides that in one class of motions, if certain admissions are made by the adverse party, the court shall refuse the motion; and that in other cases the "court may, in its discretion, upon good cause shown, * * * postpone upon other grounds than the absence of evidence."

To recapitulate, and to put the matter briefly, section 244 divides the practice upon such motion, in civil cases, into two classes. First class is that where there is absence of evidence, in which case the motion must be made upon certain affidavits, and the motion must be refused in those cases. Second class is composed of all other motions for a continuance. In this class "good cause must be shown," but not necessarily by affidavit in civil cases, and the court, in this class, is not obliged to refuse, in any event. He may grant or refuse the motion, in his discretion. That the section referred to is merely a provision for practice, and is not an enumeration of the causes for a continuance, is apparent from this: The latter portion of that section certainly allows a motion to be made without affidavit in cases other than the absence of evidence; while section 269 of the criminal practice act requires that in all cases the motion must be made upon affidavit.

I am firmly of the opinion that the legislative assembly meant to provide, in the section referred to, what the act itself indicates, the practice upon motion; that it did not mean in those sections, or particularly by section 244 of the civil practice act, to enumerate what should be causes for a continuance of a trial; and that it meant to leave such causes to courts of justice, and merely declare, by section 244, that in one class of motions in civil cases the court should not exercise its discretion to grant a postponement. And in leaving such causes to the inherent power of the courts the legislative power acted wisely; for no such body could imagine the infinite variety of facts which would, in certain cases, constitute "good cause shown" for a continuance.

If this is the correct interpretation,—and I am convinced that it is,—if section 244 of the civil practice act provides the practice, upon a motion for a continuance, and not the cause for continuance, then it (section 244) does not become incorporated in the criminal practice act by virtue of section 270 of the latter act; and the second portion of section 244 of the former act, which takes away from the court the right to use its discretion in such motions on certain grounds in civil cases, does not take away or limit the discretion of the court upon any motion for a continuance in criminal cases.

If I am wrong in my interpretation, if section 244 of the Civil Code is embodied in the criminal practice act by virtue of section 270 of that act, then in no criminal case whatever can the court allow a continuance upon the ground of the absence of evidence when the adverse party (the territory) makes certain admissions; for the court has no discretion. It must refuse the motion. See the opinion of the learned judge in the *Perkins Case*, who says: "After the district attorney has admitted that Marshal would testify to the facts stated in the affidavit of the appellant, the court *could not* postpone the trial for the purpose of securing his attendance." And I will say, in this connection, that I am not criticising the use or abuse of discretion of the learned judge who presided at the trial of this cause. He was bound by the decision of the *Perkins Case*, which, as stated, declares that he had no discretion in the matter, but that he was bound to deny the motion when the prosecuting attorney admitted that the witness would testify to the facts set out in the affidavits used upon the motion for continuance. Of these two inter-

pretations I believe the former is the correct—the only humane—interpretation of the statutes.

In the case at bar the defense was *alibi*,—a defense which always arouses the suspicion of the jury, as all lawyers know, although why it should do so no lawyer can tell, except upon the ground that it is sometimes used as a last resort by those who have no other means of escaping the punishment they deserve. In such cases, above all others, is the defendant entitled to the *viva voce* testimony of his witnesses; to have the jury look upon those witnesses, and watch closely their manner and conduct upon the witness stand; to have such witnesses fix with certainty the time at which they saw the accused at a place other than that at which the alleged crime was committed.

By our statute (section 166, p. 310,) the time of the commission of the crime needs not to be proved as alleged in the indictment, except where it is "an indispensable ingredient of the offense." Following the rule laid down in the *Perkins Case*, which takes away the discretion of the court to grant a continuance in all cases where the adverse party makes the admissions specified in section 244 in any case of homicide, the prosecuting attorney could admit that witnesses would testify to the absence of the defendant from the place and at the time alleged in the indictment, and then he could completely destroy the defense of the accused by proving a time other than that alleged in the indictment, for time is not "an indispensable ingredient of the offense" of homicide.

I am of the opinion that in criminal cases of such a serious nature the accused should not be crowded to a time; that he should be allowed time to procure his witnesses; that he should have time, after having read the indictment, and before his plea, to procure witnesses to meet the allegations of that indictment; that, in all criminal cases, the court should be allowed to use its discretion in granting or refusing a continuance, as is contemplated by the use of the word "may" in section 270 of the criminal practice act, and which the court below was prohibited from doing by the rule laid down in the *Perkins Case*; and that, in case where *alibi* is a defense, the first application for a continuance should be granted, unless the court below is firmly convinced that the motion is made in bad faith.

The proper rule in motion for continuance in criminal cases, in my opinion, is contained in the following authorities: *People v. McCrory*, 41 Cal. 458; *People v. Diaz*,⁶ 248; *De Warren v. State*, 29 Tex. 464.

In *People v. Diaz*, above cited, the court say: "The value of oral testimony over all other is too well understood to suppose for a moment that such declarations [admissions by the district attorney, as in this case] would have the same weight on the minds of the jury as the testimony of the witness if he had been examined before them in open court." This, I think, is the true rule, where the application for a continuance is the first made in the case,—made in good faith, and at the first term of the court at which the case could be heard; and the rule should be confined to cases where the good faith of the applicant is not in doubt.

In the case at bar there was no defect in the motion papers. There was no claim of bad faith. The sole ground for refusing the motion was the admissions made by the prosecuting attorney, which, under the rule in the *Perkins Case*, deprived the court of the right to use its discretion, and necessitated a denial of the motion.

In my opinion such a denial was error, and the judgment should be reversed, and the case remanded for a new trial.

(4 N. M. [Gild.] 27)

BOARD OF CO. COM'RS OF SOCORRO Co. v. LEAVITT and others.*(Supreme Court of New Mexico. January 8, 1887.)*

1. MUNICIPAL CORPORATIONS—CITY OF SOCORRO—ACT N. M. FEBRUARY 11, 1880—LAWS 1884, CHS. 37, 38.

The corporate existence of the city of Socorro, New Mexico, and of other cities in New Mexico, incorporated under the act of February 11, 1880, entitled "An act for the incorporation of cities," has not been disturbed by Laws N. M. 1884, cc. 37, 38, and still remains intact.

2. SAME—CITIES IN NEW MEXICO—LAWS N. M. 1884, CHS. 37, 39.

Laws N. M. 1884, cc. 37, 39, relating to the incorporation, disincorporation, and reincorporation of cities, are *in pari materia*, and must be read together, and be taken as part of the same act; and their joint effect is to continue the existence of municipal corporations created under the act of February 11, 1880, entitled "An act for the incorporation of cities," and to enable them, if they choose, to either reincorporate under the provisions of chapter 39, Laws 1884, or to dissolve their corporation absolutely.

Error to Second judicial district court, Socorro county.

C. C. McComas, Dist. Atty., for plaintiff in error. Keeney & Thompson and C. Riley, for respondents.

BY THE COURT. This was a proceeding by *mandamus* to compel defendants, as officers of the city of Socorro, to deliver to plaintiff the records and property of the city, for the reason, as alleged, that the legislature had annulled the incorporation of said city, and authorized plaintiff, as custodian of such records and property, to demand and receive the same. To the petition and alternative writ the defendants answered. To the answer plaintiff demurred, and the cause was submitted to the court upon the demurrer, and was decided by Judge BELL in favor of defendants, in an able and exhaustive opinion, covering fully the entire case. This opinion meets our views as to the proper construction of the statutes under consideration, and we adopt it as the opinion of this court.

OPINION OF LOWER COURT.

BELL, J. The petition in this case sets forth that the petitioners compose the board of county commissioners of the county of Socorro and territory of New Mexico, and that they complain against James L. Leavitt and others, residents of the said county of Socorro, whom they aver to be the mayor and other officers of the city of Socorro; that the said city was incorporated under an act of the legislature of New Mexico approved February 11, 1880, and that its incorporation has continued from the date of its incorporation, to-wit, the _____ day of January, 1881, until the passage of the act of April 1, 1884, entitled "An act in reference to incorporated cities." The petition further sets forth that, on the last-mentioned date, the legislative assembly of the territory of New Mexico, by an act by them passed and approved, disincorporated and dissolved all cities before that time organized and incorporated under the aforesaid act approved February 11, 1880, and that, by virtue of said act, the city of Socorro became and was disincorporated and dissolved, and its corporate existence absolutely ended; and that it became the duty of the said defendants, as officers of the said city of Socorro, and they were required by the said act last aforesaid, forthwith to turn over and deliver to the petitioners all books, records, and papers belonging and appertaining to the said city of Socorro at the time of its disincorporation; that the petitioners were by the said act last aforesaid expressly made the custodians of the said books and papers, and were entitled to have and receive the same. It further charges that by the said act last aforesaid it was made the duty of the petitioners to ascertain, settle, and adjust the indebtedness and accounts of said city, incurred during its corporate existence, after the said city was disincorporated as aforesaid; and that although the petitioners, after the disincor-

corporation of the said city of Socorro as aforesaid, demanded of the said defendants and officers of the said city that they should turn over and deliver to the petitioners the aforesaid books and papers of the said city, yet that the said defendants wholly refused to so turn over and deliver to the petitioners any property whatever that remained of the said city at the time of its disincorporation, and still refuse to do so, and are attempting to continue the existence of said city in defiance of law. Other allegations are made in the said petition, but it is unnecessary to recite them. Upon this petition, duly verified by the chairman of the board of commissioners, an alternative writ of *mandamus* was issued by the court.

A return has been made to the said writ of *mandamus* by the defendants, as officers of the said city of Socorro, wherein they deny that the legislative assembly of the territory of New Mexico, by the act of the legislature passed and approved on the first day of April, A. D. 1884, and which is mentioned and referred to in the petition, did disincorporate and dissolve all or any of the cities before that time organized or incorporated under the said act of the legislative assembly for the incorporation of cities, approved February 11, 1880; and further deny that, by reason of the said act of the legislative assembly passed and approved on the first day of April, 1884, the said city of Socorro became and was disincorporated and dissolved, or that its corporate existence was thereby ended. They further deny that it became their duty, or the duty of any of them, or that they or any of them were required by the said act, passed and approved on the first of April, 1884, forthwith, or at any time, to turn over and deliver to the said petitioners all or any of the books, records, or property belonging or appertaining to the said city of Socorro, or any books, records, or property whatever. They further deny that the said petitioners were, by the said act of the legislature last mentioned, or by any act thereof, made the custodians of the said books, records, or property, or any part thereof, or that the said petitioners were by the said last-mentioned act entitled to have or receive the said books, records, or property, or any part thereof.

Other matters set forth in the said petition are denied by the defendants in the return to the writ, but I deem it unnecessary to refer to all the matters of denial contained therein. The defendants in the return, further answering the petition, and making return to the said writ, allege that, by the act of the legislative assembly of the said territory entitled "An act to incorporate cities and towns," also approved April 1, 1884, it is provided in section 99 of the said act: "Any city or town which has been formed, organized, or incorporated prior to the passage of this act, or which may hereafter be formed, organized, or incorporated, and have exercised or shall exercise the rights and powers of a municipal corporation, and shall have in office a board of officers, exercising the duties of their offices, and the legality of the formation or organization shall not have been, or shall not be, legally denied or questioned within two years from the date of its formation or organization, shall be deemed to be a legally incorporated city or town, and its formation, organization, or incorporation, shall not be thereafter questioned." That section 105 of the said act last before mentioned provides as follows, to-wit: "Every city or town, incorporated previous to the taking effect of this act, which shall choose to retain such organization, shall, in the enforcement of the powers or the exercise of the duties conferred by the special charter or general law under which the same shall be incorporated, proceed in all respects as provided by such special charter or general law."

The defendants then aver that the said city of Socorro was formed, organized, and incorporated previous to the said last-mentioned act of April 1, 1884, to-wit, on the _____ day of January, 1881, and has exercised the rights and powers of a municipal corporation, and had in office a board of officers exercising the duties of their offices, and that the legality of the formation

or organization had not been legally denied or questioned within two years from the date of its formation or organization. The defendants then allege that, by reason of the passage and approval of the said last-mentioned act of April 1, 1884, the incorporation, organization, and existence of the said city of Socorro, under the said act of February 11, 1880, was continued, perpetuated, and secured, and was placed beyond question; and that said city of Socorro has chosen to retain its organization under the said act of February 11, 1880. This return is verified.

An examination of the acts of the legislative assembly of the territory of New Mexico, passed at its twenty-sixth session, beginning on the nineteenth day of February, 1884, and continuing until the third day of April, 1884, discloses the fact that three acts were passed directly bearing upon the question now under consideration, being, respectively, chapters 37, 38, and 39 of the said acts.

The first of these (chapter 37) is entitled "An act to repeal an act entitled 'An act for the incorporation of cities,' approved February 11, 1880." Section 1 of this act is as follows: "That an act entitled 'An act for the incorporation of cities,' approved February 11, 1880, be, and the same is hereby, repealed." Section 2 is as follows: "That this act shall take effect and be in force from and after its passage." This act was approved April 1, 1884.

The second of these acts, being chapter 38, is entitled "An act in reference to incorporated cities." This was also approved April 1, 1884. Section 1 of this act is as follows: "That the incorporation of all cities heretofore organized and incorporated under an act for the incorporation of cities, approved February 11, 1880, be, and the same hereby are, disincorporated and dissolved." Section 2 of this act is as follows: "That the officers of said corporations shall forthwith turn over and deliver to the county commissioners of the respective counties in which said cities are situate all books, records, and property belonging to the said corporations respectively, and said county commissioners are hereby made the custodians of such books, records, and property of such corporations." Section 3 provides that the said commissioners of the respective counties in which said cities are situate shall ascertain the amount of the indebtedness due and owing by the said cities, and the name of the person or persons to whom any amount is due; and for that purpose every person or persons who may have a claim against such city, or who may hold a warrant due by such city, shall, within a specified time from the passage of the act, and not afterwards, present the same to said board of commissioners, and it is made their duty to approve all such claims as are proper and legal. The act further provides for a method by which such indebtedness should be paid. It is under the provisions of this act that the board of county commissioners have filed their petition in this case.

By the third of these acts to which I have referred, which is chapter 39, and is entitled "An act to incorporate cities and towns," likewise approved April 1, 1884, it is provided, among other things, by section 105 thereof: "Every city or town incorporated previous to the taking effect of this act, which shall choose to retain such organization, shall, in the enforcement of the powers or the exercise of the duties conferred by the special charter or general law under which the same shall be incorporated, proceed in all respects as provided by such special charter or general law." Section 99 provides: "Any city or town which has been formed, organized, or incorporated, previous to the passage of this act, or which may hereafter be formed, organized, or incorporated, and have exercised or shall exercise the rights and powers of a municipal corporation, and shall have in office a board of officers exercising the duties of their offices, and the legality of the formation or organization shall not have been, or shall not be, legally denied or questioned within two years from the date of its formation or organization, shall be deemed to be a legally incorporated city or town, and its formation, organization, or incor-

poration shall not thereafter be questioned." Section 84 provides: "Any city or town, incorporated by special charter, or in any other manner than that provided by this act, may abandon its organization, and organize itself under the provisions of this act, with the same territorial limits, by pursuing the course herein prescribed." Then follows section 85, which is as follows: "Upon the petition of one-eighth of a number equal to the whole number of votes cast at the last preceding annual election for the city or town officers, and who are legal voters in any such city or town, to the council, or trustees thereof, praying that the question of organizing under this act be submitted to the legal voters, the council or trustees shall immediately direct a special election to be held, at which such question shall be decided; specifying, at the same time, the time and place of holding the same, and appointing the judges and clerks of the election." Other sections of this last act under consideration recognize the incorporation and present existence of municipal corporations which have been incorporated under general and special laws of the territory.

As no general law existed for the incorporation of cities, except the act of February 11, 1880, it is clear that chapter 39 of the Laws of 1884 contemplated the existence of such municipal corporations as had been organized under it. It is also quite clear that if effect is to be given to the provisions of chapter 37 of the Laws of 1884, already cited, and to the first section of chapter 38 of said laws, that the corporation of the city of Socorro would be dissolved. But the three acts under consideration, having all been passed upon the same day, and being in *pari materia*, must be construed together, and be taken to be parts of the same act. This rule is so well settled that it is unnecessary to cite authorities sustaining it. "Where the provisions of the same act are repugnant to each other, the last one in order of time and in local position must be held to prevail." 12 U. S. Dig. 741, §§ 807, 832, 835, 842, 844, 849. The reason of this, of course, is that the latter sections of the same statute, in point of time and local position, must be held to give expression to the latest will of the legislature upon the particular subject under consideration.

Chapter 37 of the Laws of 1884, quoted above, which repeals the act of February 11, 1880, does not affect the organization of such cities as were incorporated under it, but simply prevents future incorporation under its provisions. Section 1 of chapter 38 evidently intended to dissolve and disincorporate such municipal corporations as had been created under the act of February 11, 1880; but the language of its first section is, to say the least, inartificial. It provides that the "incorporation" of cities heretofore organized and incorporated, etc., shall be, and the same are hereby, disincorporated and dissolved. To say that the "incorporation" shall be dissolved can only be held to mean that the "corporation" shall be dissolved by looking at the intent of the legislature. I think it is fairly to be inferred from section 1 of that act, and of the sections which follow it, that it was the intention of the legislature to provide for the dissolution of the corporations created under the act of February 11, 1880, and that is the construction which I feel bound to give to it. This being so, it becomes repugnant to the provisions of chapter 39 of the Laws of 1884, which I have quoted, and several others which I have not quoted, but have referred to, all of which clearly indicate that it was the intention of the legislature to continue the existence of corporations created under the act of 1880, and to enable them, if they chose, to either reincorporate under the provisions of that chapter, or to dissolve their corporation absolutely. All these provisions of chapter 39 are later in point of time and local position than the provisions of chapter 38, which are relied upon to sustain the averment that the city has been disincorporated, and therefore, under the familiar rule already cited, are to be taken as the last expression of the will of the legislature, and be given such force and effect as their language warrants.

It results, therefore, from these views, that the corporate existence of the

city of Socorro has not been disturbed by the legislation of 1884, and that it still remains intact. The effect of chapter 37 of the Laws of 1884 is to prohibit the creation of any future municipal corporations under its provisions, and to compel municipal corporations in the future to incorporate under the act of the same date, and which is chapter 39 of the said acts; but, as I have already held, it has no effect upon the existence of such corporations as had been created under the provisions of the repealed act.

The writ must be discharged, and judgment entered for the defendants. It is therefore ordered that the judgment of the court below be affirmed.

(6 Mont. 340)

PARROTT v. SCOTT and another.

(*Supreme Court of Montana. January 18, 1887.*)

1. REPLEVIN—BOND—ACTION ON—NECESSARY ALLEGATIONS.

Where the property of a judgment debtor, levied upon to satisfy the judgment, is replevied from the sheriff by third parties, who fail to prosecute the replevin action, in an action by the judgment creditor on the undertaking in replevin his right to recover rests upon his right to have the replevied property applied to the payment of the judgment in the original action; and, when his complaint alleges that an execution had issued on the judgment, but does not allege that the judgment has not been satisfied, it is fatally defective.

2. SAME—BREACH—DISMISSAL OF REPLEVIN.

Where one of the conditions of the undertaking in replevin for goods levied upon under an execution is for the prosecution of the action, a dismissal of the action by the plaintiff is a breach of the condition, and entitles the judgment creditor to sue upon the bond for such damages as he may be entitled to.

3. SAME—CONSENT OF SHERIFF TO DISMISSAL.

It is not necessary to allege that the sheriff, defendant in replevin, did not consent to the dismissal of the action, and waive all right or claim to the return of the property and damages.

4. SAME—DELIVERY OF BOND.

The complaint is defective when it fails to allege that the undertaking was delivered.

5. SAME—ASSIGNMENT OF BOND TO PLAINTIFF.

It is not necessary that the complaint should allege the assignment of the undertaking, by the officer in whose favor it is made, to the plaintiff.

6. SAME—FAILURE BY JUDGMENT CREDITOR TO GIVE SHERIFF INDEMNIFYING BOND—Rev. St. Mont. § 309.

The failure of a judgment creditor to execute to the sheriff, who is about to levy an execution on the judgment, the indemnifying bond provided for by Code Civil Proc. Mont. § 309, does not prevent him from suing on the bond given by claimants and their sureties who replevied the property levied upon by the sheriff.

7. SAME—FORM OF BOND—Code Civil Proc. Mont. § 157.

Under Civil Code Mont. § 157, requiring an undertaking in replevin to be conditioned "for the prosecution of the action without delay and with effect," an undertaking is sufficient which provides "for the prosecution of the action," omitting the words "without delay and with effect."

Appeal from district court, Silver Bow county.

Action on replevin bond. On demurrer.

Robinson & Stapleton, for appellant, Parrott. *H. R. Whitehill*, for respondents, Scott and another.

BACH, J. This is an appeal from the judgment roll alone. The demurrer to the complaint was sustained by the court below, and judgment was rendered against the plaintiff, from which judgment this appeal is taken.

The facts set out in the complaint are as follows: James B. McMaster, the sheriff of Deer Lodge county, by virtue of an execution issued out of the probate court of said county, in an action in which George Parrott, the above-named appellant, [was the plaintiff,] and one Alexander Glover was the defendant, levied on certain personal property as the property of said Glover. William R. James and Mary Glover claimed this property as their own, and

commenced an action in the district court of said county, against the said James B. McMaster, to recover the same. Their action was an action of claim and delivery under the statute, and in accordance therewith they made, executed, and filed with Thomas Strang, the coroner of said county, the affidavit required by law; and now, using the exact wording of the complaint, "executed to said coroner an undertaking in double the value of said property, said twenty-two head of cattle, with said defendants, said Scott and Zenor, as sureties, whereby they bound themselves," etc. Then follows the condition of the undertaking, which, using the words in the undertaking, is as follows: "That we are jointly and severally bound in the sum of \$1,600, being double the value of said property, as stated in the affidavit, for the prosecution of the said action; for the return of the said property to the said defendant, if return thereof be adjudged; and for the payment to the said defendant of such sum as may, from any cause, be recovered against the said plaintiff." This undertaking was signed by H. H. Zenor and S. Scott: was dated "this twenty-seventh day of February, 1884;" and it is the undertaking sued upon in this action; and the judgment prayed for is the amount of the judgment upon which execution was issued out of the probate court of Deer Lodge county, as already stated.

In the second action, that in which the undertaking sued on was given, the defendant McMaster filed an answer, in which he denied that the plaintiffs in that action, William R. James and Mary Glover, were the owners of the property, and claimed a redelivery of the same. After the answer was filed, the plaintiffs dismissed the action.

The demurrer to the complaint, which we are about to consider, was upon the ground that the said complaint did not state facts sufficient to constitute a cause of action. There are several alleged defects, all of which are directly raised by the demurrer, and are relied upon, and each of which will therefore be passed upon.

1. That the foundation of this action is the judgment rendered in the probate court; that it appears from the complaint that execution was issued upon that judgment; but it does not appear that the defendant in the action in the said probate court had not paid the judgment. The complaint shows no damages by reason of the non-prosecution of the action. It fails to show any judgment against the plaintiff in the replevin action which these defendants were bound to pay. The only breach complained of is the failure to return the property mentioned in the undertaking. The right of the plaintiff to maintain this action is based upon the theory that he is subrogated to the rights of Strang in the undertaking, in order that the property mentioned in that undertaking should be applied to the payment of the judgment rendered in the probate court against Alexander Glover. If that judgment was paid, plaintiff suffered no damages, and he could not maintain this action. Its non-payment is one of the material facts that entitled him to maintain this case, and should have been alleged. The complaint in this respect is fatally defective. See *Winsor v. Orcutt*, 11 Paige, 578.

2. It is claimed that the complaint is defective because it does not show that McMaster, the defendant in the replevin action, did not consent to its dismissal, and waive all right or claim to the return of the property and damages. The defendant McMaster, in the replevin action, claimed a return of the property. The order dismissing the replevin action leaves the parties in this action to try and determine whether or not McMaster was entitled to the return of the property. One of the conditions of the undertaking sued upon was for the prosecution of the replevin action. The order of dismissal was a breach of the condition, and entitled the plaintiff to bring his action for such damages as he was entitled to. See *Mills v. Gleason*, 21 Cal. 274.

Subdivision 1, § 234, Code Civil Proc., provides, in substance, that when the plaintiff dismisses the action, in which a provisional remedy has been al-

lowed, the undertaking shall be delivered to the defendant, who may have his action thereon. It is not necessary for the plaintiff to deny, in the complaint, that McMaster waived all right or claim to a return of the property and damages. Such an allegation should appear as a defense. In that respect it is sufficient to allege the conditions of the undertaking and the breach complained of. We think the complaint was not defective in that respect.

3. It is claimed that the plaintiff is not entitled to any interest in the replevin bond because he did not furnish McMaster, the sheriff, the indemnifying bond mentioned in section 309 of the Code of Civil Procedure. That section defines and provides for an undertaking, which is for the benefit of the sheriff. The furnishing such an undertaking to the sheriff may be a prerequisite to an action against him, but it is not to an action against the defendants.

4. It is claimed that the complaint does not state a cause of action in the plaintiff, because there is no allegation of an assignment of the undertaking either to McMaster or to the plaintiff. That point has already been decided otherwise by this court in *Lomme v. Sweeney*, 1 Mont. 584, affirmed in 22 Wall. 208.

5. It is further claimed that the undertaking sued upon is not a statutory undertaking; that, if good at all, it is good only as a common-law obligation; and that the case of *Lomme v. Sweeney* is not an authority in point; and that, the undertaking being good only as a common-law obligation, an allegation of assignment was necessary. The statute (section 157 of the Civil Code) contains the condition referred to in these words: "For the prosecution of the action without delay and with effect." The undertaking provides "for the prosecution of the action," omitting the words "without delay and with effect." The undertaking contains a condition which is more favorable to the defendants. It in no way enlarges the liability of the defendants, as fixed by the statute. It contains nothing that the statute does not require, and is therefore to be governed by the same rules as any statutory undertaking, and the case of *Lomme v. Sweeney* controls. See Murfree, Off. Bonds, § 191, and cases cited.

6. It is claimed that the complaint is defective, because it does not contain any allegation that the undertaking was ever delivered. The complaint alleges merely that the plaintiff in the replevin action "executed to said coroner an undertaking," but it does not allege a delivery thereof. The appellant claims that, inasmuch as the law requires all such undertakings to be filed, such filing is a sufficient delivery. Undoubtedly that is the rule where it appears from the complaint that such filing was had. See *Holmes v. Ohm*, 23 Cal. 268. In that case the undertaking sued on was copied in full in the complaint, with the indorsement thereon, showing that the undertaking was properly filed. In the case we are considering a copy of the undertaking is attached as an exhibit to the complaint, and made a part thereof; but it does not appear in the complaint, or upon a copy of the undertaking, that the latter was ever filed. We cannot presume that the indorsement of filing was on the original. There being no allegation of a delivery of the undertaking to any person whatsoever, the complaint, in this respect also, is defective. See *Garcia v. Satrustegui*, 4 Cal. 24.

The judgment of the court below is affirmed, with costs.

(6 Mont. 345)

HEDDERICK v. POUTET and another, Copartners, etc., and others.

(*Supreme Court of Montana*. January 19, 1887.)

1. REPLEVIN—REDELIVERY BONDS—COMMON-LAW BOND—Rev. St. Mont. PAGE 69, § 163.
Although a bond signed by defendants in replevin as principals, and two other persons as sureties, for a redelivery of the property replevied, is not in compliance with Rev. St. Mont. p. 69, § 163, which requires an "undertaking signed by two or

more sufficient sureties," the statute not requiring the principals to sign the undertaking, yet it is a good common-law bond, and, not being prohibited by statute, nor against public policy, an action may be maintained thereon upon failure of the defendant in replevin to comply with the terms of the judgment in the replevin suit.

2. SAME—PLEADING—ASSIGNMENT OF BOND TO PLAINTIFF.

It is not necessary to allege in the complaint the assignment of such a bond, by the officer in whose favor it is made, to the plaintiff.

3. SAME—FILING BOND WITH CLERK.

The failure to file a redelivery bond with the clerk of court does not defeat the right to recover thereon.

Appeal from district court, Dawson county.

Action on a redelivery bond. On demurrer.

Strevelle & Garlock, for appellant, Hedderick. No appearance for respondents.

GALBRAITH, J. This is an appeal from a judgment rendered in consequence of a demurrer sustained to the complaint. The complaint alleges the following facts: The respondent had formerly commenced his action in claim and delivery against Taylor and Hall, for certain personal property. Taylor was the sheriff of Dawson county, and therefore the summons was placed for service in the hands of the coroner, who served the same on the defendants, Taylor and Hall, and took the property into his possession. Before the time had matured for the delivery thereof to the plaintiff, Taylor and Hall demanded a redelivery of the property to themselves. For this purpose they executed the following bond:

"TERRITORY OF MONTANA, COUNTY OF DAWSON, ss.—IN DISTRICT COURT.

"George W. Hedderick, Pltf., vs. James Taylor and Ira Hall, Defts.

"Know all men by these presents that we, Poutet & Gallagher as principals, and W. S. Hurst, William Lowe, and John Lee as sureties, are held and firmly bound unto Andrew R. Duncan, coroner of Dawson county, in the sum of twenty-five hundred dollars, (\$2,500,) for the payment of which we firmly bind ourselves, our heirs, executors, and assigns. The conditions of this obligation are such that, if the bounden Poutet & Gallagher shall return to the above-named plaintiff the property described in the affidavit of said plaintiff, or the value thereof, if a return be adjudged, and pay all costs that may be awarded against them in the said action, then shall this obligation be null and void; otherwise in full force and effect.

"In witness whereof we have hereunto set our hands and seals this twenty-fourth day of April, A. D. 1884.

[Signed]

"POUTET & GALLAGHER. "W. S. HURST. "WM. LOWE. "JOHN LEE."	[Seal.] [Seal.] [Seal.] [Seal.]
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The affidavit of justification of sureties required by law was appended to this bond.

Upon the delivery of this bond, the property was delivered to Taylor and Hall by the coroner. Subsequently the action was changed from Dawson county to the county of Custer for trial, and, after a trial, a verdict was returned in the district court of the latter county for the plaintiff, Hedderick. Judgment was rendered upon this verdict for a return of the property described in the foregoing bond, or, in case a delivery thereof could not be had, for the value thereof as found by the jury, with interest and costs of suit. An execution was then issued upon this judgment, which was returned wholly unsatisfied. None of the property was ever returned, nor the judgment paid, nor any part thereof.

The demurrer was only upon the ground "that said complaint does not state facts sufficient to constitute a cause of action." The respondent contends that the court properly sustained this demurrer, for the following reason: "That it is not the character of obligation required by the statute, and therefore it is not binding upon the obligors."

Our statute entitled "Claim and Delivery of Personal Property" is as follows: "At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant." Rev. St. p. 69, § 163.

This section provides that the undertaking is to be executed only by the sureties. The words "they are bound" evidently refers to the sureties, and it is intended that they are bound for the delivery of the property to plaintiff when the condition occurs. The undertaking is not required to be signed by the defendant when he seeks the return of the property. In *Pierce v. Miles*, 5 Mont. 549, S. C. 6 Pac. Rep. 347, even where the statute required "a written undertaking on the part of the plaintiff, with two or more sufficient sureties," this court held that the undertaking need not be signed by the plaintiff; that an undertaking on the part of the plaintiff means an undertaking for him, or on his behalf; and it is not necessary to the validity of such an undertaking that it be signed by the plaintiff."

There is a much stronger reason for holding, as we do in this case, that the defendant need not sign the undertaking, for the statute provides that the "defendant may * * * require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties." This language requires that the sureties execute the undertaking. But this obligation is not that the sureties shall deliver up the property to the plaintiff, or, in the words of the statute, "that they are bound for the delivery thereof to the plaintiff;" but that Poutet & Gallagher, who signed the obligation as principals, "shall return to the above-named plaintiff the property." The obligation manifestly does not comply with the provisions of the above section in this respect. It differs from the undertaking required by the statute, in that it is a bond signed by persons as principals who are parties to the proceedings, and providing that such principals, and not the sureties, are bound for the delivery of the property to the plaintiff, if the condition occurs.

But, notwithstanding that this is not the undertaking which the law requires, the question arises, can the plaintiff nevertheless recover on this obligation in this action? Bonds or obligations of this character are of the same general nature, subject to the same legal rules and incidents, as what are termed official bonds; "and in like manner bonds which by law are required to be executed under certain circumstances in the course of judicial proceedings, such as indemnity, delivery, replevin, and appeal bonds, all fall within the general description of official bonds; in short, all bonds are official bonds which are prescribed by statute, or of which either the obligor or obligee is a public officer, and the subject-matter of the condition is either the discharge of public duty, or proceedings of a public character in a court of equity." Murfree, Off. Bonds, § 36.

The legal rules and incidents relating to official bonds are applicable to the obligation in question, which is what is generally called a delivery bond. Such a bond, when it does not violate a statute or contravene public policy, although it may be invalid as a statutory bond or undertaking, may, nevertheless, be good as a common-law obligation.

"The bond of an officer so far falling short of the requirements of the statute as to be invalid as an official bond may yet be obligatory as a common-law bond, unless prohibited by statute, or against public policy." Murfree, *Off. Bonds*, § 67.

The chief distinction, therefore, between a statutory bond, strictly so called, and a common-law bond, is that the obligee or beneficiary of the former is entitled to all the special remedies and processes which are granted by statute law; whereas the common-law or voluntary bond stands upon the footing of an ordinary contract embodied in a bond upon condition between man and man. The general rule controlling the subject is, it may be remembered, that bonds intended to be official and statutory, but too defective to fulfill all the requirements of the statute, and to be entitled to the privileges appertaining to strictly official bonds, are good as common-law bonds, unless they contain provisions contrary to those which are prescribed in the statute, or in violation of other rules of law, common or statutory, or of public policy.

Thus a bond, although it does not altogether comply with the statute, cannot be said to violate or to be contrary thereto, or to contravene public policy. Can the respondent recover upon the bond in question as a common-law bond, and is it good as embodying an ordinary contract upon condition between the obligee and the respondent? The instrument is in form not an undertaking, but a bond, in which Poutet & Gallagher are principals, and the remaining signers only sureties. It contains a recital of the court in which the action for the recovery of the property referred to in the bond was brought, and the affidavit required by law to be filed in such a case, in which the property was described. There can be no doubt as to what property or to what judgment the bond refers. These facts are also set forth in the complaint, and are, of course, admitted by the demurser.

The bond is therefore that Poutet & Gallagher shall perform the conditions named therein. It was upon a legal and sufficient consideration. The complaint alleges the fact that, upon the delivery of the bond to the coroner, he returned the property to the defendants. This was an inconvenience, loss, or detriment to the respondent, and was a legal and sufficient consideration. The obligors therefore undertook, for a legal consideration, that Poutet & Gallagher should perform the condition named therein. The complaint alleges the failure so to do. Therefore, although the obligation in question did not strictly conform to the statute, yet we think it was binding upon the obligors.

But it is claimed that the respondent has not a right of action, for the reason that the complaint does not allege an assignment to him from the coroner. We think that this question is settled in the case of *Lomme v. Sweeney*, 1 Mont. 584, which was affirmed by the supreme court of the United States, (22 Wall. 208,) where it was held that the sheriff to whom, in an action of claim and delivery, an undertaking had been executed and delivered as required by the above provision for the return of the property, was a trustee of such property for the plaintiff, and he could bring the action upon it in his own name without an assignment. See, also, *Parratt v. Scott, ante*, 763.

The failure to file the bond with the clerk of the court, as required by section 169 of the above chapter, will not in any way affect the right of the respondent to recover. He cannot, by failure to comply with this provision, defeat his right of action. The complaint states facts sufficient to constitute a cause of action, and the court erred in sustaining the demurser.

The judgment is reversed, and cause remanded for a new trial.

(6 Mont. 351)

UNITED STATES v. NORTHERN PAC. R. CO.*(Supreme Court of Montana. January 18, 1887.)***1. PUBLIC LAND—GRANT OF ALTERNATE SECTIONS OF UNSURVEYED LANDS TO NORTHERN PACIFIC RAILROAD COMPANY—GRANT IN SEVERALTY.**

Under the grant of lands in the charter of the Northern Pacific Railroad Company, which provides "that there be, and hereby is, granted" to said company every alternate section of public land, not mineral, designated in odd numbers, to the amount of 20 alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and providing for a survey of the land when the line of the road is located, previous to the survey of the lands the government and the company are not tenants in common, but the latter takes, from the date of the charter, a grant in severalty, to be applied to the subject-matter upon the fixing of the line of the road and survey of the lands.

2. EQUITY—ACCOUNT—OWNERS IN SEVERALTY OF UNDESCRIPTED PARTS OF TRACT OF LAND.

Where a tract of land is owned, in ascertained proportions, by two persons, but the particular part of the land owned by each is not defined by application to the subject-matter, a suit for an accounting is not the proper method of determining the damage to the interest of one of the parties by the other cutting timber on the land, as they are not tenants in common, and it is impossible to tell on whose land the timber was cut.

Appeal from Deer Lodge county, Second judicial district.

Robert B. Smith, U. S. Atty., for appellant. W. F. Sanders, for respondent.

WADE, C. J. This is an action, instituted by the United States, the appellant, against the Northern Pacific Railroad Company, the respondent, for an accounting, and to recover the sum of \$1,100,000, for certain timber, logs, and lumber, which the appellant alleges were cut, taken, converted, and carried away by the respondent during the years 1883, 1884, and 1885, from certain non-mineral unsurveyed lands, belonging to the appellant and respondent, as tenants in common, situate in the territory of Montana, between the western line of said territory and McCarthy's bridge, over the Hell Gate river in Deer Lodge county, and on either side of the line of the railroad of the respondent, and not more than 20 miles distant therefrom; and for a perpetual injunction enjoining the respondent from cutting or removing timber from said unsurveyed lands, held by the appellant and respondent as such tenants in common, and from injuring, wasting, or disposing of the same. The court below sustained a demurrer to the complaint, and, the appellant abiding the same, judgment was rendered for the respondent, from which the plaintiff appeals to this court. The foundation of appellant's action rests upon the proposition—*First*, that the United States and the Northern Pacific Railroad Company are tenants in common of the lands from which the trees and timber in question are alleged to have been taken; and, *second*, that an accounting, as between such tenants in common, is a proper remedy.

1. Whether the relation of tenants in common exists between these parties depends upon the provisions of the act of congress which gave to the respondent company life, and the rights and relations thereupon arising. The charter of the Northern Pacific Railroad Company is not only a law, but is also a contract, binding alike upon both parties, and giving to each certain rights, and imposing upon each certain obligations, which rights thereby become vested, and which obligations cannot be escaped or avoided. There was ample consideration for this charter and contract. The railroad in contemplation was of national importance. The purpose of the government in entering into this contract, and in granting this charter, was to promote the public interest and welfare by causing this road to be constructed, thereby to secure to the government at all times the use and benefits of the same for postal, military, and other purposes. Charter, § 20. But congress recog-

nized the fact, at that time (1864) patent to all the world, that a railroad and telegraph line from Lake Superior to Puget sound by the Northern route could not be built through the uninhabited regions between these points by mere private enterprise, and hence the "Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the Northern route." The purpose of this act, as its title clearly indicates, was to aid in the construction of the road, in consideration of the benefits which the government would derive by such construction, as the provisions in its various sections clearly indicate. The scope and extent of the grant, the amount of aid which the government, for this purpose, saw proper to contribute to this enterprise, is found in section 3 of the act incorporating the company, wherein it is provided "that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land-office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, or occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, but not more than ten miles beyond the limits of said alternate sections."

The words, "that there be, and is hereby, granted," are words of present grant, and took effect at the date of the act of congress. A grant of lands by the government is equivalent to a deed in fee.

In the case of *Northern Pac. R. Co. v. Majors*, 5 Mont. 145, S. C. 2 Pac. Rep. 322, after a review of the authorities, in deciding upon the effect and meaning of these words, and of the act incorporating the Northern Pacific Railroad Company, this court said: "Our conclusion, therefore, both upon reason and authority, is that the title of the respondent [the Northern Pacific Railroad Company] took effect at the date of the approval of the act of congress; that the location of the route and the survey of the lands gave precision to the title, and caused it to attach to the particular sections, as of the date of the approval of the act, as fully as if such particular sections had been designated in the act; that the character of the title is that of a grant upon condition subsequent; and that the office of the patent is to confirm the title, as certain designated portions of the road are completed and reported upon by the commissioners, and render it absolute and unconditional."

The location of the definite route of the road, and the survey of the lands, anchored the grant, and attached it to its proper subject-matter. But before the definite location and survey, and by the location of the general route of the road, by operation of law,—by a provision of the act itself,—the lands embraced within the limits of the grant, both as to the odd and even sections,—both as to that granted to the company, and as to that retained by the government,—were withdrawn from sale, entry, or pre-emption; and, as to that granted to the company, this withdrawal continued, both before and after survey; and, as to that retained by the government, until after survey.

Section 6 of the act provides "that the president of the United States shall

cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided by this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

The latest expression of the supreme court of the United States upon the subject of this grant to the Northern Pacific Railroad Company, and when the same became operative, are found in the case of *Buttz v. Northern Pac. R. Co.*, 7 Sup. Ct. Rep. 100-108, (decided at the October term of that court, 1886,) in which it is declared that, "at the time the act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of congress from operating to pass the fee of the land to the company." In the same case it is further held that, "when the general route of the road is thus fixed in good faith, and information thereof given to the land department, by filing the map thereof with the commissioner of the general land-office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company which, in aid of the construction of the road, it is granted."

Nearly one year previous to this decision, the supreme court of Montana, in the case of *Northern Pac. R. Co. v. Lilly*, 6 Mont. —, S. C. 9 Pac. Rep. 118, had said, in speaking of the effect and operation of section 6: "This section is itself a grant, and a legislative reservation and withdrawal of the lands granted from sale or pre-emption, except by the company. * * * This land is reserved from sale by congress. It is a legislative reservation, and takes effect whenever the general route of the road is fixed; and thereafter no person could acquire any right or interest in the land reserved from sale, except by act of the company, the grantee of the government." Thus, as to the alternate sections within the limits of the grant, designated by odd numbers, the title passes from the government to the company. But as to the lands within the limits of the grant reserved by the government, being the alternate sections, designated by even numbers, they cannot be offered for sale until they are surveyed. The provisions of section 6 are that the reserved sections cannot be sold, and are not subject to the operation of the homestead or pre-emption laws, until they are surveyed.

This, then, was the condition of the title to the lands upon which the logs and timber in question were cut: The general and definite route of the road had been fixed; indeed, the road had been constructed, and was in operation through and over the lands. The land was unsurveyed. The government was the owner of the reserved even sections, but could not sell them; and the company was the owner of the odd sections, and such sections were not subject to sale except by the company; but the respective sections had not been surveyed, and thereby designated. Did this condition of title create a tenancy in common in these lands as between the government and the company? Each as to the other was the owner of the alternate sections, and all that remained to be done was to have the sections numbered. The government owned no interest in the lands that had been granted to the company; and the company owned no interest in the lands reserved by the government. As between these parties there was no undivided joint ownership in these lands. The interest of the company was a several, separate interest, and so

was that of the government. Neither could acquire any interest in the whole under a grant of a part. Neither could acquire a joint interest in all the sections by a several and separate grant to or reservation of the alternate sections to each. The company owned the entire interest in every tree or stick of timber on the lands conveyed to and embraced within its grant; and the government had the same interest in the lands reserved to itself. Neither the government nor the company could sell their lands, and neither could demand partition; for neither owned any undivided interest in the lands of the other. The grant to the company had already partitioned the lands granted, and it only required a survey—an extension of lines—to show the section boundaries; and this survey the government had promised to make as fast as required in the construction of the road.

What are the incidents of a tenancy in common in lands? There must be a joint undivided interest in the entire tract.

In the case of *Ross v. McJunkin*, 14 Serg. & R. 364, land-warrants had been issued to John and William Menough,—to John for 300 acres, and to William for 200 acres,—which had been surveyed together, and a general diagram of survey returned, which contained no division line, nor anything to distinguish the one tract from the other. The parties to this action, which was ejectment, derived their titles respectively from John and William Menough; and GIBSON, J., speaking for the supreme court of Pennsylvania, said: "The nature of the interest which the original owners of the warrants held under their joint survey will go far to settle the rights of the parties before us. They were grantees from the state, not of an undivided interest in the whole, but of separate and distinct parts of the whole; consequently, they were not tenants in common. The grant to the one would not have entitled him to possession in common of the whole; nor, if one had been disseized, could he have recovered an undivided portion from the other. The truth is, the survey was imperfect; and, although a valid appropriation of the land as to strangers, it left their rights, as between themselves, suspended till the subject of the grant to each should be specifically designated by the proper officer, or by themselves. It has been held that any number of warrants may be surveyed together by a common outline, so as to prevent a valid appropriation of a part of the land included to subsequent warrants; and, it being a matter between the warrantees themselves, I can see no difference whether the interior lines be laid down by protraction or not. But the separate owners of warrants thus laid would certainly not have an interest in common in the lands included in the general survey. Tenants in common, although their estates be several, have each an undivided interest in the whole; but it can with no propriety be said that each has an interest in the whole under the grant of a part." And with equal propriety it might be said, as to the railroad company, that it is a grantee from the government, not of an interest in the whole tract 80 miles in width along the line of the road, but of separate and distinct parts of the whole; that the grant to the company did not entitle it to possession in common of the whole; that, if it had been disseized, it could not have recovered an undivided portion from the government of the lands reserved; that the grant to the company of the alternate odd sections, and the reservation to the government of the even sections, left their rights, as between themselves, suspended till the subject of the grant to each should be specifically designated; that these separate owners of separate sections do not have an undivided interest in common in the whole tract; and that the company acquired no interest in the whole by the grant of a part.

This is not at all in conflict with the opinion of the supreme court of the United States, delivered by Justice FIELD in the case of *Frasher v. O'Connor*, 115 U. S. 107, S. C. 5 Sup. Ct. Rep. 1141, so much relied upon by appellant. In that case the court says: "A very great portion of the lands in that state (California) were covered by Mexican or Spanish grants. Some of the grants

were by specific boundaries, and the extent of the land covered by them could be readily ascertained without an official survey. But by far the greater number were of a specific quantity of land lying within boundaries embracing a much larger quantity. Thus, grants of one or two leagues would often describe the quantity as being within boundaries embracing double or treble that amount; the grant declaring that the quantity was to be surveyed off by officers of the vicinage, and the surplus reserved for the use of the nation. The grantee in such case was, of course, entitled only to the specific quantity named; but what portion of the general tract should be set apart to him could only be determined by a survey under the authority of the government. Until then the grantee and the government were tenants in common of the whole tract. No one could intrude upon any portion of it, the whole being exempted from the pre-emption laws. The practical effect of this condition in many cases was to leave the grantee, until the official survey, in the possession, use, and enjoyment of a tract of land containing a much larger quantity than that granted."

The sense in which the grantee and the government are, in this decision, said to be tenants in common, is that the separate share of each had not been set off. There is no intimation that the grantee of a part thereby acquires undivided interest in the whole, or that the share of each might have been ascertained by a partition. Tenants in common, though their estates be several, have an undivided interest in the whole, and can acquire no such interest by the grant of a part.

In the case of the Mexican grant, it required an act of congress to compel the share of the grantee to be surveyed and designated, which would have been wholly unnecessary and useless if the government and the grantee had been tenants in common. If they had been tenants in common, in a legal sense, no survey would have been necessary; for, in that case, they would each have owned an undivided interest in the whole tract. Merely extending a survey over a tract held by tenants in common would not designate the shares of each. It would only ascertain and number the sections in which they had a joint undivided interest. And the fact that a survey would ascertain and designate the acres or the sections that belong to the grantee and those that belong to the government, and that the interests, when so ascertained, are several, and not joint, is conclusive that property so held and owned does not cause its owners to become tenants in common.

Section 6 requires the government to cause the lands granted to the company to be surveyed as they shall be required in the construction of the road. The force of this requirement is not affected by the act of July 15, 1870, (16 St. at Large, 810,) which provides that, before any lands granted to the company shall be conveyed to any party entitled thereto, there shall be first paid into the treasury of the United States the cost of surveying, selecting, and conveying the same by the company or party in interest. This merely provides that, before the lands shall be conveyed by the company to any party, the company shall pay the costs of survey, etc.; but this does not do away with the duty of the government to cause the lands to be surveyed. They must be surveyed before they can be sold or conveyed. It is the plain duty of the government to cause these lands to be surveyed, and then, under the act of 1870, to prohibit any sales or conveyances by the company, or the issuance of any patents to it, until it has paid the costs of such survey. If the lands had been surveyed as required by section 6, then no question could have arisen between the government and the company as to the ownership of trees and timber upon the lands included within the boundaries of the grant. And the government cannot make its failure to perform this duty the foundation of an action against the company, which a survey in accordance with the requirements of section 6 would have rendered impossible. The construction of the road required this survey, thereby, if for no other reason, to have rendered

such an action as this, or kindred actions, unnecessary and impossible. It required a survey to the end that the rights of the government and the company be clearly defined and properly understood. It required a survey that the pre-emption and homestead laws might be applied to the alternate sections along the line of the road, and to enable the government to sell such sections. This survey, rendered necessary by the construction of the road, was not required simply for the benefit of the company, but also for the benefit, advantage, and protection of the government and its property. When the survey shall take place is not within the discretion of the company. The construction of the road, and as fast as it is constructed, puts these provisions of section 6 in motion, and requires the survey to be made. It was not intended that, if the land granted to the company was not required in the construction of the road, it should never be surveyed.

Now, if these parties could be held to an accounting, each being the owner in severalty of parts of the unsurveyed lands, but which parts had not been designated, and neither having an undivided interest in the whole tract, how could a just and true account be stated, and the parties correctly charged for trees and timber taken from such lands? It would be utterly impossible to ascertain from whose lands they were taken. The very first inquiry would be whether the trees and timber had been taken from the lands of the company or from that belonging to the government. The fact that these parties own their shares or parts in severalty, and that they have no undivided interest in the entire tract, would suggest this inquiry at the outset; but the question could not be answered by anything short of a survey and designation of the sections. Suppose an accounting should be decreed, and the company made to pay for one-half the trees and timber taken from the unsurveyed lands described, and then, when these lands came to be surveyed, and the sections designated, it should be found that the company had taken trees and timber only from its own sections. We do not think an accounting would be proper, when the damage and injury liable to be occasioned thereby would require another action or an act of congress to remedy it. On the contrary, if it should be shown that all the trees and timber in question had been taken from the sections belonging to the government, then, under this action, wherein the government only claims as a tenant in common, it could recover for only one-half of the value of such trees and timber, and would lose the other half; and what it lost the company would gain.

A survey of the lands, which the government ought to make, would show the exact rights of the parties, and then an accounting would be improper and unnecessary. And the government cannot lawfully demand an injunction until it can be shown that its property is being injured, or that injury is threatened; and this cannot be shown until the lands are surveyed, and the sections designated. Then actions in the nature of trespass or trover would be the remedy of the government for trees taken or converted by the company.

The judgment is affirmed, with costs.

MCLEARY, J., (concurring.) I concur in the opinion of the court for the following reasons, briefly stated: The act of congress of second of July, 1864, did not grant to the Northern Pacific Railroad Company one-half of a certain tract of land 80 miles in width, of which the railroad track is the center line, through the territory of Montana, as seems to have been the theory of the United States district attorney in framing this complaint. But there were granted to the Northern Pacific Railroad Company the alternate sections, to be designated by the odd numbers, in an area extending 40 miles on each side of the railroad track, as it runs through the territories. This did not create a tenancy in common. No interest whatever was granted to the railroad company.

in the even-numbered sections. The title therein remained in the government. Then, as soon as the route was located and surveyed, and the map thereof was filed with the commissioner of the general land-office or the secretary of the interior, and not before, the grant from the government took effect, and attached to the specific parcels of land, known as odd sections, lying on each side of the established route. And these even-numbered sections were easily distinguished. In fact they were already known; for before the building of the railroad, as this court practically knows from current history, the base line and the principal meridian of Montana, and the initial point, had been long since established, and the several townships ranked themselves in place on the ground. They had their several locations in ranges north and south of the base line, and east and west of the meridian, and these designations were already determined. And in the same manner each section in each township was known by its number, as well then as it ever was, or ever would be. The general land-office, years before the territory of Montana was set apart from the public domain, had established the present system of designating townships and numbering sections. The sixteenth and thirty-sixth sections in each township had long before been set apart by the legislative enactment for the benefit of public schools. And the setting apart of these odd sections for this railroad company was done in the same manner. It is true, they could not be exactly identified on the ground itself until a survey had been made; but this fact does not in the least affect the title. There were the initial point, the base line, the principal meridian, and the railroad track, from which all measurements must be made; and any surveyor could take a chain and transit and mark every corner of every tract belonging to the railroad company. For this reason, also, there was no tenancy in common. But the railroad company owned these lands, as it does now and always has, in severalty; and the United States still holds the title to the even-numbered sections, which were never in any way affected by the railroad grant. I do not fully approve the decision in the case of *Northern Pac. R. Co. v. Majors*, 5 Mont. 111, S. C. 2 Pac. Rep. 322, as to the time at which the grant of the lands to the company attached to the particular tracts; but, as far as it is quoted as an authority in this case, it meets my approval.

The true rule, as it seems to me, fixing the time when this grant attached to the particular lands, is set forth in the case of *Butz v. Northern Pac. R. Co.*, 7 Sup. Ct. Rep. 100-108, (decided at the autumn term, 1886,) by the supreme court of the United States; and in this particular it appears to conflict with the case of *Northern Pac. R. Co. v. Majors*, above cited. In all other particulars I fully concur in the opinion of the court herein rendered.

(6 Mont. 373)

In re Estate of CHARLEBOIS, Deceased.

CHARLEBOIS v. BOURDON, Adm'r, etc.

(*Supreme Court of Montana. January 26, 1887.*)

I. WILLS—PROBATE—NOTICE OF HEARING—PUBLICATION—REV. ST. MONT. PAGE 195, §§ 13, 16.

Under Rev. St. Mont. p. 195, § 13, requiring that notice of the hearing of a petition for the probate of a will shall be published at least three times, upon three different days of publication when published in a weekly newspaper, and section 16, p. 195, providing that at the time of hearing the court must require proof that the notice has been given, which, being made, it must hear proof of the will, the court has no jurisdiction until these requirements are complied with; and where the notice of hearing is published only twice, in a weekly paper, an order admitting a will to probate, and appointing an administrator with the will annexed, is void.

**2. SAME—REVOCATION—IMPEACHING DECREE ADMITTING TO PROBATE—PROBATE COURTS
—REV. ST. MONT. PAGE 192, § 1.**

Although, under Rev. St. Mont. p. 192, § 1, the records, judgments, and decrees of courts of probate in the territory have the same force and effect as those of courts of general jurisdiction therein, yet, where an order of a probate court admitting a will to probate recites that notice of hearing proof of the will was published according to law, such order is not conclusive on that point when the records show that the notice was not published the number of times required by law.

Appeal from district court, Missoula county.

Petition to set aside probate of a will and appointment of administrator.

Stevens & Bickford, for appellant, Bourdon, Adm'r, etc. *Woody & Marshall*, for respondent, Charlebois.

WADE, C. J. This is an appeal from a judgment and order of the district court affirming an order of the probate court of Missoula county vacating and setting aside an order of said court admitting a certain written instrument purporting to be the last will and testament of Charles Charlebois, deceased, to probate, and the appointment of Leon Bourdon, the legatee therein named, administrator with the will annexed of said decedent. The order vacating the order of admission to probate was made upon the petition of Hilaire Charlebois, a son of the deceased, on behalf of himself, a daughter, and a granddaughter, heirs at law of said deceased.

It appears from the record that on the twenty-second day of November, 1880, the said Leon Bourdon presented a paper purporting to be the last will and testament of Charles Charlebois, late of Missoula county, deceased, to the probate court of said county, dated September 30, 1880, in which said Leon Bourdon is named as devisee, together with a petition, in which is set forth the date of the death of said deceased, a description and the value of his estate, the names of the subscribing witnesses to his will; that the same was executed by the testator, under no duress, restraint, or undue influence; and that the testator died at the age of 70, leaving no heirs or next of kin in the territory or elsewhere, to the knowledge of said petitioner. Wherefore the petition prayed that said will be admitted to probate, and that he be appointed administrator of said estate with the will annexed. Thereupon said probate court appointed Saturday, the fourth day of December, 1880, at 1 o'clock P. M., for hearing said application for the admission of said will to probate, and ordered the clerk of said court to publish a notice thereof, not less than 10 days before the day of such hearing, in the *Weekly Missoulian*, a newspaper printed and published in said county of Missoula, which order was dated on the twenty-second day of November, 1880. Thereafter, on the said fourth day of December, 1880, the court made an order continuing said hearing until the eleventh day of December, 1880, at 1:30 P. M.

It further appears that on the tenth day of December, 1880, proof of publication of notice of said hearing was filed, in which the publisher of said newspaper makes affidavit that said notice was published in his said newspaper for two consecutive weeks, in the issues of November 26 and December 3, 1880. Thereafter, on the thirteenth day of December, 1880, the court, having taken the proof, admitted said will to probate, and issued letters of administration, with the will annexed, to said Leon Bourdon, who proceeded to settle said estate, and on the sixteenth day of August, 1881, rendered his final account; whereupon said court, on the twelfth day of September, 1881, entered an order of distribution, decreeing and distributing the whole of said estate to said Leon Bourdon, the said devisee under said will. Afterwards, on the twenty-fifth day of September, 1885, Hilaire Charlebois, a son of said deceased, for himself and the other heirs at law, presented a petition to said probate court, asking that the probate of said pretended will be set aside, and that the order appointing said administrator be annulled, for the reason, among others, that said court never acquired jurisdiction to make the order admit-

ting said will to probate, for that, by the terms of the statute in such case made and provided, before any last will and testament can lawfully be admitted to probate, notice of the time and place of hearing for that purpose is required to be published for three consecutive weeks in some newspaper of general circulation in the county where such hearing is to take place; whereas notice of the hearing in question was published for only two consecutive weeks. Thereafter, on the twentieth day of October, 1885, said probate court, after notice, and a hearing, in which said administrator, and the petitioners were represented by counsel, adjudged that the order admitting said will to probate is void, and that all subsequent proceedings thereunder are likewise void and of no effect.

From this order and adjudication said administrator appealed to the district court of said county, in which court said order was affirmed, and the order admitting said will to probate adjudged and declared to be a nullity. From this judgment and order said administrator appeals to this court.

The statute in relation to the probate of wills provides that, when the petition is filed and the will produced, the probate judge must fix a day for hearing the petition. Notice of the hearing shall be given by the clerk of the court, by publishing the same in some newspaper of the county; and that, if the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication. Section 13, p. 195, Rev. St. The statute also provides that, at the time appointed for the hearing, the court must require proof that the notice of hearing has been given, which being made, the court must hear the testimony in proof of the will. Rev. St. § 16, p. 195.

The court is authorized to hear the testimony in proof of the will after proof of notice of the hearing has been given. But there is no authority to hear the testimony before proof of notice. Notice, as provided by the law, gives jurisdiction. The probate court is of limited jurisdiction. It has its life and being in the statutes. It possesses such authority as is conferred. Jurisdiction comes to it by observing the law. The hearing for the admission of a will to probate is in the nature of an action, and the order thereon is in the nature of a judgment. The heirs at law have the right to be heard. They have the right to be present at the hearing; and if they are not notified thereof, and an order is made without giving them an opportunity to be heard, or to contest the admission of the will to probate, they would stand in very much the same position as if a judgment had been rendered against them without bringing them into court, and giving them an opportunity to answer or defend. No lapse of time would validate such a judgment. It would be dead at its birth, and lapse of time could not bring it to life. It could be attacked anywhere or in any form of proceeding.

The order admitting the will to probate recites that due notice of the time and place appointed for proving the will, and for hearing the petition for that purpose, had been given to all persons interested, as required by law. The probate practice act provides that the proceedings of probate courts shall be construed in the same manner, and with like intendment, as are the proceedings of courts of general jurisdiction; and as to its records, judgments, and decrees, there is accorded like force and effect and legal presumptions as to the records, orders, decrees, and judgments of the district court. Rev. St. § 1, p. 192. The appellant therefore contends that the order admitting said will to probate imports absolute verity, and that it is conclusive upon the question that all persons entitled thereto were given the notice required by law.

The purpose of the publication of notice of the time and place of hearing the petition for the admission of a will to probate, like that of the publication or service of a summons, is to confer jurisdiction by bringing the parties into court. The summons or process for bringing parties into court forms a part of the judgment roll. It is that which authorizes the court to act. It is an essential part of the proceedings leading up to the judgment. Now, the

recitals in a judgment do not import absolute verity if they contradict and stultify the record and proceedings upon which the judgment stands, and by which it was obtained. If the judgment recited that the defendants were duly served with summons, and made default, and the judgment roll and record showed affirmatively that the summons was not lawfully served, or that it was not served at all, then the recitals in the judgment would not import absolute verity. They would not import verity when the record of proceedings before the court, and by which the judgment was obtained, show that such recitals are untrue. If the record of the proceedings by which the judgment was obtained was silent, then everything necessary to the validity of the judgment and its verity would be conclusively presumed; but no such presumptions arise when the record of the proceedings shows affirmatively that the recitals contained in the judgment are untrue.

This is not a collateral attack upon the judgment or order admitting the will in question to probate. It is a direct proceeding to have that order or judgment set aside and held for naught. The children and heirs at law declare that the written document admitted to probate as the will of their father was not his will, and they further declare, what is admitted to be true, that they were not lawfully notified of the time and place when the petition for the admission of the same to probate would be for hearing. They are not in default, for they never had notice.

It is contended that, because the probate court has jurisdiction to open and receive proof of last wills and testaments, and to admit them to probate, and that, as the probate court has admitted the will in question to probate, therefore that is the end of all inquiry on the subject. But the law points out the process by which probate courts become clothed with jurisdiction for that purpose, and until the law is complied with, the jurisdiction does not attach and become operative.

We do not understand by what process of reasoning, or by what sense of morality or justice, these children can be cut off from their legal right to contest the admission of this will to probate; and without giving them their day in court, or an opportunity to be heard, to hand the property of their father over to a stranger. Their father was an old man; and, for all that appears in the record, he had departed this life, his will had been produced in court by a stranger, its sole legatee, and his property handed over to this stranger, before the children of the deceased, who lived in another state, had any knowledge of the death of their parent. We do not think that children and heirs at law can be thus easily deprived of their inheritance.

The judgment and order annulling and setting aside the order admitting the paper purporting to be the last will and testament of Charles Charlebois, deceased, to probate, is hereby affirmed, with costs.

(70 Cal. 608)

NICHOLSON v. TARPEY and others. (No. 8,439.)

(*Supreme Court of California. September 3, 1886.*)

1. SPECIFIC PERFORMANCE—PAYMENT OF PURCHASE PRICE—DELIVERY OF DEED—INADEQUACY OF CONSIDERATION—DENURBER.

Where, in an action to reform a deed, and for the specific performance of a contract for the sale of land, the complaint shows on its face that the purchase price was accepted, and a deed delivered, a denurber on the ground of inadequacy of consideration will not be sustained.

2. EVIDENCE—PRIMARY AND SECONDARY—SPECIFIC PERFORMANCE—ORIGINAL CONTRACT—EXECUTION AND CONTENTS OF.

In the trial of an action for specific performance, and to reform a deed, against the devisees and heirs at law of T., a witness in his deposition before the trial testified, without objection, to the contents of the written agreement between the parties. But at the trial defendant objected to it, on the ground that secondary evidence of its contents could not be introduced without proof of the loss or destruction of the original. Thereupon plaintiff showed that the contract was executed in duplicate,

one copy of which was delivered to him, and the other retained by T., and that, when the deed was executed, his copy was delivered to T., who destroyed it. The copy retained by T. was not accounted for, nor did it appear that any notice had been given for its production in court. *Held*, that defendants had a right to have the original contract introduced in evidence, if in existence and capable of being produced; but, as T., had the copy in his possession, and it could have been introduced, thus obviating the necessity for secondary evidence, the objection would not be entertained.

3. SAME—STATEMENTS OF PARTY IN HIS OWN FAVOR—ADMISSIBILITY OF—RES GESTÆ.

In the trial of an action for specific performance of a contract for the sale of land, the statements made by the plaintiff in his own behalf to the assessor, when he gave in the land for taxation, in the absence of the opposite party, and constituting no part of the *res gestæ*, are not admissible in evidence.

Department 2. Appeal from superior court, Monterey county.

Action for specific performance of a contract for the sale of land. Judgment for plaintiff. Defendants appealed.

Julius Lee, for Nicholson, respondent. *D. M. Delmas*, for Tarpey and others, appellants.

BY THE COURT. 1. The demurrer to the complaint in this cause was properly overruled. In actions for the specific performance of contracts for the sale of lands, it is necessary to allege and show to the court an adequate consideration for the performance of the contract sought to be enforced, and that the same is fair and reasonable in all its parts, and of such a character as may fairly call for the interposition of a court of equity. *Agard v. Valencia*, 39 Cal. 292; *Bruck v. Tucker*, 42 Cal. 346; Fry, Spec. Perf. § 251.

In this cause, however, the complaint shows that Mr. Tarpey, with whom the contract for conveyance was made, accepted the consideration of \$1,500 in such contract specified to be paid, and executed a deed of conveyance, which plaintiff herein supposed conveyed the land in question, but which, in fact, by the fraud of said Tarpey, failed to include a portion of the land agreed to be conveyed. By accepting the purchase price, and delivering of a deed, Tarpey waived all claim to inadequacy of consideration, and that question is not involved in the case.

The *gravamen* of the charge against Tarpey is that he professed to convey the whole premises, and by his fraudulent representations induced the plaintiff herein to believe that he had so conveyed, when in truth he had granted but a portion thereof, and the object of this action is to so reform the deed as to make it conform to the agreement pursuant to which it was executed.

2. There was no error in the ruling of the court admitting the deposition of George C. White. According to the record, the witness White, whose deposition had been taken previous to the trial, testified, without objection, to the contents of the written agreement between Tarpey and plaintiff for the conveyance of the land in question. At the trial defendants for the first time objected to the evidence contained in this deposition, upon the ground that secondary evidence of its contents could not be introduced without proof of the loss or destruction of the original, etc. Thereupon it was shown by the testimony of plaintiff that the contract was executed in duplicate, one copy of which was delivered to plaintiff, and the other retained by Tarpey; that, at the date of the execution to the plaintiff of the deed, his copy of the agreement was delivered to Tarpey, who destroyed it. The copy retained by Tarpey was not accounted for, nor did it appear that any notice had been given for its production in court. Defendants had a right to have the original contract introduced in evidence if in existence, and capable of being produced. The defendant Tarpey had the copy in his possession, and could have produced it, thus obviating the necessity for introducing secondary evidence. Not having produced it, his objection should not be listened to.

3. At the trial, plaintiff, as a witness in his own behalf, testified that, after he moved to the land bought of Tarpey in 1871, he himself gave in the said

lands to the assessor of Monterey county for taxation, and was then asked by plaintiff's counsel the following question: "When you gave it in, what did you say to the assessor?" In response to which the witness replied: "I told him I had 400 acres there; that the land was unsurveyed; and that the deed called for 600 acres, giving the bounds of the deed," etc. To the introduction of which evidence counsel for defendants objected in due form, and the ruling of the court admitting such evidence is assigned as error.

The statements of a party in interest in his own behalf, made in the absence of the opposite party, and constituting no part of the *res gestæ*, are not, in general, admissible as evidence, and we perceive no theory upon which the evidence introduced was admissible. It consisted merely in the oral declarations of the party in his own behalf, and as such cannot be upheld. If it be urged that it was introduced for the purpose of showing that the property was assessed to plaintiff, and the taxes thereon paid by him, the answer is twofold: *First*. Prior to April 1, 1878, the payment of taxes upon land was not a fact essential to adverse possession. *Second*. The assessment of property, and payment of taxes thereon, are facts which, when essential to a case, are to be proven as such, and the declarations of a party, made to the assessor at the time he assesses property, do not prove, or tend to prove, the fact of assessment, or any other fact competent to be shown.

Conceding it to have been proper for plaintiff to prove as a fact that this property was assessed to him for the purposes of taxation, it does not follow that his declarations of ownership or possession, made in his own behalf, and which in nowise tended to show that an assessment was in fact made, can be received. *Schenck v. Sithoff*, 75 Ind. 485, and *Whitney v. Houghton*, 125 Mass. 451, are in point, and, we think, conclusive of the question.

The testimony thus erroneously admitted was important to the issue of plaintiff's adverse possession made in the case, and, as we cannot see that it failed to influence the decision of the cause, the judgment and order appealed from are reversed, and a new trial ordered.

(71 Cal. 584)

In re Knott. (No. 11,842.)

(Supreme Court of California. January 24, 1887.)

ATTORNEY AND COUNSEL—DISBARMENT—STATE COURT—FALSE AFFIDAVIT BEFORE UNITED STATES LAND DEPARTMENT.

A young and inexperienced attorney made a false affidavit in a proceeding before the general land-office at Washington, to obtain a patent, relying on the assurance of an older lawyer that he could properly make such affidavit, which it was claimed he believed to be technically true when he made it. *Held*, in a proceeding to disbar in the California court, that the offense, not having been committed within the jurisdiction of that court, was to be considered as a moral offense only, and, under the circumstances, might be attributed to youth and inexperience, and the proceedings should be dismissed, the party instituting them not objecting thereto.

In bank.

Page & Hells, for accuser. *Roger Johnson*, for respondent.

BY THE COURT. This is a proceeding to disbar the respondent for making what is claimed to have been a false affidavit in a proceeding to obtain a patent at Washington. Apparently the affidavit was one which the respondent may have believed to have been literally and technically true, but which was morally false, and was, in effect, an imposition upon the secretary, with whom it was filed. We have before had occasion to condemn the practice which is too common of making affidavits to what the affiant may claim to be the legal effect of facts not stated. They are often simply impositions upon the court. In this case the respondent was at the time young and inexperienced, and relied upon the assurance of an older and more experienced law-

yer, that he could properly make the affidavit. It was not really an act as an attorney in our jurisdiction, and could probably only be considered as affecting the moral character of the respondent. The accuser desires to have the proceeding dismissed, saying that he made the accusation under the influence of anger. We do not recognize the right of an accuser to have such a proceeding dismissed; but having examined the evidence, we are inclined, in view of all the circumstances, to attribute the fault, though a grave one, to youth, inexperience, and ignorance. The proceeding is therefore dismissed.

(71 Cal. 602)

PEOPLE v. BUSH. (No. 20,239.)

(Supreme Court of California. January 25, 1887.)

1. CRIMINAL LAW—CHANGE OF VENUE—TRANSMITTING RECORD—PEN. CODE CAL. § 1036.
The "copy of the record, pleadings, and proceedings" required by Pen. Code Cal. § 1036, to be transmitted on change of venue of a cause, does not include a bill of exceptions taken on a former trial, nor charges to the jury given on such trial.
2. SAME—ORDERING VIEW IN CRIMINAL CASE—PEN. CODE CAL. § 1119.
Pen. Code Cal. § 1119, giving the court power to order a view in criminal cases, does not deprive a defendant of any constitutional rights, as it should be construed to contemplate the presence of defendant and his counsel at such view.
3. SAME—ORDERING VIEW OUT OF COUNTY—POINTING OUT PLACES.
A view may be ordered in a county other than that where the trial is had, and a person appointed by the court to show the jury the places named in the order of the court may point out and name such places to them.
4. SAME—CHARGE TO JURY—CREDIBILITY OF WITNESSES.
It is proper for the court, upon a trial for murder, to allude to the fact of the relationship of certain of defendant's witnesses to him, as affecting their credibility.
5. SAME—HOMICIDE—MALICE—BURDEN OF PROOF.
If a homicide is shown, the law presumes malice, and the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon defendant, unless the proof upon the part of the prosecution tends to show that it only amounts to manslaughter, or was justifiable.

Commissioners' decision. In bank.

Appeal from superior court, San Diego county.

Indictment for murder.

Z. Montgomery, Levi Chase, and W. J. Hunsaker, for appellant. Wallace Leach, J. L. Copeland, and E. W. Hendricks, for the People.

FOOTE, C. The defendant appeals from a judgment of conviction of murder in the second degree, and from an order refusing him a new trial, made in the superior court of San Bernardino county. He had been previously tried upon the charge of murder, and convicted in the superior court of San Diego county of that crime, in the first degree, and on appeal to this court the judgment rendered against him was reversed. 10 Pac. Rep. 169. Thereupon he obtained a change of the place of trial of his cause to the first-named county. He now claims that the superior court of that county did not have jurisdiction to try him, for the reason, as he alleges, that the certified transcript of the record sent from San Diego county, on the change of venue to San Bernardino county, did not contain certain bills of exception taken on the trial of the case in the former county, for purposes of appeal to this court, nor certain charges given to the jury on the former trial by the judge of the court then trying the cause. This position is not tenable. Such papers were not essential to give the superior court of San Bernardino county jurisdiction to try the defendant on the charge alleged against him. They are not, in the contemplation of the statute, a part of the "record" necessary to be transmitted on a change of the place of trial of such a cause *de novo*. Section 1036, Pen. Code.

This view of the meaning of the statute, viz., that the words, "copy of the record, pleadings, and proceedings," require the transmission, on change of

the venue of a cause, only such papers as may be essential to the proper trial of the defendant's case *de novo*, is strengthened by the presence in the statute of the words "including the undertakings for the appearance of the defendant and witnesses." As the undertakings might, in a certain contingency, be necessary, those words relating to them were evidently added out of abundant caution, so that not only the papers necessary to the *proper trial* of the defendant should be in the record, but also any papers which might be contingently necessary if forfeitures of the undertakings should be desired. If the words first cited meant to include the papers for which the defendant contends, the addition of the latter words would have been entirely superfluous; and we must therefore conclude that the legislature enacting the statute placed that construction on the language first mentioned, which we feel constrained to do.

We are also of opinion that it was within the jurisdiction of the trial court to make the order for the view by the jury of the place where "the offense is charged to have been committed, or in which any material fact occurred," under section 1119 of the Penal Code. Nor do we perceive any error arising from the taking of that view. Section 1119 of the Penal Code confers the right on any superior court in this state, in the exercise of a sound discretion, to cause a view to be taken, by a jury trying a criminal cause, of any "place in which the offense is charged to have been committed, or in which any other material fact occurred," and this right is there given, whether the place or places to be viewed lie in the county where the cause is then on trial, or in any other county of this state. This right, thus given clearly and without limitation, is not, as we think, in any way in conflict with the provisions of section 6 of article 6 of our state constitution. We have formerly held that the statute contemplates the presence of the defendant and his counsel at such view, in order that he may not be deprived of any of his constitutional rights to be confronted by witnesses against him, and to appear and defend in person and with counsel, and to that opinion we still adhere. *People v. Bush*, 10 Pac. Rep. 169.

The objection made that Thomas Bundy, the person appointed by the court to show the jury the places named in its order for the "view," pointed out and named such places to the jury, is without merit, for we cannot conceive how he could have shown the jury the two places which they were sent to view in any other way, under the statute. What is said by this court in the case of *People v. Green*, 53 Cal. 60, does not in any degree militate against the propriety of such a method of procedure.

We perceive no merit in the point that the court erred in not forcing the prosecution to introduce, as its own, three of the defendant's witnesses, Maud and Cora Parsons, his nieces, and Albert Bush, his son.

It is insisted that the eleventh and twelfth instructions asked by the defense, and refused, ought to have been given.

The court in its general charge, upon the same subject as that contained in said instructions, said: "If you find that the defendant committed the homicide, the law presumes it to have been done with malice, and the burden of proving circumstances of mitigation, or that justify or excuse it, devolve upon him, unless the proof on the part of the prosecution tends to show that it only amounted to manslaughter, or that the defendant was justifiable or excusable." That was a clear and explicit enunciation of the law on the point covered by the refused instructions, and the defendant was not prejudiced by their refusal.

It is also assigned for error that the court gave this instruction: "In this case Maud and Cora Parsons, nieces of the defendant, have been examined as witnesses in behalf of the defense. This is their right. It is proper, however, for the jury to bear in mind the relationship between them and the defendant, and the manner in which they may be interested by your verdict, and the

very grave interest they must feel in it, and it is proper for the jury to consider whether their position and interest may not affect their credibility or color their testimony." By that instruction the court simply informed the jury of certain facts and circumstances in the case before them, which they would, perhaps, as men of ordinary observation, have been bound to know, and this was within a proper latitude of observation from a court in its charge to a jury. *People v. Wong Ah Foo*, 10 Pac. Rep. 375, 377; Bish. Crim. Proc. §§ 982-1064.

Upon the whole case, we perceive no prejudicial error, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(71 Cal. 589)

PEOPLE v. GONZALES. (No. 23,233.)

(*Supreme Court of California*. January 19, 1887.)

1. HOMICIDE—EVIDENCE—DECLARATIONS OF DEFENDANT'S PARAMOUR.

In a prosecution for murder, where it appeared that the deceased suspected defendant of being his mother's paramour, and that he was killed by defendant in an affray resulting from an attempt by deceased to eject defendant from the mother's house, held that, even if there was evidence tending to show that the mother conspired with defendant to kill her son, yet her declarations regarding the homicide, made subsequent thereto, in the absence of defendant, were not admissible against defendant.

2. SAME—PARAMOUR'S DAUGHTER.

So, also, similar declarations of a sister of deceased, are inadmissible.

3. SAME—INSTRUCTIONS—GUARDING AGAINST POSSIBLE ERROR BY JURY.

Defendant held not entitled to an instruction that, although warned by the son to leave the county, he cannot be said to have voluntarily sought a place of danger in afterwards going to the mother's house, on her invitation, and not thinking there was any danger; there being nothing to suggest to the jury's mind the idea sought by this instruction to be excluded.

4. SAME—SELF-DEFENSE—INSTRUCTION.

An instruction that "a defendant cannot, in any case, justify killing another by a pretense of necessity, unless he was wholly without fault in bringing that necessity on himself," is erroneous.

5. SAME—NECESSITY.

An instruction that "the necessity must be apparent, actual, imminent, absolute, and unavoidable," is contradictory and misleading.

6. SAME—DUTY TO AVOID ENCOUNTER.

A man who expects to be attacked is not always bound to employ all the means in his power to avert the necessity of self-defense.

7. SAME—DANGER—DEFENDANT'S BELIEF.

To render a homicide justifiable on the ground of self-defense, not only must defendant be in apparently imminent danger, but he must believe that he is so.

8. SAME—MEANS OF DEFENSE—DEFENDANT'S BELIEF.

An instruction excluding from the jury the consideration of the question whether or not defendant had apparently, to his comprehension as a reasonable man, the means at hand to avoid killing deceased, without incurring imminent danger of great bodily harm, is erroneous.

Commissioners' decision. In bank.

Appeal from superior court, Del Norte county.

Indictment for murder. Defendant convicted, and appeals.

R. W. Miller and *R. G. Knox*, for appellant. *The Attorney General*, for the People.

FOOTE, C. The defendant was convicted of murder in the first degree. From the judgment therein, and an order denying him a new trial, he has appealed. His first contention is that the court erred in allowing the state-

ments of a Miss Umphlet, and of her little daughter, (made to divers persons after the alleged crime had been committed by the defendant, and when he was not present,) to be given in evidence by those who had heard Miss Umphlet and the daughter make them.

The declarations, as detailed by Dr. Thorworth, at page 40 of the transcript, were: "Miss Umphlet [that is, the deceased's mother] appeared at the door, was there, and some others. I asked them to move the man into the house. The door was closed, and it seemed rather strange that his mother was not by him. I knew nothing of the facts of the matter. I opened the door, and she appeared. I asked if she had any objection to having the injured man brought into the house. She said that she had no particular objection, but that she would not remain there; she would leave. I told her I did not care where she went, so that the boy was brought into the house. She afterwards returned, after an hour or two, and remained there all night."

By Lewis Lockwood, on page 84: "Yes; she [that is, Miss Umphlet] said that first she asked her daughter what she was doing there. She told her she had come to see me or Lew. Miss Umphlet says: 'The professor [meaning the defendant] has shot George, [the deceased,] and I hope Frank Thraine has got his belly full.'"

By Alonzo Winton, at page 95: "In a very short time after I got up there Miss Umphlet came in with her daughter. I told her there was nobody there but Mrs. Storver's little boy and me. She asked where she was, and I told her she was at my house, and was going to stay all night. She turned around, and said, 'All right,' and gave her head a toss, and went out."

By Lillie McVay, at page 97: "Some one asked her if George was dead. She said 'No.' Joe Otto asked her if he soon would be. She said she guessed so. She then told us this story: She said George came to the door. She asked who was there, and George said, 'Me.' She opened the door, and he came in. He jumped for the professor, and she jumped between them. She said that she knew he would not shoot her. She said that she knew if the professor ever got a bead on him he would fetch him 'so quick,' (snapping her fingers.)"

By Chauncey Messenger, at pages 107, 108, and 109: "She [meaning Miss Umphlet] told me about the boys coming there, and disturbing them. They were playing cards. She said that she thought the boys would have done better to have attended to their own business, and cleaned up their own dirty work, than to be meddling with hers. * * * She said that they took the professor out doors, and when they got him out he broke loose, and ran back in the house, and turned around and shot George. * * * She said that she thought it was a good thing that it happened; that it would learn people to keep their nose out of other people's business; and that the professor did right, she thought, because he had been told by the officer not to leave; that he did not have to leave, and that she did not think that they could do anything with him. * * * She did not say she had another pistol. I was talking to her about the way she was talking around the house. I told her she had better go a little slow, and kind of behave herself; that she might be arrested herself. She threatened to put me out of the house, and called me some pretty rough names. I told her she had better behave herself, that she was liable to get into trouble herself. She said that she was not afraid of the sons of bitches; that she was heeled herself."

By Pat Gay, at pages 111, 112: "When I got there Frank Thraine was crying around there, and she called him a bellowing calf, and told him he ought to be locked up in the cooler. She said she knew if the professor ever got a bead on one of them he would catch him. He had been a soldier, or something like that. That was after I went into the house. Somebody said that 'hanging was too good for her,' and she said she knew where another pistol was, and some of them would get it if they didn't watch out."

By Lizzie Higgins, at page 129: "She came in and asked for a bed, and Lillie told her that she could not give her a bed until her mother came. She sat down and took off her things. Joe Otto asked her how the trouble began. She said George and Frank Thraine came there, and they rapped on the door. She asked who was there, and George said it was him. She went and opened the door, and they rushed in. When Frank Thraine started to come in she pushed the door to keep him out. George came in with a pistol in his hand. She got between him and the professor, and told him not to shoot, but he shot a bullet through the floor. Frank Thraine got hold of the professor, and pulled him through the door. While they were out there, professor got a bead on him, and she said he brought him down as quick as that, (snapping her fingers.)"

By James Trimble, at page 141: "I did not hear Miss Umphlet say anything about it. At another time the little girl came into the house, just after the shooting where I was, and says: 'I think they have killed my brother; the professor shot poor George.' Then she said they came pretty near shooting me. She said the bullet went about so far from me, and she held up her hands about that far apart. This happened before I went out of my brother's house." He stated the same, in substance, when recalled, at page 185.

According to the record, the deceased, George Kirkham, was the son of the person called Miss Umphlet. She had, before the killing, been divorced from her husband, and had but lately moved into the dwelling where she resided at the time of the homicide. It seems that certain reports had reached the ears of the son relative to a supposed intimacy between his mother and the defendant; that, indignant, as may be supposed, at that which he believed was the guilty conduct of the pair, the son had determined, in conjunction with a companion, one Frank Thraine, to put a stop to the disgraceful conduct which he believed existed, and that the defendant was warned by one or both of the companions to leave the town where he was then residing, and visiting Miss Umphlet; that he sought advice of an officer, who told him he had a right to stay where he was; that he did stay, and procured a pistol, as he claims, for purposes of self-defense; that the two young men, Kirkham and Thraine, came at night to Miss Umphlet's house, one of them (Kirkham) with a pistol in his hand, and ordered the defendant to leave, which he proceeded to do, aided in his retirement by Thraine, who held him by the hair and conducted him to the gate; that there he got loose, and ran back to the house, where he shot the deceased.

There is evidence in the record tending, in some degree, to show that such a connection existed between the defendant and the deceased's mother, Miss Umphlet, as he (Kirkham) apprehended. There is also evidence tending to show that the defendant armed himself expecting an attack from those parties, and went to the house of Miss Umphlet supposing it might be made on him there. There were also facts and circumstances developed in evidence which tended to prove that Miss Umphlet knew of the defendant's intentions, and did not dissuade him from putting them into execution, but rather encouraged him.

It was perhaps desired by the prosecution to bring out fully before the jury the fact that Miss Umphlet was the paramour of her son's slayer, and that she sympathized with him rather than her son, and approved of the killing of the latter. For this purpose they may have sought to show the acts and declarations of Miss Umphlet after the killing, and when the defendant was not present. A portion, at least, of the several statements of the above-named witnesses, narrating as they did the alleged declarations of Miss Umphlet, certainly tended to exhibit her and the defendant, as regarded their relations, in no enviable light before the jury, and as both being hostile to the deceased, and we cannot say that they may not have proved prejudicial to the defendant. Miss Umphlet was not a witness before the jury, and her

alleged declarations, being made after the full accomplishment of the homicide, were not a part of the *res gestae*. Even admitting that other evidence in the record tended to demonstrate that she had conspired with the defendant unjustifiably to slay George Kirkham, yet her narrations (made after the crime with which the former was charged, had been fully consummated) were not admissible against him. Prejudicial error was therefore committed in allowing them to go to the jury. *People v. English*, 52 Cal. 212; *People v. Aleck*, 61 Cal. 137-139.

The daughter's statement, made after the killing, and without the presence of the defendant, and related by Trimble, was not admissible; it was mere hearsay.

The defendant further complains that two of the instructions which he asked to be given by the court to the jury were refused. They are as follows:

"If the jury find from the testimony that at the time of the killing of deceased the defendant had been assailed by the deceased and one Thraine, in a violent and threatening manner, and that deceased at the time of the assault held in his hand a deadly weapon, to-wit, a revolver, and if you find that such assault was made with intent to forcibly evict the defendant from the house of Ellen Umphlet, where the killing was done, then I charge you that such assault was unlawful; and, if the circumstances attending it were such as to cause a reasonable man to believe that he was in danger of receiving great bodily injury at the hands of his assailant, then I charge you that he was justifiable in taking the life of his assailant."

"If the jury find from the testimony that defendant had been warned to leave the county of Del Norte, or any place within said county, and that he subsequently made diligent inquiry as to the existence of danger, and from such investigation reasonably believed that he had no occasion to fear assault, and that defendant acted in good faith, upon such reasonable belief, then I charge you that the visiting of the house of Ellen Umphlet, upon her invitation, was not an unlawful act, and that a person acting under such circumstances cannot be said to have voluntarily sought a place of danger."

In the first instruction the jury were not told, as they should have been, that they must be of opinion, from the evidence, that the defendant *believed* he was in imminent danger of death, or some great bodily harm, then about to be done him at the moment of the killing by his assailants; for it is not enough that the jury may believe one killing his adversary has an apparent and reasonable ground then and there to apprehend great bodily harm or death at the hands of his adversary; they must further be of opinion, from the evidence before them, that the defendant entertained such belief, and acted upon it.

The defendant seems to be of opinion that his second instruction should have been granted, because, as he claims, the prosecution had shown in evidence that the defendant had been warned by the deceased and Thraine to leave the county, and had not done so, and had gone to Miss Umphlet's house in defiance of such order; and that in consequence of such evidence the jury, without such an instruction as he sought, might have been led into the error of believing that the defendant, in not obeying the order and going to Miss Umphlet's, unlawfully sought the difficulty. There was no charge of the court given upon its own motion, or by request of the prosecution, which instructed the jury that such was the law, and we cannot conceive how any man of ordinary intelligence could be otherwise led to such a belief as a jurymen. The instruction was also quite obscure in its language, enunciated no clear proposition of law, and was calculated to mislead the jury.

The defendant further urges upon our attention, as an improper act committed by the trial court to his prejudice, the granting, over his objection, of instructions propounded by the prosecution, and numbered seventh, eighth, tenth, eleventh, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth.

The tenth instruction does not enunciate a correct proposition of law, where it declares that one "cannot in any case justify killing another by a pretense of necessity, unless he was wholly without fault in bringing that necessity on himself;" for cases may, and frequently do, occur, in which the aggressor, although primarily in fault, has really and in good faith sought to avoid further conflict before the mortal blow was given; and when this is apparent, and he slay his antagonist in the necessary defense of his own life, he is not guilty of any crime.

The seventeenth instruction, in the first sentence thereof, which reads thus: "But the necessity must be apparent, actual, imminent, absolute, and unavoidable,"—is contradictory and misleading. It should have been expressed in the following or like language: "But the necessity must be actually or apparently imminent, absolute, and unavoidable." For it is not necessary that a defendant should show that danger to him of loss of life, or danger of some great bodily harm then about to be done him, actually existed; for actual, real, and imminent danger, to his comprehension as a reasonable man, is sufficient. *People v. Anderson*, 44 Cal. 65-69.

The eighteenth instruction excludes from the jury the consideration of the proposition whether or not, from the evidence, the defendant had apparently, to his comprehension as a reasonable man, the means at hand to avoid killing the deceased, without incurring imminent danger of losing his own life, or imminent danger of having great bodily harm done to his person.

The nineteenth instruction is clearly wrong. A man who expects to be attacked is *not* always compelled to employ all the means in his power to avert the necessity of self-defense, before he can exercise the right of self-defense; for one may know that if he travels along a certain highway he will be attacked by another with a deadly weapon, and be compelled in self-defense to kill his assailant, and yet he has the right to travel that highway, and is not compelled to turn out of his way to avoid the expected unlawful attack. In this case the defendant had a right to go to Miss Umphlet's house, if invited there by her, even if he expected there to be attacked, and the fact that he did go there did not, of itself, take away from him the right of self-defense, if unlawfully attacked.

The other instructions assailed as incorrect are neither so accurate or intelligible as they might well have been, but they are not so clearly erroneous, when taken in connection with the rest of the charge, as to demand, on that account alone, the reversal of the judgment and order. Yet, for the reasons heretofore given, they should be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; SEARLS, C.

By THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

SHIPMAN and others v. SUPERIOR COURT, etc. (No. 11,985.)

(Supreme Court of California. January 28, 1887.)

INJUNCTION—REVERSAL OF JUDGMENT ON DEMURRER—AMENDED COMPLAINT—EFFECT OF.

Where a temporary injunction is granted on a complaint subsequently held insufficient on appeal, an amended complaint operates to continue the injunction obtained previously.

Department 1.

Application for a writ of prohibition to restrain proceedings in the court below for an alleged contempt in violating a preliminary injunction issued in the case of *Roman Catholic Archbishop v. Shipman*. Upon an appeal taken in that case, (11 Pac. Rep. 843,) the decision of the court below, overruling the de-

murrer to the complaint, was reversed, and, after filing the *remititur*, an order was made and entered by the court below, sustaining the demurrer to the complaint. Plaintiff in that action, by leave of court, then filed an amended complaint, but did not apply for or obtain any order reviving or renewing the injunction, and no other injunction was issued. Subsequently an order of sale was made in the action, and placed in the hands of the sheriff by Mr. Wood, attorney for Alice Dorland. The property was advertised for sale. Application was then made by plaintiff in the case, and granted, that Wood show cause why he should not be punished for contempt in violating the injunction issued at time of commencing suit. Petitioners herein claimed that the reversal of the judgment set aside the temporary injunction, and from the time of the entry of the order in the superior court, the case stood without any restraining order or bond; respondents, that the injunction is still in force, notwithstanding the reversal of the judgment.

J. C. Bates, for petitioners. *Wilson & Wilson*, for respondents.

BY THE COURT. Application denied, on authority of *Barber v. Reynolds*, 33 Cal. 497.

(71 Cal. 611)

PEOPLE v. DEMOUSSET. (No. 20,253.)

(Supreme Court of California. January 29, 1887.)

1. ABDUCTION—DEFENSE—UNCHASTE CONDUCT OF CHILD—Pen. Code Cal. § 267.

The gist of the offense of abduction of a female under the age of 18 for the purpose of prostitution, under Pen. Code Cal. § 267, is the taking away of the child against the will of the person having lawful charge of her, and it is no defense that the child has previously been guilty of unchaste conduct, and evidence of such conduct is not admissible.

2. SAME—TAKING BY FORCE—INDUCEMENT.

To constitute the crime of abduction, under Pen. Code Cal. § 267, it is not necessary that the taking should be by force, but it will be sufficient if the child was induced by the defendant to leave the custody of her mother.

3. SAME—EVIDENCE.

In an indictment for abduction under Pen. Code Cal. § 267, where the girl abducted testified that the defendant suggested to her that she should leave home, because he was afraid that her mother would find out the relations existing between the defendant and her, and that she should leave on the false pretense that her step-father was trying, or had tried, to have sexual intercourse with her, and that she left home solely on the suggestion and in consequence of the threats of the defendant, and the girl's mother testified that she consented to the girl going away from home on account of this charge, and that the defendant supported its truth, evidence that the girl had in fact had sexual intercourse is immaterial, as bearing solely on a collateral question, and therefore inadmissible. PATERSON, J., dissenting.

4. CRIMINAL LAW—TRIAL—INSTRUCTIONS—GENERAL CHARGE—PARTICULAR POINT.

Where the court has charged, in general terms, that if the jury find that any witness has willfully sworn falsely upon any material point, the entire testimony of such witness is to be distrusted, it need not instruct the jury that testimony upon a particular point is material, and that, if a certain witness has sworn falsely upon that point, his entire testimony is to be distrusted.

In bank. Appeal from superior court, Los Angeles county.

Indictment for abduction under Pen. Code Cal. § 267.

Lucien Shaw and *James M. Damron*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

BY THE COURT. The defendant was convicted of the crime of abduction for the purposes of prostitution, and sentenced to serve a term of five years in the state prison, under section 267 of the Penal Code, which reads as follows: "Every person who takes away any female under the age of eighteen years, from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution,

is punishable by imprisonment in the state prison not exceeding five years, and a fine not exceeding one thousand dollars."

The court instructed the jury as follows: "If, from the evidence, the jury believe that Augustine Coela was a female child under eighteen years of age, in the legal charge of her mother, and that the defendant took her away, as alleged in the information, for the purpose of prostitution, they should find the defendant guilty as charged."

It is claimed that this instruction is erroneous because it omits the element of the previous chaste character of the female, and because it does not inform the jury that the taking must have been without the consent of the parent. It will be observed that the section says nothing about the chastity of the female. The law is intended to protect the chaste and reclaim the erring; to protect parents and guardians in their custody and care of minor females, without regard to the character of such female for chastity, and the family from sorrow and disgrace. We are not disposed, in the construction of this section, to interpolate any phrase that will detract from its effectiveness in this regard.

In other portions of its charge the court said to the jury: "Before you can convict the defendant, you must be satisfied, to a moral certainty, not only that the defendant took the girl away from her parents without their consent, but also that he took her away for the purpose of prostitution. The word 'prostitution' in the statute does not mean sexual intercourse with some particular man, or with one man only, but it means to offer freely and openly, to an indiscriminate, common intercourse with men." This charge, in connection with the language of the instruction objected to,—"took her away as alleged in the information,"—is a sufficient answer to the second ground of objection.

The court further instructed the jury: "The law does not require that the taking must be by force. If the child was induced by the defendant to go away from the custody and care of her mother, it is a sufficient taking away under the statute." It is said that this instruction is erroneous, in that it leaves out of the case all question of the character of the inducements, and does not even require that they should have been used fraudulently. We think that the instruction, read in connection with the preceding instruction, was correct. The court immediately before had said to the jury: "The gist of this offense is the taking away of the child against the will of the person having lawful charge of her for the purpose of prostitution." It is seldom possible for the court to give the whole law of the case to the jury in one sentence. The charge must be read in its entirety. In this instruction the court simply said to the jury that a physical carrying away is not required to constitute the taking, but that inducements are sufficient.

The girl had given evidence to the effect that the defendant had administered drugs to her in order to cause her to submit to sexual intercourse, some days prior to the time of the alleged abduction. The court was asked by the defendant to instruct the jury that this alleged giving of drugs was material, and that, if she testified falsely upon that point, she was to be distrusted as to her whole testimony. The court refused to give such instruction, on the ground that it was calculated to mislead the jury, and was not supported by the evidence. The court, however, did instruct the jury: "If you find that any witness has willfully sworn falsely upon any material point, then the entire testimony of such witness is to be distrusted." We think this was sufficient. The jury may or may not have considered the conduct of the defendant, on the occasion referred to, as in any way bearing upon the question of guilt or innocence of the crime here charged. The court is not required to instruct the jury as to the materiality of particular circumstances. The ruling of the court on the admissibility of the evidence was a sufficient action on its part. It will be presumed the jury gave it proper consideration. As coun-

sel for defendant states in his brief: "The circumstance did not necessarily prove any element of crime."

The defendant offered to show that the girl, Augustine Coela, had, prior to the alleged abduction, had sexual intercourse with a number of men. The offer was rejected, and an exception was reserved. We are unable to see how such testimony could be material. Want of chastity is no defense, and if the defendant could show that the girl made the first proposal, and went willingly with him, it would be immaterial; for the gist of the offense, as the court told the jury, "is the taking away of the child against the will of the person having lawful charge of her, for the purpose of prostitution."

The defendant further offered to show that the girl had had illicit intercourse, from time to time, with the step-father, but the court excluded it. The girl had testified, in substance, that the defendant suggested to her that she should leave home, because he was afraid, if she stayed there, her mother would find out what they had been doing; and that she should leave on the false pretense that her step-father was trying, or had tried, to have intercourse with her; and that she made all the trouble that arose on account of this charge because she was afraid of the defendant, and without any real foundation for it, but solely on the suggestion and in consequence of the threats of the defendant. The girl's mother testified that she consented to the girl going away from home because of this charge, and that the defendant supported, or acquiesced in, the truth of the charge.

The defendant claims that he never made any such proposition to the girl, but, on the contrary, that the girl voluntarily told him of it, and that he was much shocked to hear it; that her step-father threatened to kill her on account of her statement to her mother that the step-father had attempted to have illicit intercourse with her; and that he (defendant) assisted her to get away, because the step-father might kill her.

During the cross-examination of the girl's mother, counsel for defendant proposed to show that she (the mother) had permitted her daughter to sleep with the step-father, at the store, during seven or eight months in the year 1885, and to follow that up by showing that illicit relations existed between them, and that he wanted, at this point, to show the condition of things that existed. The offer was excluded, and the defendant excepted.

Caspar Shaffer, a witness, called on behalf of defendant, was asked this question: "State to the jury if, during the month of January, 1885, while you were at the shop kept by yourself and Mr. Lorraine, you saw anything of an improper relation existing between the witness Augustine Coela and Mr. Lorraine, her step-father." The question was objected to, the objection sustained, and an exception taken by the defendant.

Defendant offered to show by another witness that Augustine and her step-father had had sexual intercourse with each other during the month of September or October, 1885. The same ruling was made by the court, and an exception taken by the defendant.

We see no error in the exclusion of the testimony offered. The question to which it was addressed was collateral to the issue involved, and the evidence was accordingly immaterial.

The evidence supports the verdict.

The judgment is affirmed.

PATERSON, J. I dissent. Upon the testimony in the case it became a most pertinent inquiry for the jury whether the girl was taken by the defendant to save her from the alleged criminal assaults by her step-father, or for the purpose of prostitution. The girl had said to her mother that she would not remain, and had written to her that she would not return, because she was afraid the father would "bother her again." On the witness stand she said that her former statements in that regard were untrue, and that the story had

been concocted by the defendant. On which occasion did she tell the truth? Did the defendant frighten her into the assertion of a false charge? The mother testified that she heard the step-father say he would kill the girl if she told such things about him. Did this threat of the step-father frighten the girl into giving false testimony by denying the truth of the charge she had made? Upon the determination of these inquiries must have depended largely the question of the defendant's motives, as well as the question of the mother's consent, and anything tending to show which statement was correct must be material. The conduct which was imputed to the step-father was most unreasonable, unnatural, and debased, and the story was correspondingly improbable and incredible. Upon its face it carried the badge of falsity. The jury would be slow to believe that the girl ever told the defendant such a story. If, however, the jury knew, as a matter of fact, that the statement was true, and that the mother knew it, much less weight would be given to the testimony of the mother and daughter upon the most important questions in the case, viz., whether the girl went with the consent of the mother, and whether defendant took her for the purpose of indiscriminate prostitution. If the defense of the defendant had been that he took the girl to save her from cruel and inhuman punishment, such as burning or tying up by the thumbs, and similar questions of veracity between himself and the girl had arisen, can it be doubted that the truth of the fact claimed might be proved to show that, however improbable and incredible his statement as to his reasons might appear to be, it is nevertheless true? While lewd conduct is no defense, it may often be an important and material circumstance tending to explain the taking away, as well as to show the credibility of the witness upon some material matter to which she has testified, and to explain the motives of the defendant. I think that the evidence offered to show the relations existing in fact between the step-father and the daughter was most material for these purposes, and should have been admitted.

(71 Cal. 618)

PEOPLE, etc., *ex rel. GLOUGH v. LEVY.* (No. 11,771.)

(Supreme Court of California. January 29, 1887.)

1. APPEAL—TRIAL WITHOUT JURY—CONFLICT OF EVIDENCE.

Where a case has been tried in the superior court without a jury, and there is evidence on the point at issue sufficient to cause a substantial conflict, the supreme court will not reverse the judgment of the lower court, even though it might appear that the finding of such court is contrary to the weight of the testimony.

2. EVIDENCE—INSANITY—INTIMATE ACQUAINTANCE—DISCRETION OF COURT.

Where the sanity of a person is in issue, it is within the discretion of the trial court to determine whether a witness is sufficiently acquainted with the party to enable him to speak, and the supreme court will not interfere with its decision, where there is no abuse of discretion.

3. WITNESS—IMPEACHING—FOUNDATION—CODE CIVIL PROC. CAL. § 2052.

Where no attempt is made to contradict a witness, he may be questioned as to previous statements inconsistent with his testimony, although no foundation has been laid for his impeachment, as required by Code Civil Proc. Cal. § 2052.

In bank. Appeal from superior court, city and county of San Francisco.

Quo warranto.

Langhorne & Miller, for appellant. *C. L. Ackerman and David McClure*, for respondent.

PATERSON, J. This is an action, in the nature of *quo warranto*, to oust the defendant from the office of judge of the superior court in and for the city and county of San Francisco, into which it is alleged he has intruded, and to reinstate the relator therein. The relator was elected to said office for the term of six years from and after the first Monday of January, 1883. After his election he duly qualified as such judge, took possession of and held

the office until the twenty-eighth day of August, 1885. On the eleventh day of August, 1885, the relator signed and delivered to one McCourtney, his court-room clerk, and instructed him to deliver to the governor, the following paper.

To His Excellency, George Stoneman, Governor of California—DEAR SIR: I herewith tender you my resignation as superior judge of the city and county of San Francisco, state of California. Failing health will no longer permit me to perform the duties thereof.

Respectfully yours,

F. M. CLOUGH, Judge."

McCourtney handed the document to Mrs. Clough, who thereafter delivered the same to T. J. Clunie, by whom it was delivered to Gov. Stoneman on or about the twenty-eighth of August, 1885. Appellant claims that at the time said resignation was signed, and thereafter, until it was delivered to the governor, the relator, Clough, was insane, and that his acts in relation to said resignation are void; and this is the principal ground of contention on this appeal.

The cause was tried before the superior court, sitting without a jury, and the court found as facts "(14) that said relator was, on the said eleventh day of August, 1885, and at the time of making and delivering the said resignation, in a fit and proper condition for the proper transaction and understanding of business, and he was at the said time of sound mind and memory;" "(20) that at the time of signing said resignation said relator well knew the purport and effect of the same, and did voluntarily sign said resignation;" "(22) that said relator was, at the time of the delivery aforesaid, of sound mind, and well able to understand the effect of his said act of delivery."

It is claimed, however, by appellant, that said findings are not supported by the evidence.

Mr. McCourtney, the relator's court-room clerk, of whom it is alleged in the complaint that "the relator reposed great confidence in his truthfulness and friendship," testified as follows: "I did not notice anything wrong with him. He talked the same that day [August 11th] as he did in his court-room. I have observed the conduct of Judge Clough in his court-room during the time that I have been there, and have known him for three or four years. He talked the same that day as he did in his court-room. I did not see any difference. He signed the state demands also, besides the city warrants. I am very familiar with his handwriting and his signature. I can see no difference in the signature on the warrants here shown and the signatures in the court-room. He signed the word 'Judge' at the bottom. I did not ask him to sign it. He put it there of his own volition. He said: 'Now, I have resigned. Forward that to the governor of the state.' He asked if he would get this month's salary, and I said, 'Certainly, you will get that.'"

W. Fitzgerald, who had known the relator for about three years, testified that he saw him the next day after he came down from Stockton, on August 8th. "I remained with him after that about six or seven weeks. I had mostly charge of him. I spent nearly all the time, except when I would run down town during the day-time, with him all those weeks. I should think most of the time, to the best of my opinion, he was sane all the time I was with him. He was sane, and not out of his mind, except when he got excited. His mental condition was good. I could not see any change. * * * He seemed to talk very rationally. I was there when the resignation was signed. He had a conversation after, with McCourtney. He signed it right off. I don't know whether he read it. I should say he was understanding what he was doing."

Dr. Buckley, an expert witness, testified, in answer to hypothetical questions: "I should consider a person who signed a document, after all this reasoning *pro* and *con* relative to the subject, was perfectly sane in mind."

This evidence shows that, whatever may be the weight of the evidence against it, there is a substantial conflict as to the sanity of the relator at the time he executed the resignation, and delivered it to McCourtney, on the eleventh day of August, 1885.

The most serious question, it is claimed, in the case is as to the condition of his mind from the eleventh day of August to and including the twenty-eighth, or until the appointment of the respondent to fill the vacancy.

Although it might seem to us that the finding of the court is contrary to the weight of testimony, it is sufficient to say that there was evidence enough to cause a substantial conflict therein. It is true there is no direct evidence as to his sanity during each and every day of the period referred to, but, if the question be material, there is testimony indicating sanity during a portion of the time, and from which the court was justified in finding him to be sane during the whole period. Judge Maguire, an intimate friend and associate of the relator, testified that he visited him on several occasions. He says: "I think it must have been between the fifteenth and twenty-fifth of August that I saw him, but I cannot place closely the first visit I made. I met Judges Lawler and Rariden there. Judge Clough then and there conversed with me and the other judges. He said that he desired to speak about his alleged resignation, and the appointment of Levy. We asked him about it, talked about it, and he made some statements concerning it. * * * He seemed to me to be weak physically, and not very strong mentally, but still so rational as to surprise me, from his former condition and conversation. I should say that he had very greatly improved at that time; improved so far as to seem to be rational, if not disturbed. * * * During that time he seemed to be quite rational, and quite sane, barring the weakness that was incident to sickness of that character. I would regard him to be of sane mind. I would consider that he talked quite rationally upon all other subjects that were discussed at that time, barring the weakness and the nervous excitement at times, which he checked, as I say."

McCourtney testified: "I went there again, for the purpose of getting his warrant signed. It was in the latter part of August or the first part of the next month. He came and greeted me, and shook hands with me. It was about the time that Judge Levy was appointed. I think it was before Judge Levy took his seat. He came in, and shook hands with me, and I told him, I said: 'Well, judge, I have brought you out your demand; I suppose it is the last you will get.' He said: 'Yes, I don't know whether I have any right to sign it or not.' I did not stay over five or six minutes. He acted just as he always did in court."

Mrs. Clough testified: "So, then, August 28th, I telegraphed the governor, and told him that the judge was much better, and he had not resigned. * * * He commenced to recover, I think, about a week or ten days after he came from Stockton, August 7th. He was better that week than he had ever been,—the week that he went up there in September,—and I thought probably he was well enough to get his discharge; but the ride up and down upset him, and after that he commenced being nervous again. * * * Dr. Hayne said he was well enough to go and get his discharge, and he was seemingly very well. I did not see anything out of the way. He talked rationally and intelligently. This was about the middle of September. After that he was not violent."

This testimony, which is all there is bearing on the point in connection with his acts in relation to the demands and warrants for salary, created, in our opinion, a substantial conflict in the evidence. Appellant claims that the resignation was procured through fraud, and upon the respondent's offer to share with the relator or his family a part of the salary of the office, in the event of the respondent's appointment thereto, and therefore that the resignation was void as against public policy. But the court found that no such

offer was made, and that there was no fraud in procuring the resignation. Upon this question there was also a conflict of testimony, and the same is true of all the findings about which there is any controversy.

The hypothesis upon which defendant's counsel based his question calling for the opinion of Dr. Buckley was warranted by the evidence, and we cannot say that the facts stated were insufficient to render it competent.

During the cross-examination of Mrs. Clough, she was asked whether she had stated to the attorney general that the judge was much better. To this question counsel for plaintiff objected, on the ground that the proper foundation had not been laid for impeachment, as required by section 2052, Code Civil Proc. The objection was overruled, and plaintiff excepted. Inasmuch as no attempt was made to contradict the witness, there was no error in the ruling.

It is claimed that the witness McCourtney ought not to have been allowed to testify concerning the sanity of relator, because he was not shown to be an "intimate acquaintance," within the meaning of the statute. It is often a difficult question to determine whether the witness is sufficiently acquainted with the party to entitle him to speak. That the witness should be familiar with the temperament and habits of mind of the person whose soundness is in question there is no doubt, but the determination of the competency of the witness is within the discretion of the court below, with the exercise of which, there being no abuse, this court will not interfere. *People v. Pico*, 62 Cal. 53.

Other errors are assigned, but we see nothing prejudicial in any of them. Judgment and order are affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

MCKINSTRY, J. I concur in the judgment.

(71 Cal. 608)

Ex parte ROBINSON. (No. 20,275.)

(*Supreme Court of California.* January 29, 1887.)

1. CONTEMPT—REFUSAL TO OBEY ORDER OF COURT TO PAY ALIMONY—DECLARATION IN COURT—AFFIDAVITS.

The defendant, in an action for divorce at the instance of his wife, was ordered to pay her a sum for costs. The money was not paid, and no affidavit was filed showing non-payment, but the defendant appeared in court to show cause why he should not be punished for contempt. The court, having heard the evidence as to his ability, decided that he was amply able to pay. The defendant thereupon declared that he would not pay; that he "would be locked up,"—meaning that he would go to jail rather than obey the order. Held that, although failure to obey such order would not ordinarily be punishable except upon affidavit, yet, the defendant having refused to pay in the presence of the court, he might be imprisoned without affidavits.

2. APPEAL—REHEARING—HABEAS CORPUS.

In the California supreme court, a petition for rehearing in a *habeas corpus* case will not be allowed.

In bank. Petition for a writ of *habeas corpus*.

W. H. H. Hart and Aylett R. Cotton, for petitioner. *Sawyer & Burnett*, for respondent.

PATERSON, J. The petitioner was adjudged guilty of contempt in the superior court of Del Norte county for refusing to pay certain sums of money which the court had directed him to pay, as costs and attorney's fees, in an action for divorce therein pending between his wife and himself. In the action referred to the plaintiff, wife of petitioner, had been awarded a decree of divorce, the defendant had moved for a new trial, and prepared and served his bill of exceptions. The plaintiff, having no means to present her defense to said motion, applied to the court for an order requiring the defendant to

pay the cost of transcribing the short-hand notes, and a sufficient fee to enable her to employ an attorney to attend to the proceedings for a new trial. After hearing the matter upon affidavits, the court directed the defendant to pay the plaintiff or her counsel the sum of \$160 within two days after service of the order, or show cause thereafter, to-wit, on the fourth day of November, 1886, why he should not be punished for contempt. The money was not paid. No affidavit showing non-payment was presented, but on said fourth day of November the defendant and his counsel appeared before the court to show cause why he should not be punished for contempt. The court heard the evidence of the parties as to the ability of the defendant to pay, and decided that the defendant had been and then was amply able to pay the said sum. Immediately upon learning the decision of the court the defendant refused to pay the money, saying he "would be locked up," meaning, of course, that he would go to jail before he would obey the order of the court. Thereupon the court adjudged him guilty of contempt, and ordered that he be confined in the county jail until he complied with the order for the payment of the \$160.

Petitioner claims that the court exceeded its jurisdiction in making the order adjudging him guilty of contempt, and that the order is therefore void, and his detention thereunder unlawful. It is contended that the contempt, if any, was committed without the presence of the court, and that the court could not lawfully make any order requiring him to show cause, except upon affidavit being first presented showing his failure to comply with the order for the payment of the money. In support of this proposition petitioner relies upon the case of *Batchelder v. Moore*, 42 Cal. 412. In that case the contempt alleged was clearly one which was not and could not be committed in the presence of the court. The affidavit upon which the proceedings were based was defective in the most important particular, and it resulted that the court had no authority to proceed. We are not disposed to question the correctness of that decision, and if the petitioner herein had contented himself with answering the question why he had not complied with the order of the court,—whether his reasons were good or bad,—or if he had objected in any way to the proceedings, or if he had voluntarily appeared, and said nothing, we should hold that the court below, in the absence of an affidavit showing failure to comply with the order, had no authority to convict him of contempt. The defendant, however, did not content himself with excuses, good or bad, nor did he object to the proceedings of the court, nor did he keep that silence which would have been circumspect; but he went further, and showed his defiance of the court, and its lawful order, by a declaration plainly indicating that he never intended to obey the order, and that, if imprisonment was the *ultimatum*, he was ready for it. We think that this direct challenge to the authority of the court was a contemptuous defiance of a lawful order, *in the presence of the court*, and that he was properly adjudged guilty of contempt therefor. It was a repetition *in the presence of the court* of the offense for which the court had, without authority, cited him to appear and answer.

It is claimed that, since the issuance of the writ herein, a compliance with the order of the court has become unnecessary, because the proceedings on motion for new trial have lapsed or have been dismissed, and there is no longer any necessity for the payment of the money. If this be true, the court below may discharge the prisoner; but, as the order for payment is still in force, we remand the petitioner.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCFARLAND, J.

(February 8, 1887.)

ON REHEARING.

BY THE COURT. Petition for rehearing denied. There is no practice here allowing petitions for rehearing in cases of *habeas corpus*.

(71 Cal. 627)

BOYS' & GIRLS' AID SOC. v. REIS, Treas., etc. (No. 9,914.)*(Supreme Court of California. January 31, 1887.)***1. REFORM SCHOOL—CONSTITUTIONALITY OF PEN. CODE CAL. § 1388.**

Pen. Code Cal. § 1388, authorizing courts to suspend final judgment in any conviction against a minor for a misdemeanor or felony, to commit him to the custody of the managers of a non-sectarian charitable institution conducted for the purpose of reclaiming minors, and, in their discretion, to direct payment of the expense of his custody in such institution to be made from the funds of the county where the criminal proceeding is pending, is constitutional; and is not in conflict with Const. Cal. art. 4, § 22, prohibiting the payment of money from the state treasury for the benefit of institutions not under the exclusive control of the state as a state institution; nor with article 9, § 8, prohibiting the appropriation of public money for the support of any school not under the exclusive control of the officers of public schools, such provision having reference to common and public schools, as spoken of in the constitution, such as are organized for the sole purpose of disseminating knowledge, and imparting scholastic instruction; nor with article 11, § 13, prohibiting the delegation of municipal power.

2. SAME—POLICE COURT—JURISDICTION.

A tribunal presided over by a police judge is a "court," within the meaning of the California constitution, and may exercise the jurisdiction granted by Pen. Code Cal. § 1388, authorizing the committal of juvenile criminals to reform schools.

3. SAME—EXPENSE OF CUSTODY—BOARD OF SUPERVISORS.

The discretion imposed upon the court by section 1388 of Pen. Code Cal., to allow payment of the expense of keeping a minor, in an institution for the reformation of minor criminals, from the funds of the county in which the criminal proceeding is pending, must be exercised personally, and, when properly exercised, the board of supervisors is not required to supervise the action of the court before payment may be made from the county treasury.

Appeal from superior court, city and county of San Francisco. *Mandamus.* Commissioners' decision. In bank.

John L. Love, for appellant. *E. F. Swortfiguer* and *John A. Stanly*, for respondent.

FOOTE, C. This is an appeal from a judgment ordering a peremptory writ of mandate to issue commanding the defendant, treasurer, etc., forthwith to pay out of the treasury of the city and county of San Francisco certain sums of money. The defendant urges that the statute enacted by the legislature, dated the fifteenth day of March, 1883, adding a new section to the Penal Code, to be known as section 1388, is unconstitutional. The said act is to be found in the Statutes of 1883, p. 377. He also contends that the statute in question does not contemplate that the treasurer of said city and county should have incumbent on him, as a mere ministerial duty, the payment of the demands on the treasury by the direction of the court.

Section 1388 of the Penal Code is as follows: "Final judgment may be suspended on any conviction, charge, or prosecution for misdemeanor or felony, where, in the judgment of the court in which such proceeding is pending, there is a reasonable ground to believe that such minor may be reformed, and that a commitment to prison would work manifest injury in the premises. Such suspension may be for as long a period as the circumstances of the case may seem to warrant, and subject to the following further provisions: During the period of such suspension, or of any extension thereof, the court or judge may, under such limitations as may seem advisable, commit such minor to the custody of the officers or managers of any strictly non-sectarian charitable corporation, conducted for the purpose of reclaiming criminal minors. Such corporation, by its officers or managers, may accept the custody of such minor for a period of two months, (to be further extended by the court or judge should it be deemed advisable;) and should said minor be found incorrigible and incapable of reformation, he may be returned before the court for final judgment for his misdemeanor. Such charitable corporation shall accept

custody of said minor, as aforesaid, upon the distinct agreement that it and its officers shall use all reasonable means to effect the reformation of such minor, and provide him with a home and instruction. No application for guardianship of such minor by any person, parent, or friend shall be entertained by any court during the period of such suspension and custody, save upon recommendation of the court before which the criminal proceedings are pending first obtained. Such court may further, in its discretion, direct the payment of the expenses of the maintenance of such minor during such period of two months, not to exceed, in the aggregate, the sum of twenty-five dollars, (\$25.) which sum shall include board, clothing, transportation, and all other expenses, to be paid by the county where such criminal proceeding is pending, or direct action to be instituted for the recovery thereof out of the estate of said minor, or from his parents. Such court may also revoke such order of suspension at any time."

In support of his first contention the defendant argues that the act is in contravention of section 22, art. 4; section 8, art. 9; section 13, art. 11; and section 11, art. 1,—of the constitution of this state.

They are as follows, respectively:

Sec. 23, art. 4. "No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the comptroller; and no money shall ever be appropriated or drawn from the state treasury, for the use or benefit of any corporation, association, asylum, hospital, or other institution not under the exclusive management and control of the state as a state institution, nor shall any grant or donation of property ever be made thereto by the state: provided, that, notwithstanding anything contained in this or any other section of this constitution, the legislature shall have power to grant aid to institutions conducted for the support and maintenance of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances, such aid to be granted by a uniform rule, and proportioned to the number of inmates of such respective institutions: provided, further, that the state shall have at any time the right to inquire into the management of such institutions: provided, further, that whenever any county, or city and county, or city, or town, shall provide for the support of minor orphans, or half orphans, or abandoned children, or aged persons in indigent circumstances, such county, city and county, city, or town, shall be entitled to receive the same *pro rata* appropriations as may be granted to such institutions under church or other control. An accurate statement of the receipts and expenditures of public moneys shall be attached to and published with the laws at every regular session of the legislature."

Sec. 8, art. 9. "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools; nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this state."

Sec. 13, art. 11. "The legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."

Sec. 11, art. 1. "All laws of a general nature shall have a uniform operation."

We do not perceive that the section of the Code under consideration is in conflict with section 22 of article 4 of the constitution. That section has exclusive reference to the legislative power to appropriate or draw money from "the state treasury for the use and benefit of any corporation," etc. Under section 1388 of the Penal Code no money can be, or is in any manner

sought to be, taken from the *state* treasury, and it does not affect the revenue of the state, as such. Nor has the legislature, by that statute, attempted to direct any absolute payment from a county treasury. It has vested in a court, in the exercise of its wise and proper judicial discretion, the right to order payment out of that treasury, to a limited extent, and in strict accordance with the letter of that law, certain sums of money in each given case, where such an order could be legally made according to the terms of the statute. It is not in conflict with section 8 of article 9 of the constitution, for that section has reference to *schools*, as such, in the ordinary acceptation of the term; that is, *common* and *public* schools, as spoken of in the constitution,—such as are organized for the sole purpose of disseminating knowledge, and imparting scholastic instruction.

The Boys' & Girls' Aid Society, as constituted, appears to be a corporation which "is strictly non-sectarian and charitable, conducted for the purpose of reclaiming minors;" and we do not see why the legislature might not as well allow a judge of a proper court to confide to the managers and directors of the corporation the custody of a minor, who has been convicted of an infraction of the penal laws of the state, for a certain specified time, and to order the proper sum necessary to his maintenance while in such custody out of a proper fund provided for the purpose and in the treasury of the proper county, as to order his imprisonment in the county jail, and the costs of his maintenance there to be paid out of said treasury. Both laws would have for their common object the reformation of the criminal, and the prevention of crime, and would be necessarily constitutional, being the exercise of the "police power" essentially existing under the constitution as a legislative attribute; nor do we perceive what "municipal power" is delegated under the act, which is prohibited by section 18 of article 11.

The municipality of the city and county of San Francisco is a political corporation, and its functions are only such as are necessary to fulfill the purpose of its existence. The creation of that municipality for the purpose of engaging in the charitable and praiseworthy labor of reclaiming and reforming criminal minors was not within the contemplation of the legislature which enacted the consolidation act, and other laws which govern and control the city and county of San Francisco as a municipal corporation, for such power is not therein expressly granted, or necessarily implied from such grant, and it cannot otherwise exist. *Wallace v. Mayor of San Jose*, 29 Cal. 186; *City of Oakland v. Carpenter*, 18 Cal. 546; *Argenti v. City of San Francisco*, 16 Cal. 283; *Boone, Corp.* § 287; *In re Lee Tong*, 18 Fed. Rep. 259; *Dill. Mun. Corp.* § 89; *Cooley, Const. Lim.* 194.

It is not unconstitutional to apply the word "court" to a tribunal presided over by a police judge. It is an inferior court, which the legislature may establish in any incorporated city or town, or city and county. Const. art. 6, § 1. Nor is the order of such court, for the payment out of the city and county treasury of the sum mentioned in the statute, an exercise of the right of "taxation without representation." The statute under which it is to be done contemplates the expenditure of such money, out of a fund to be provided for that purpose. It is alleged in the affidavits filed by the corporation respondent, admitted by the defendant, and found by the trial court, "that said treasurer of said city and county, on said third day of October, 1884, had then, hitherto has had, and still has, ample funds provided by law for the payment of said orders;" meaning the orders made by the police court of said city and county, which the defendant refused to pay. The benefits of the reclamation of minors intended by the statute would be enjoyed by the whole community, and no inequitable burden cast upon any person.

The police judge of any incorporated city or town, or city and county, may be elected by only a part of all the qualified voters thereof, and yet he would be the judge of an inferior court such as the constitution (article 6, § 1) con-

tempiates, and any such court could exercise the jurisdiction granted by section 1388 of the Penal Code, and that would not be a violation of the constitution where it declares: "All laws of a general nature shall have a uniform operation." Article 1, § 11, Const.

The statute says: "Such court may further, in its discretion, direct the payment of the expenses of the maintenance of such minor during such period of two months, not to exceed in the aggregate the sum of twenty-five dollars, (\$25,) which sum shall include board, clothing, transportation, and all other expenses, to be paid by the county where such criminal proceeding is pending," etc. We know of no other way for such payment to be made than out of the treasury of the county where the "proceeding is pending." The order made herein, in each case, directs the payments to be made "out of the treasury of the city and county of San Francisco," where each and all of the "proceedings were pending." To the judge of the proper court the statute commits the discretion of making the orders for such payments. Where such a discretion is by law conferred upon a specific officer, such officer must exercise that discretion personally, (Boone, Corp. § 310; *Richardson v. Heydenfeldt*, 46 Cal. 68; *City of Stockton v. Creanor*, 45 Cal. 646,) and, when properly exercised, the board of supervisors is not required to supervise the action of the court, (*Ex parte Reis*, 64 Cal. 243, 244.)

The demand in controversy is not one of those that is to be first approved by the board of supervisors, for section 85 of the consolidation act includes only such demands as are mentioned in that act, and are authorized by it. Sections 97, 98, Consolidation Act; *Ex parte Reis, supra*, 239. The statute under consideration does not attempt to repeal said section 85, nor does it affect the act itself, for the provisions of the consolidation act are left untouched. Its officers exercise the same functions under it after as before the enactment of the statute. It does superadd a duty on the treasurer, that of paying the demand mentioned, under the order of the judge of the police court; but that does not affect any power or duty vested in him by the consolidation act. *Ex parte Reis, supra*, 240.

The judgment should be affirmed.

We concur: BELCHER, C. C.; SEARLS, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment is affirmed.

(71 Cal. 628)

HOME & LOAN ASSOCIATES v. WILKINS and others. (No. 11,582.)

(Supreme Court of California. January 31, 1887.)

APPEAL—UNDETAKING—TWO APPEALS, AND ONE UNDERTAKING REFERRING TO NEITHER—FILING NEW UNDERTAKING—CODE CIVIL PROC. CAL. § 954.

Where an appeal is taken from two orders, and one undertaking on appeal filed, which refers to neither of them, so that it cannot be determined for which it is intended, the appellant will not be allowed to file a new undertaking, under section 954, Code Civil Proc. Cal., as that act only allows such proceeding when the undertaking is insufficient; but this is no undertaking at all.

Department 2.

Appeal from superior court, city and county of San Francisco.

E. A. & G. E. Lawrence, for appellant. *J. R. Brandon*, for respondents.

THORNTON, J. Motion to dismiss appeals. In this case appellant took appeals from two orders, and filed one undertaking on appeal, not distinctly referring to either appeal. The language used in the undertaking filed recites only one appeal, without distinguishing which of the two appeals was referred to. The undertaking so filed is no undertaking at all. It is so ambig-

uous that it must be regarded as if none had been filed. *People v. Center*, 61 Cal. 191; *Corcoran v. Desmond*, 11 Pac. Rep. 816.

An application is made to this court by appellant to be allowed to file the proper undertakings under section 954, Code Civil Proc. The section referred to does not authorize it. It only authorizes a new undertaking when the one filed is insufficient. But in this case there has really been none filed. To allow new ones to be filed would be, in effect, to permit a new appeal to be perfected after the time fixed by law. *Hastings v. Halleck*, 10 Cal. 31.

Application to file other undertakings denied, and the appeals dismissed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(71 Cal. 624)

Ex parte GILMORE. (No. 20,246.)

(Supreme Court of California. January 31, 1887.)

CRIMINAL LAW—SENTENCE—VACATING ILLEGAL AND IMPOSING LEGAL SENTENCE—Pen. CODE CAL. § 241.

Under section 241, Pen. Code Cal., authorizing the sentence of one convicted of assault to fine or imprisonment for three months, a sentence to fine and imprisonment is illegal; and the court which rendered the sentence has power to call the prisoner before him at the term at which it was rendered, or within a reasonable time, if the court has no terms, to vacate the sentence, and impose a legal one; and six days after the first sentence is a reasonable time.

Department 2. On *habeas corpus*.

John D. Whaley, for petitioner. *J. N. E. Wilson*, for respondent.

THORNTON, J. The petitioner was regularly convicted of an assault, and sentenced to fine and imprisonment for three months. The sentence was one which the court was not authorized by law to impose, the statute allowing a sentence of fine or imprisonment not exceeding three months. Pen. Code, § 241. The petitioner applied to this court for a writ of *habeas corpus*, and, after he was heard, the court which had pronounced the illegal sentence vacated it, and imposed imprisonment for 81 days. The first sentence was pronounced on the twenty-third of October, 1886, the petitioner was heard on the twenty-eighth, and the court imposed the second and legal sentence on the twenty-ninth, of October, 1886. The second judgment was brought to our attention by a supplementary return.

We are of opinion that the first sentence or judgment was illegal, and perhaps void. As it was illegal, the court which rendered the judgment had power, during the term at which the judgment was rendered, to call the prisoner before it, vacate the illegal sentence, and impose one in accordance with law. *Ex parte Lange*, 18 Wall. 163. See prevailing and dissenting opinions. The petitioner being thus under the control of the superior court, we should have remanded the petitioner to give an opportunity to the court to do what it has done,—have the party brought before it, vacate its illegal sentence, and render a legal one. This being done, it remains only to say that the petitioner was legally held, and he must be remanded to the custody of the sheriff.

It may be urged that the superior court has no terms, and therefore the rule above cited does not apply. Conceding that such court has no terms, then it has power, within a reasonable time, to do what was done here, and the action taken by the court in passing the legal judgment was, in our judgment, within a reasonable time.

Ordered that the prisoner be remanded to the custody of the sheriff of the city and county of San Francisco.

We concur: MORRISON, C. J.; SHARPSTEIN, J.

(72 Cal. 5)

OAKLAND PAVING CO. v. TOMPKINS, City Marshal, etc. (No. 11,794.)*(Supreme Court of California. February 4, 1887.)***CONSTITUTIONAL LAW—AMENDING CONSTITUTION—"ENTRY" OF AMENDMENT IN JOURNALS
—IDENTIFYING REFERENCE—CONST. CAL. ART. 18, § 1.**

The provision of Const. Cal. art. 18, § 1, that proposed amendments to the constitution "shall be entered" in the journals of each house, after the requisite vote in favor of them, does not require them to be copied into the journal in full, but is satisfied by an identifying reference. THORNTON, J., dissenting.

In bank. Appeal from superior court, Alameda county.

This case is identical with *Oakland Paving Co. v. Hilton*, 11 Pac. Rep. 3, except that here the parties stipulated that the street laws of 1864, of 1870, and of 1885 were complied with. See concurring opinion of MCKINSTRY and SHARPE-STEN, JJ., Id. 20. After the above decision was rendered, this application for *mandamus* was made. The defendant is successor in office of Hilton.

C. T. Johns, for appellant. John H. Boalt, Henry Vrooman, and C. T. H. Palmer, for respondent.

TEMPLE, J. This case arises from a street assessment in Oakland. The only question submitted is whether the constitutional amendment No. 1, ratified by the electors at the general election in 1884, being an amendment to section 19, art. 11, was proposed by the legislature as required by section 1, art. 18, of the constitution. That section provides that amendments may "be proposed in the senate and assembly, and, if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in the journals, with the yeas and nays taken thereon," etc. The objection is that the proposed amendment was not entered in the journal of either house as required by the constitution. It was not copied into the journal, but there was entered an identifying reference, such as is always entered in regard to legislative bills; that is, it was proposed as a senate bill, and was referred to by title and number. The yeas and nays were entered as directed. It is agreed that the amendment thus proposed was submitted to the people, and received a very large majority of the votes cast.

This question is not a new one in this court. In *People v. Strother*, 67 Cal. 624, S. C. 8 Pac. Rep. 383, it was the only issue of any importance, and it was squarely decided that the amendment had been constitutionally adopted. This was in bank, and there was no apparent dissent. This decision was in October, 1885, and in the following May in the case of *Oakland Paving Co. v. Hilton*, 11 Pac. Rep. 3, an opinion was rendered by Justice THORNTON, which was concurred in by Mr. Justice MCKEE, holding to the contrary. The other members of the court who participated in that decision based their concurrence on other grounds.

It is contended that in this condition of the decisions, the question ought to be considered an open one. We do not accede to this proposition. In the case of *People v. Strother* the point was squarely presented, was the only one involved, and was plainly and unequivocally decided. We see no reason why it is not entitled to the usual authority of a precedent; nor do we concede that in so deciding there was error. All admit that the constitutional requirement must be strictly performed; but it does not follow from this that the language of the instrument must be understood literally. The same rules of construction must be applied to ascertain what its requirements are as though it were not mandatory and prohibitory. And we think, when an act commanded or authorized may be done in different ways, either of which would be a strict compliance with the terms of the instrument, understood in some common and popular sense, either mode may be pursued, unless some reason is discoverable for holding that one of such modes only will

answer. If, for instance, the direction to enter the amendment in the journal is complied with, in some usual and popular sense of the language, either by copying the amendment into the journal, or by placing upon the journal an identifying reference only, either will do unless the context shows a different intention.

Now, the word "enter" primarily means to go in, or to come in, but has many derivative meanings, and is often employed in elliptical expressions, and is quite apt to be so used that the literal or most obvious meaning cannot be attributed to it. We read, for instance, in the laws of congress, that citizens may enter at the land-office a tract of land, and the expression is repeated in different forms many times. We are often told that a certain horse has been entered for a race, or an animal has been entered at a fair. What is really done in each instance is to make a record of certain important facts, for preservation or notice; and such is certainly a very ordinary meaning of the word "enter," when used in this derivative sense; that is, to register the essential facts concerning the thing said to be entered. And we think it may be fully admitted that the most natural and obvious meaning of the word, when employed in this derivative sense, is to copy without greatly affecting the argument.

We find, near the title-page of nearly every book printed, that it has been *entered* in the office of the librarian of congress. What is really left with the librarian is the title-page of the proposed book, and this constitutes the entry, although, after it is printed, the author is now required to present a copy of the book for the congressional library. We sometimes read that a certain play of Shakespeare was entered at Stationers' Hall. We find that the entry really made was a brief identifying reference, preliminary to obtaining license to print. Such instances of the use of the word, and of the phrase in which it occurs, might be multiplied indefinitely, but these are enough to show that this usage is quite common. Now, if we substitute, in all these and like cases, the word "copy," or the phrase "enter at large," for the word "enter," we are conscious at once that a great change has been made. Indeed, the mere fact that the qualifying words "at large," "at length," "in full," do so often accompany the word "enter," is proof that all feel that it is not a synonym of the word "copy."

The language, however, had been construed under the old constitution, which contained the same words, and under which amendments had been adopted in the mode pursued in this case. The practice of both houses of the legislature had given this construction to similar language. The joint rules have always required, as also do the rules of the house of representatives of congress, that at a certain stage in the passage of a bill it shall be entered on the records of the house. They have always been so entered by identifying reference. The convention itself adopted Cushing's Manual, which employs similar language, which is so used that it must be similarly understood. Many statutes in force at the time the convention was in session employ the language in the same sense. Pol. Code, §§ 254, 656, 4031; Civil Code, § 324. The convention adopted the language under consideration with knowledge of the practical construction which had been given to the same words under the old constitution, and in view of the established usage of the legislature as to entries in the journals. It knew that the practice had always been to consider similar matters entered on the journals when there was made a simple identifying reference. It knew, also, of the common usage to which we have referred; and it is fair to presume that it intended the same meaning. Otherwise it would have used some language which would indicate that a different entry was required from that which was habitually made in the journals. In addition to this we have the authority of both houses, which have declared the proposal duly made, and the amendment duly adopted; of the executive, who submitted it to the people; and whatever force there be in the fact that

the people acted upon and ratified it. This is sufficient to uphold the amendment, unless we can see from the context that something else was meant. We perceive no such intent. The evident purpose of the entire provision doubtless was to preserve a record of the vote. As a majority controls the journals, it may have been apprehended that it might be made to appear that the proposal was duly passed although lacking the requisite majority, and so it was required that the yeas and nays be entered. But, however this may be, the principal thing is the record of the yeas and nays, and this purpose is accomplished as perfectly by the entry made as it would be by any other.

As to preserving the identity of the amendment proposed, there is no greater difficulty in this matter than with reference to bills. That is left to be provided for by the legislature.

The parties agree that, in case the amendment was properly adopted, the judgment should be affirmed. It is stipulated that in the proceedings there was full compliance both with the street laws prior to 1880 and with the law of 1885. It is therefore not necessary to decide which law is in force. That question is really stipulated out of the case. Judgment affirmed.

We concur: MORRISON, C. J.; PATERSON, J.; MCFARLAND, J.; MCKINSTRY, J.; SHARPSTEIN, J.

THORNTON, J. I dissent.

(72 Cal. 10)

Ex parte Mon Fook. (No. 20,276.)

(Supreme Court of California. February 4, 1887.)

CRIMINAL LAW—SENTENCE—HOUSE OF CORRECTION OR STATE PRISON—ACT CAL. OF APRIL 1, 1878.

A defendant who pleads guilty of burglary, and confesses to prior convictions thereof, cannot be sentenced to the house of correction, under California act of April 1, 1878, providing that no person who may be sentenced to the state prison shall be sentenced to the house of correction, if he has been once before convicted of felony, and that the fact of previous conviction may be found by the court, upon evidence introduced at the time of sentence. TEMPLE, J., dissenting.

In bank. On *habeas corpus*.

Z. T. Cason, for petitioner. Joseph Kirk, for respondent.

PATERSON, J. On May 22, 1885, the petitioner, after due proceedings had in the superior court of the city and county of San Francisco, pleaded guilty of burglary, and confessed the charge of two prior convictions of felony—burglary also—to be true. The court thereupon sentenced him to serve the term of four and one-half years in the house of correction.

The act of April 1, 1878, (St. 1877-78, p. 953,) provides:

"Sec. 3. All persons appearing for sentence in the police judge's court, the city criminal court, or the municipal criminal court, of the city and county of San Francisco, who might be sentenced to imprisonment in the county jail, or in the state prison, may, instead thereof, be, by the proper court, sentenced to imprisonment in the house of correction, in said city and county, subject, however, to the provisions of the next section; and no person shall be sentenced to imprisonment in the house of correction except under the provisions of this act.

"Sec. 4. No person shall be sentenced to imprisonment in the house of correction for a shorter or a longer term than that for which he might be sentenced in the county jail, or in the state prison, and in no case whatever for a shorter term than three months, nor for a longer term than three years. No person who might be sentenced to imprisonment in the state prison shall be sentenced to imprisonment in the house of correction, if he is more than twenty-five years of age, if he has once before been convicted of a felony, or

twice before convicted of petit larceny, nor unless, in the opinion of the court, imprisonment in the house of correction will be more for his interest than imprisonment in the state prison, and equally for the interest of the public. The fact of a previous conviction may be found by the court upon evidence introduced at the time of sentence." Applicable to superior court, *Ex parte Flood*, 64 Cal. 251.

Passing over the question as to the effect of an excessive sentence, and the question of the correctness of the decision in *Ex parte Bernert*, 62 Cal. 524, we think the judgment is void because the prisoner is not within any of the classes of criminals who may, by the terms of the statute, be committed to the house of correction. That institution, as its name indicates, is designed for the reformation of youthful criminals,—those who have not yet become hardened in crime; and, as we construe section 4 of the act, no one can be committed to the house of correction who is over 25 years of age, or "who has been once before convicted of a felony, or twice before convicted of petit larceny, nor unless, in the opinion of the court, imprisonment in the house of correction will be more for his interest than imprisonment in the state prison, and equally for the interest of the public." It was the intention of the legislature to provide a place where young offenders should not be brought into contact or association with veteran criminals.

It being now too late to enter a proper judgment in the court below, (*Ex parte Gilmore*, ante, 800,) it is ordered that the petitioner be discharged from custody.

We concur: MORRISON, C. J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

TEMPLE, J. I dissent.

(72 Cal. 1)

HOFFMAN v. REMNANT. (No. 9,835.)

(*Supreme Court of California. February 3, 1887.*)

1. EJECTMENT—DEFENSE OF PURCHASE FROM PLAINTIFF — FACTS NECESSARY TO CONSTITUTE.

An answer in ejectment, alleging that defendant had contracted with plaintiff for the purchase of the premises, and that he had made a partial payment, and been let into possession, and that plaintiff still retains the amount paid, but not alleging payment in full, or that the remaining purchase money was not yet due, does not show a defense.

2. SAME—CROSS-COMPLAINT—FAILURE OF TITLE—REFUSAL TO RETURN PAYMENTS.

A cross-complaint in ejectment averred a contract between plaintiff and defendant for the purchase by defendant of the premises sued for, the making of certain payments thereon by defendant, and that he had been let into possession; that, since the beginning of the action, he had discovered for the first time that plaintiff had no title to the premises, but that the title was in another person named; whereupon defendant offered to return the premises, and everything received by him under the contract, to plaintiff, and demanded back the money paid by him, but plaintiff refused to return it. Held, that the matter stated was not the proper subject of a cross-complaint, whether or not it would support some kind of a separate action.

In bank. Appeal from superior court, Santa Cruz county.

Ejectment. Plaintiff had judgment below.

Chas. B. Younger and J. M. Lesser, for Remnant, appellant. *Joseph H. Skirm and Warren Olney*, for Hoffman, respondent.

McFARLAND, J. The appellant, Remnant, who was defendant in the court below, appeals from a judgment rendered against him in an action of ejectment. The grounds upon which he relies for a reversal are that the court erred in sustaining a demurrer to that part of his answer which sets up a

"further and separate defense," and also in sustaining a demurrer to a cross-complaint filed by defendant.

1. In the "separate defense" defendant merely averred that plaintiff entered into a contract with defendant to convey to the latter the premises described in the complaint, upon the payment by defendant to plaintiff of the sum of \$3,410; that defendant paid \$1,750 of this money, and was let into possession of the premises; and "that the plaintiff has not paid or returned to this defendant said last-named sum of money, or any part thereof, but still retains the whole thereof." The complaint in this case is in the ordinary and proper form of a complaint in ejectment. An answer to such a complaint should contain some matter of denial, or averment constituting a defense—either legal or equitable—to the action. It would have been a good answer to have averred that the remaining purchase money was not yet due, or to have stated facts showing that it had been paid, and that defendant was thus entitled to possession under the contract, and to compel the execution of a conveyance; but it is impossible to conceive how the bare fact that plaintiff had not paid back to defendant the \$1,750 would constitute any defense whatever. There was no error, therefore, in sustaining the demurrer to this part of the answer.

2. The averments of the cross-complaint are, in brief, that on April 6, 1878, plaintiff represented to defendant that he was the owner in fee of the premises described in the complaint, and could convey them by a good and sufficient deed, free from incumbrances; that defendant was thereby induced to purchase, and did purchase, said premises from plaintiff for \$3,410; that defendant paid plaintiff \$1,750 as part of the purchase price, and then, on said sixth day of April, 1878, plaintiff and the defendant entered into a written contract, by which defendant promised to pay plaintiff \$1,660 on or before the first day of July, 1879, with interest, and plaintiff agreed that, upon the payment of said money, he would execute to defendant a good and sufficient deed of said premises; that upon the making of said contract plaintiff delivered possession of the premises to defendant, who has been in possession ever since; that in October, 1878, he paid plaintiff \$49.80, as interest on the unpaid purchase money, and a like sum as such interest in January, 1879; that at the time of the making of said contract said plaintiff was not the owner in fee of said premises, and was not such owner at any time afterwards, and could not have made a good and sufficient deed of the same; that in 1872 one Imus was the owner in fee of said premises, and in that year executed a mortgage thereon to a third party; that he had since died, and that at the time of the execution of the said contract a suit to foreclose said mortgage was pending against the heirs and legal representatives of said Imus; and that defendant did not discover that plaintiff was not the owner of said premises, and did not know of the existence of said mortgage, and the pendency of the proceedings to foreclose the same, until after the commencement of the present action, which was June 10, 1881. The cross-complaint then avers that immediately after this discovery "this defendant did rescind the said contract," and offered to restore to plaintiff everything of value which he had received under it, and tendered it to plaintiff for cancellation, and offered to surrender possession of the premises, and demanded the return of the \$1,750, and also the interest paid on the unpaid purchase money; but that plaintiff refused, and still refuses and fails, to return said money, or any part thereof. The prayer is that defendant have judgment against plaintiff for \$1,849.60, with interest from January 5, 1879.

It is clear that the demurrer to this cross-complaint was properly sustained. It presents no equitable defense to the action, and certainly no legal one. It is not necessary to inquire whether or not the facts averred would support some kind of an independent action. To allow a defendant, in an ordinary action of ejectment, to set up matters which do not constitute a defense, but

are intended merely as the foundation for a money judgment against plaintiff, would be to sanction something unknown to the principles and rules of pleading and practice.

Appellant's counsel argues that the act of bringing the suit by plaintiff was itself a rescission by him of the contract. If that extreme view of the matter could possibly be held correct, it is difficult to see how it would give the cross-complaint any better standing as a pleading to a complaint in ejectment. But if appellant was in possession under the contract, as the argument here assumes, then, upon appellant's failure to perform his part of it, the bringing of the ejectment suit was not in rescission, but in pursuance, of the contract.

We think that there was no error in sustaining the demurrer.

The court made a number of findings entirely outside the issues, but there were sufficient findings to show plaintiff's ownership and right of possession. Judgment affirmed.

We concur: THORNTON, J.; MCKINSTRY, J.; TEMPLE, J.; SHARPSTEIN, J.

(14 Or. 404)

DESPAIN and another v. CROW and others.

(*Supreme Court of Oregon. January 18, 1887.*)

GARNISHMENT—WHO IS LIABLE—JUDGMENT DEBTOR.

The defendant in a judgment cannot be garnished by a creditor of the plaintiff therein; following *Norton v. Winter*, 1 Or. 47.

Appeal from circuit court, Umatilla county.

STRAHAN, J. This is an agreed case under the statute, and its sole purpose is to determine whether or not the defendant in a judgment can be garnished by a creditor of the plaintiff therein. The case has been argued with much learning and research by counsel on each side, and our attention has been drawn to the conflicting authorities, but the question was considered and settled at an early period of our judicial history, and we decline to reopen it. *Norton v. Winter*, 1 Or. 47. Courts will sometimes overrule their own decisions, where they plainly appear to have been wrong in principle, or where a correct principle has been improperly applied, but not where the authorities are simply in conflict. In such case *stare decisis* applies with peculiar force.

Let the decree be affirmed.

(14 Or. 397)

MORROW Co. v. HENDRYX, Treasurer.

(*Supreme Court of Oregon. January 18, 1887.*)

1. SCHOOLS AND SCHOOL-DISTRICTS—CLAIMS OF UMATILLA AND MORROW COUNTIES, OREGON, TO TAX OF 1884—CIVIL CODE OR. § 583.

Under section 583, Civil Code Or., providing that, in order that *mandamus* may issue, the act sought to be enforced shall be "an act which the law specially enjoins as a duty resulting from an office, trust, or station," *mandamus* will not lie to compel the county treasurer of Umatilla county, out of which Morrow county was created by Sess. Acts 1885, p. 239, to pay to the latter any portion of the school taxes of 1884, collected by Umatilla county, such payment not being required by any statute of the state.

2. SAME—ACT CREATING MORROW COUNTY—BOARD APPOINTED THEREBY—JURISDICTION TO APPORTION SCHOOL TAXES—SESS. ACTS OR. 1885, PAGE 239, § 10.

Section 10, Sess. Acts Or. 1885, p. 239, creating a board to determine the amount of the indebtedness of Umatilla county, Oregon, over and above the value of the public property of the county, and to determine the proportion of such net indebtedness that should be assumed by Morrow county, created out of Umatilla county by that act, gave no authority to such board to determine the respective rights of the two counties to the school taxes collected by Umatilla county for 1884.

Appeal from circuit court, Umatilla county.

STRAHAN, J. On the application of Morrow county, an alternative writ of *mandamus* was issued out of the circuit court of Umatilla county, directed to the appellant, as treasurer of Umatilla county. The command of the writ is that he pay out of the school moneys in the treasury of Umatilla county, Oregon, unto the treasurer of the county of Morrow, in said state, the sum of \$2,149.32, and the further sum of \$690.20, or that he appear on a day named, and show cause why he has not done so.

Section 583 of the Civil Code prescribes in what cases the writ of *mandamus* may issue. It is as follows: "It may be issued to any inferior court, corporation, board, *officer*, or person, to compel the performance of an act which the law specially enjoins as a duty, resulting from an office, trust, or station. But though the writ may require such court, corporation, board, officer, or person to exercise its or his judgment, or proceed to the discharge of any of his or its functions, it shall not control judicial discretion. The writ shall not be issued in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law."

At the regular session of the legislative assembly, in 1885, an act was passed entitled "An act to create the county of Morrow, and to fix the salaries of county judge and treasurer." Sess. Acts 1885, p. 239. After sundry provisions creating the county of Morrow, fixing its boundary, locating the county-seat temporarily at Heppner, providing for the representation of such new county in the senate and house, section 5 of said act provides: "The county clerk of Umatilla county shall send to the county clerk of Morrow county, within thirty days after this act becomes a law, a certified transcript of all delinquent taxes from the assessment roll of 1884 that were assessed within the limits of Morrow county; also a certified transcript of the assessment of persons and property within the limits of Morrow county for 1884; and the said taxes shall be payable to the proper officer of Morrow county. The county treasurer of Morrow county shall, out of the first money collected for taxes, pay over to the treasurer of Umatilla county the full amount of the state tax on the assessment roll of 1884, due from citizens of Morrow county. * * *

Among other things, section 10 of said act contains the following: "The county of Morrow, within one year after its organization by the appointment of its officers, as hereinbefore provided, shall assume and pay to the county of Umatilla a just proportion of the indebtedness of Umatilla county, after deducting therefrom the value of the public property of Umatilla county; and J. L. Fuller, S. Rothchild, and J. H. Kunzie, of Umatilla county, are hereby appointed a board to determine the value of such property, and the amount of indebtedness to be assumed by said Morrow county. Said persons shall meet at the county-seat of Umatilla county, on the first day of April, 1885, or within ten days thereafter, and take and subscribe an oath before the clerk of Umatilla county faithfully to discharge their duties. Thereupon said board shall proceed with said work, and, when completed, file a report of their conclusions in duplicate with the clerks of Umatilla and Morrow counties. Within thirty days of the filing of such report in Morrow county, either county may appeal from the decision of said board to the circuit court for Umatilla county, by serving a notice of appeal upon the clerk of the other county. Upon perfecting the issues in said circuit court, either county may demand a change of venue to any other county in the Sixth judicial district of the state of Oregon, which may be agreed upon by said counties, or, in the event of their disagreement, which may be designated by the judge of said district. The trial may be by a jury, and the judgment rendered may be enforced as other judgments against counties. If the county appealing fails to recover a more favorable judgment than the finding of said board, by at least five hundred dollars, it shall pay the costs of the appeal. If no appeal be

taken by either county within the thirty days above provided, the finding of said board shall be conclusive. * * * The remainder of the section relates to the compensation of the board, and how the same shall be paid.

The report of the conclusions of said board is as follows:

"To the Honorable County Courts of Umatilla and Morrow Counties: The undersigned, a board of commissioners created by house bill No. 4, entitled 'An act to create the county of Morrow, and fix salaries,' etc., approved February 16, 1885, and under said act we were called upon to adjust and determine the indebtedness and the value of property in Umatilla county, and to be assumed by said Morrow county, have performed that duty, and submit our findings herewith:

"Total value of all property and assets, outstanding taxes, etc. -	\$181,636 78
Total liabilities of county,	187,168 14

Leaving a net indebtedness of	\$5,531 36
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The proportion of this to be assumed by Morrow county this board finds to be	\$1,149 30
Unpaid taxes, 1884, turned over to Morrow county,	11,567 08
Less school taxes due Morrow county, out of tax levy of 1884,	4,077 17

Leaving a net balance due Umatilla county from Morrow county of	\$8,639 21
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"A detailed statement will be found annexed.

"The board also find that there is a balance of county school money in the treasury, derived from fines, forfeitures, etc., to a portion of which Morrow county would be justly entitled; but the county school superintendent and treasurer find no authority in the laws governing disbursements of school funds authorizing them to pay such money to Morrow county. This board finds that a just proportion due Morrow county from said school fund would be \$690.20, and would recommend that the honorable county court of Umatilla county instruct the treasurer of said county to pay the amount to Morrow county. The minutes of the proceedings of this board, from day to day, is also submitted herewith.

"In compliance with an order of the honorable county courts of Umatilla and Morrow counties, issued at their April term of 1885, this board, believing that their work would be expedited by the assistance of an expert book-keeper, engaged one from Portland, who was highly recommended. Said expert, on examination of the county books and records, stated that, to make an exhibit to the correctness of which he could certify, would cost \$6,000 to \$8,000. This board, believing that such an investigation and exhibit would not justify the expense therefor, discharged him, to do the work ourselves.

"We also submit herewith various bills, amounting to \$456.15, all of which we find just and reasonable, for your approval, and order of payment of half each, by each of your honorable courts, to whom all of this we respectfully submit.

[Signed]

"S. ROTCHILD,
"J. H. KUNZIE,
"J. L. FULLER,
"Board of Commissioners.

"Pendleton, July 10, 1885."

The only real controversy that is now presented by this record is as to the item of \$4,077.17, for which Morrow county seems to have received a credit as school taxes due it out of the tax levy of 1884. An examination of this ques-

tion will necessarily require us to consider another item of the report, because the two are so connected together that they cannot be treated of separately.

But before proceeding to a particular examination of this report, it might be well to advert to some of the more general principles of law applicable to the subject.

Windham v. Portland, 4 Mass. 389, is an early and leading case. It is there said: "If a part of its [an incorporated town] territory and inhabitants are separated from it, by annexation to another, or by the erection of a new corporation, the former corporation still retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties, unless some new provision should be made by the act authorizing the separation."

So, in *Laramie Co. v. Albany Co.*, 92 U. S. 307, it is said: " * * * The constant practice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such a manner as to them may seem reasonable and equitable."

The same doctrine is maintained in *Canova v. Commissioners Bradford Co.*, 18 Fla. 512; *Trinity Co. v. Polk Co.*, 58 Tex. 821; *Pulaski Co. v. County Judge Saline Co.*, 37 Ark. 389; *Supervisors Chickasaw Co. v. Supervisors Sumner Co.*, 58 Miss. 619; *Eagle v. Beard*, 33 Ark. 497; *State v. McFadden*, 23 Minn. 40; *Askev v. Hale Co.*, 54 Ala. 639; *Commissioners Currituck Co. v. Commissioners Dare Co.*, 79 N. C. 565; *Commissioners Sedgwick Co. v. Bunker*, 16 Kan. 498.

It is therefore only necessary to determine what provision the legislature has made in order to ascertain what are the rights and liabilities of the two counties. All there is in the act which materially affects the question of taxes is in section 5. By that section the clerk of Umatilla county is required, within 30 days after the act became a law, to send to the county clerk of Morrow county—*First*, a certified transcript of all delinquent taxes from the assessment roll of 1884 that were assessed within the limits of Morrow county; and, *second*, a certified transcript of the assessment of persons and property within the limits of Morrow county for 1884. It is expressly provided that said taxes shall be payable to the proper officer of Morrow county. In addition to this, it is further provided in said section that the county treasurer of Morrow county shall, out of the first money collected for taxes, pay over to the treasurer of Umatilla county *the full amount of state tax* on the assessment roll of 1884, due from the citizens of Morrow county. The reason and justice of this latter provision are apparent. By the assessment and return of taxes for the year 1884, Umatilla county had become liable to the state for the entire amount of state taxes on the roll for that year, and this part of the act simply provides for the reimbursement of said county to the extent of the *state taxes* assessed against persons resident in Morrow county. This is the full extent of the liability imposed by the act on Morrow county in relation to the taxes of 1884. The amount to be paid to Umatilla county, under this part of the act, may be ascertained by an examination of the assessment roll, and was not referred to the board created by section 10, and they had nothing whatever to do with it. The item of \$11,567.08, from which is deducted the other item of \$4,077.17, were both placed in the report of the board under a misapprehension of said board as to the extent of their powers under the act, as well as the true construction of section 5, and therefore the report must be construed as if these items had not been included therein. They are separate and severable from the residue of the report, and their exclusion will not materially affect the other work of the board, or, at least, the remaining part of the report in no manner depends on these items. Section 10 of the act clearly

and concisely defines the whole power and authority of the board. It is, in substance, to determine what would be a just proportion of the indebtedness of Umatilla county which Morrow is required to assume and pay, after deducting therefrom the value of the public property of Umatilla county.

If we have not entirely misunderstood this report, the board has assumed that, by the terms of the act in question, Umatilla county was entitled to receive back from Morrow the entire amount of taxes for the year 1884 which were certified to Morrow county under section 5. If this is the true construction of the report, it is based on a misapprehension on the part of the board as to the extent of Morrow county's rights and liabilities under the act. If Morrow county has not yet paid to Umatilla county the amount of *state taxes* on the roll of 1884, assessed against persons resident in that county, she can still do so; but this report is not to be taken as the measure of her liability in this respect.

As to the school taxes directly involved here, there are not sufficient facts before us to enable us to determine the matter on this record. If Umatilla county has in her treasury school moneys derived from taxes which of right belong to Morrow county, the matter must be litigated in some other appropriate proceeding, or determined in some other way. The facts upon which such right is supposed to depend do not appear in this record, and we could not render a judgment which would determine the final rights of the counties interested without doing a possible injustice to one or the other. We do not find that the payment of this money by the appellant to the treasurer of Morrow county is "an act which the law specially enjoins as a duty resulting from an office, trust, or station." Our attention has not been called to any statute which creates or imposes the duty, and we know of none. We therefore reverse the judgment of the court below, and remand the cause, with directions to dismiss the writ.

(All concur.)

(14 Or. 410)

NEILL v. WILSON.

(*Supreme Court of Oregon. January 21, 1887.*)

1. PILOTS -- COLUMBIA RIVER -- BOUNDARY BETWEEN OREGON AND WASHINGTON TERRITORY--ACT OF CONGRESS, MARCH 2, 1837.

Under the act of congress of March 2, 1837, providing that it shall be lawful for the master or commander of any vessel, coming into or going out of any port situate upon the waters which are the boundary between two states, to employ any pilot, duly licensed or authorized by the laws of either of the states bounded on said waters, to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding, the master of any vessel, whether bound in or out of the Columbia river, may take a pilot from either Oregon or Washington Territory, without any reference to fact of which pilot offered his services first, or whether either of them had served as pilot on the vessel before. Following *The Abercorn*, 26 Fed. Rep. 87.

2. SAME--"STATES" INCLUDES "TERRITORIES"--ACT OF CONGRESS, MARCH 2, 1837.

The word "states," in the act of congress of March 2, 1837, regulating the employment of pilots on water forming the boundary between two "states," should be construed to include a territory of the United States.

Appeal from circuit court, Clatsop county.

C. W. Fulton, for Neill, appellant. *T. R. McBride and Noland & Dorris*, for Wilson, respondent.

LORD, C. J. This is an appeal from a judgment on demurrer to the plaintiff's complaint. The action was brought to recover the sum of \$161 for half pilotage. In substance, the facts alleged are that the plaintiff is a duly-licensed Oregon pilot, attached to the pilot schooner Governor Moody; that the defendant is the master of the British bark Clan Ferguson; that on the seventeenth day of January, 1886, the plaintiff piloted said bark over the bar

of the Columbia river, into Astoria; that on the eleventh day of March, 1886, the said bark being then on her outward bound voyage, the plaintiff tendered and offered his service as a pilot to conduct and navigate said bark from the port of Astoria, over the bar and bar-pilotage ground, to the open sea, and that defendant refused the services of plaintiff as such pilot, etc.; that upon such refusal, that plaintiff demanded his fees, amounting to the sum of \$161; that, at the time the plaintiff offered his services, the defendant had not engaged a pilot to navigate said bark to the open sea; that the defendant has engaged another pilot, Charles Johnson, licensed by the board of pilot commissioners of Washington Territory, to pilot said bark from Astoria, over the bar-pilotage ground, and to the open sea.

By the act of 1882 it is provided that "a pilot who brings a vessel in over the Columbia river bar is entitled to pilot her to the sea when next she leaves the river: * * * but, if the master or owner of such vessel desires another pilot, the board may provide for allowing him to take another pilot from the same boat." Section 33, p. 21, Sess. Laws 1882. By section 30 of the same act it is also provided that, if such pilot's offer of service is refused by the master, he shall pay him half pilotage." Id. 20.

Upon this state of facts, under these provisions of the Oregon pilot act, it is claimed that the tender of the plaintiff's service as such pilot, and the refusal by the defendant to accept the same, a right of action accrued to the plaintiff for half pilotage. To support this proposition, two authorities are mainly relied upon, viz.: *The William Law*, 14 Fed. Rep. 793, and *The Glenearne*, 7 Fed. Rep. 606; but the facts in neither are parallel with the facts in hand.

In the first, it was said by the court that it had been decided that an offer to pilot a vessel, with a present capacity to perform the duty, which is refused by the vessel, is equivalent in point of law to the actual performance of the service, and entitles the pilot to the same compensation as if he had actually performed it. *Ex parte McNiel*, 18 Wall. 236; *Steam-ship Co. v. Joliffe*, 2 Wall. 450; *Cooley v. Board of Wardens*, 12 How. 299; *The California*, 1 Sawy. 463. But the court is careful to add—repeat—that "it will be observed that, in the course of this vessel from the place where she was spoken by the libelant to the break-water, she passed over no other territory than that within the jurisdiction of the state of Delaware."

In the second case a part of the pilotage ground included the navigation of the Willamette river to Portland, which was exclusively within the jurisdiction of the state of Oregon. DEADY, J., said: "When the Glenearne was at Astoria, bound up the Columbia river, she was on pilotage ground, subject to the laws of both Oregon and Washington, and might, so far, take a pilot from either, after declining the services of one from the other, without becoming liable for half pilotage to the latter; and, so far as the navigation of the Columbia river is concerned, this is a sufficient answer to the libelant's claim, independent of the fact that the Washington Territory pilot first offered his services. But the Glenearne was then bound on a voyage to Portland, which involved the navigation of the Willamette river for a distance of twelve miles." And this portion of the pilotage ground, like in the case of *The William Law*, *supra*, being within the jurisdiction of the state of Oregon, no other than a duly-licensed pilot of the state was qualified to act, because the act of congress of March 2, 1837, did not apply to it. Hence the result reached in these cases.

But here the bark was outward bound, and in waters that are the boundary between Oregon and Washington Territory, and, consequently, on pilotage ground subject to the laws of both, and to which the act of congress of March 2, 1837, does apply. That act provides "that it shall be lawful for the master or commander of any vessel coming into or going out of any port situate upon the waters which are the boundary between two states, to em-

ploy any pilot duly licensed or authorized by the laws of either of the states bounded on said waters to pilot said vessel to or from said port, any law, usage, or custom to the contrary notwithstanding." But, to avoid the effect of this, it is argued that the act only refers to waivers which are the boundary between two *states*, and not between a state and territory, to which it can have no application, within the meaning of the word as used in the act, or as expounded by the supreme court of the United States. A "state," it is said, is not a "territory," within the purview of the constitution, or so understood in ordinary acceptation, or by judicial construction of any court of last resort; that unless the word "state" is synonymous with, and imports the same thing as "territory," it cannot have the same meaning and effect, without construing the statute beyond the intention of the legislature, which it is not the province of the court to do. The decisions cited in support of this view were constructions of the judiciary act, under that clause of the constitution which provides that "the judicial power shall extend to all cases, in law and equity, * * * between citizens of different states," (section 2, art. 3;) and in which it was held that a territory was not a "state, in the sense in which the term is used in the constitution," for the purpose of conferring jurisdiction on such courts in a case between a citizen of a territory and a citizen of a state. *Corporation of New Orleans v. Winter*, 1 Wheat. 92; *Hepburn v. Elzey*, 2 Cranch, 445. But the cases are not alike. It is well known that the act of congress of 1837, *supra*, was enacted to neutralize or remedy the effect of conflicting laws of adjoining jurisdictions or states, on navigable waters which was their common boundary. Such being the object of the law, it matters not whether it be a state or territory. If it be authorized or allowed to legislate upon the subject-matter out of which the conflict arose, and which the act of congress was intended to remedy, it is a "state" in that sense, and within the purview of the act. Now, the Columbia river is the common boundary between Oregon and Washington Territory. In the absence of congressional legislation to the contrary, both are permitted to pass pilotage laws for the navigation of their common boundary. The state and the territory, or the two jurisdictions, are therefore capable of producing that state of facts—the mischief—which the act of congress was designed to remedy; and, if this be so, the act must apply to one as much as the other.

In *The Panama*, 1 Deady, 33, it is said: "Whether the word 'state,' as used in this act, should be construed so as to include a territory, is a question not free from doubt. The case is within the *mischief* intended to be remedied by the act, and it seems to me might be held to come within its spirit and purview, without any violation of principle. I do not think it comes within the reasoning or considerations that controlled the court in *Hepburn v. Elzey*, 2 Cranch, 445, in which it was held, under the judiciary act giving the national courts jurisdiction of controversies between citizens of different states, that a citizen of the District of Columbia could not sue in such court as a citizen of a state, because such district was not a member of the Union." And, later, the same view was more elaborately expressed in *The Ullock*, 19 Fed. Rep. 207, Mr. Justice DEADY saying: "But the special reason for this narrow construction of the word 'state' does not apply to this case. Congress had the power to extend the act of 1837 over a water constituting the boundary between the state of Oregon and the territory of Washington. The language actually used in the act may be reasonably construed so as to accomplish this object, and the case is within the *mischief* intended to be remedied thereby. The master of the Ullock being then entitled, upon this construction of the law, to take a pilot from either Oregon or Washington, without reference to which made the first offer of his services, the libelant is not entitled to recover as for an offer and refusal of pilot services, even though such offer was duly made."

To my mind, the reasoning of these authorities is incontrovertible, and it

would be a work of supererogation to further elaborate it. It follows, then, that the act of congress is applicable to the pilotage ground on the Columbia river, which is the boundary between the state of Oregon and Washington Territory; and, this being so, we cannot better express our own view than by adopting the language of Mr. Justice DEADY in the late case of *The Abercorn*, 26 Fed. Rep. 877, which involved the identical question, upon the same state of facts, as presented here: "As between the Oregon pilots, doubtless, the regulations compelling the master of a vessel to take the pilot out of the river that brought him in is valid and binding; but the state cannot compel a vessel in the Columbia river to take an Oregon pilot under any circumstances, or to pay him half or any pilotage, if the master prefers to and does take a Washington pilot. The matter is too plain for argument, and only needs to be stated to be understood. The act of congress is paramount, and no regulation of the state can impair or limit its operation. As applied to the facts and circumstances of this case, it declares, in effect, that the master of any vessel, whether bound in or out of the Columbia river, may take a pilot from either Oregon or Washington, without any reference to the fact of which offered his services first, or whether either of them had served as pilot on the vessel before." See, also, *The South Cambria*, 27 Fed. Rep. 525.

Such being the meaning of the act, and the construction given to it, we cannot do otherwise than affirm the judgment.

(14 Or. 417)

McDEARMID v. FOSTER and others.

(*Supreme Court of Oregon. January 24, 1886.*)

1. LIEN—FARM LABORER—CROP—OREGON ACT OF OCTOBER 21, 1878.

The Oregon act, approved October 21, 1878, providing that "any person who shall make, alter, repair, or bestow labor on any article of personal property, at the request of the owner or the lawful possessor thereof, shall have a lien upon such property so made, altered, or repaired, or upon which labor has been bestowed, for his just and reasonable charges for the labor he has performed, and the materials he has furnished, and such person may hold and retain possession of the same until such just and reasonable charges shall be paid," does not give a lien to an employee of a farmer upon a crop which the employee has harvested.

2. SAME—SPECIAL CONTRACT—ACTUAL POSSESSION.

A laborer who has been employed by a farmer to harvest a crop is not entitled to a lien upon it, for the value of his work and services, in the absence of a special contract creating it, to be followed by an actual and physical change of possession in the nature of a pledge.

Appeal from circuit court, Umatilla county.

L. B. Cox, for appellants, Foster and others. *G. W. Walker*, for respondent, McDearmid.

THAYER, J. The respondent commenced an action in the court below against the appellants, to recover the possession of 206 sacks of wheat, containing about 425 bushels, marked "J. R. F. & Co., P.", alleged to have been wrongfully taken and detained from him, and in which he had a special property to the extent of \$106, which was less than the value of the wheat so taken. He also claimed \$20 as damages for the taking and detention of the said wheat.

The appellants denied all the material allegations of the complaint, and set forth in their answer the following new matter of defense: "And, further answering the complaint, defendant alleges that the property mentioned in the complaint was formerly a growing crop of wheat owned by one William Burden; that the only claim of a special property which might have been made therein or thereto by the plaintiff is based on a pretended lien claimed by plaintiff for his services in heading the said crop; that the value of said wheat is only the sum of \$225, or thereabouts; that on the seventh day of November, 1884, said William Burden was indebted to this defendant and

one J. H. Kunzie, then partners, doing business under the firm name of John R. Foster & Co., in the sum of \$628.16, and on said day, in order to secure said indebtedness, with interest thereon at the rate of ten per cent. per annum, said William Burden executed to this defendant and said J. H. Kunzie, as partners, a chattel mortgage on said property, which mortgage was by them filed on the tenth day of November, 1884, in the office of the county clerk of Umatilla county, state of Oregon, and has ever since remained there on file, and wholly unsatisfied, except as hereinafter stated; that this defendant has been, since the first day of March, 1885, the owner of the said chattel mortgage, and of the debt thereby secured; that on the sixteenth day of September, 1885, the said William Burden delivered possession of the mortgaged property aforesaid to this defendant under said mortgage, and defendant took and disposed of the same, and applied the proceeds of the sale thereof upon his debt aforesaid."

The respondent, in his reply to the said matter, admitted that the property mentioned in the complaint was formerly a growing crop of wheat owned by William Burden, and that his special property therein was based upon a lien for work and labor bestowed on said crop, in heading the same, but denied that such lien was a pretended one; admitted the chattel mortgage upon the crop, but denied that said Burden delivered the possession of the mortgaged property to the defendant under the mortgage, or that the latter disposed of the property, or applied the proceeds upon any debt. The respondent also set out in his reply the following matter: "And, further replying to the answer, plaintiff alleges that the conditions of said mortgage were not broken until long after the seizure of said property by defendant, on the sixteenth day of September, 1885; that said conditions were broken on the eighth day of November, 1885, and not before; that said mortgage provided that, in case its conditions were broken, it might be foreclosed by giving four weeks' notice, published in a newspaper of Umatilla county, of the time and place of said sale, and by selling at public auction; that said mortgage was not foreclosed in the manner therein provided, or in any manner, or at all; that no notice whatever was ever given, in any manner, of the sale of said property; that no sale of said property under said mortgage ever took place; that said mortgage was filed for record on the tenth day of November, 1884, in the clerk's office of said county; and that said mortgage has not been removed in any manner; that the lien created by said mortgage during its existence was inferior to and second to the said lien of this plaintiff for said work and labor performed in heading said crop of wheat; that defendant had actual notice of the existence of plaintiff's said lien, for work and labor so performed, three days prior to the alleged delivery of said wheat crop, on the sixteenth day of September, 1885, to said defendant, by said Burden; that, at the time of the performing of said work and labor, defendant, by his agent, was present, and did not disclose the fact that he had any lien upon or interest in said crop of wheat; that on or about July 1, 1885, said defendant instructed said William Burden to employ persons to cut and harvest said wheat, and said Burden, being the owner of said grain, and in the lawful possession thereof, did employ this plaintiff to cut said grain; that the cutting and stacking of said wheat crop added to the value of said mortgaged property the full amount of this plaintiff's special property in said wheat, to-wit, one hundred and six dollars."

The case was tried by jury, who returned the following verdict:

"John McDearmid, Plaintiff, v. John R. Foster & Co., Defendants.

"We, the jury in the above-entitled cause, find for the plaintiff, and that the plaintiff is the owner of a special property to the following described personal property, to-wit: Two hundred and six sacks of wheat, containing about four hundred and twenty-five bushels, and marked 'J. R. F. & Co., P.' one hundred and fifty-three sacks of which wheat was threshed about the second

day of October, 1885, from wheat-stacks standing on the east half of section 11, township four north, range thirty east, Willamette meridian, in Umatilla county, Oregon; and fifty-three sacks of which wheat was, about the second day of October, 1885, threshed from wheat-stacks standing on the north-west quarter of sec. thirty-four, township five north, range thirty east, Willamette meridian,—all in Umatilla county, Oregon; that said special property is and was of the value of \$106, and that plaintiff is entitled to the immediate possession of said property.

W. F. HAMILTON, Foreman."

The following questions, in the way of special verdict, were also submitted for the jury to answer: "(1) Was any portion of the grain in controversy within Umatilla county at the time of the filing of this complaint, October 12, 1885? No. (2) Was the plaintiff in continuous possession of the grain in controversy, from the date of the performance of his work upon it, down to the time when John R. Foster took possession of it? Yes. (3) Was the property in question wrongfully taken by defendant from plaintiff in Umatilla county, Oregon? Yes. (4) Was the grain in controversy in Umatilla county, Oregon, and in possession of defendant at the time demand was made on defendant to return the same to the plaintiff? Yes."

On this verdict a judgment was entered in favor of plaintiff for the return of said property, or, in case return thereof cannot be had, for the value of plaintiff's special property therein, to-wit, \$106, and costs; from which judgment this appeal is taken.

The respondent offered himself as a witness in his own behalf upon the trial, and, among other things, testified to the following: "I was in possession of the grain from about the twelfth of August, 1885, to about the first or second of October, 1885. I headed the grain. Did it at William Burden's instance. Burden was in possession of the grain. He sowed it. I headed and stacked it. * * * The grain was all stacked when I finished heading. I never delivered possession of the grain to any person. I went back in about two weeks to see if it was all right, and passed by the grain several times thereafter, and looked at it. I left a man in charge of the grain,—William Burden. I don't know the date of building the fence. I held possession of the grain all the time, from when I first commenced work there under my lien for the purpose of satisfying my claim." On cross-examination: "I did not do the work personally. Godfrey McAlister ran the header for me. I left the morning it commenced, and did not return until about two weeks after it was finished. When I passed by the grain, as testified in direct examination, I was going along the road to Cold Spring landing, sometimes on other business, and sometimes purposely to see if any one was interfering with the grain. The grain was stacked in two places. It was left standing, when stacked, without any inclosure around it, except such as inclosed the fields, until I put the fences around the stacks, as I have testified. The reason I put the fences up was I heard John R. Foster & Co. claimed the wheat, and were going to take it. I fenced it in order to hold possession. I had possession all the time. The wheat stood naked in the fields, on Burden's land. I did no other acts in regard to the grain than those to which I have testified. The fence was up before I knew John R. Foster would take the grain. Burden said to me, before harvest, he wanted the grain headed. No agreement was made about the heading, or payment therefor. I had no conversation with defendant in regard to the matter."

The appellants gave evidence tending to show that they were the owners of the said chattel mortgage; that on the sixteenth day of September, 1885, the said William Burden delivered possession of the wheat to them, as it stood in the stacks, under said mortgage; and that they took and disposed of it, and applied the proceeds of the sale thereof upon their alleged debt.

A great many questions were raised at the trial, and there are 36 assign-

ments of error in the notice of appeal. I have not observed how long it took to try the case, but should conclude, from the number of points made, that it must have taken a very long time. I shall not attempt to consider all the questions presented in the case. If I did, I should necessarily have to neglect other and more important business before this court.

The respondent claimed the lien upon the wheat by virtue of his having headed and stacked it. He claims that the act to provide for liens for laborers, etc., approved October 21, 1878, (Sess. Laws 1878, pp. 102, 103,) gave him a lien for his labor referred to. This the appellants' counsel denies, and that is the main question in the case. The act referred to provides that "any person who shall make, alter, repair, or bestow labor on any article of personal property, at the request of the owner or lawful possessor thereof, shall have a lien upon such property so made, altered, or repaired, or upon which labor has been bestowed, for his just and reasonable charges for the labor he has performed, and the material he has furnished; and such person may hold and retain possession of the same until such just and reasonable charges shall be paid." The word "lien" had, long prior to the passage of this statute, acquired a settled meaning. The term imported that the party was in possession of the thing he claimed to detain. It was a right to hold the property upon which payment was required to be made, either for the purchase price, or for some care, labor, or attention bestowed upon it. A large class of persons, at common law, were authorized to claim such right. It included all persons who, by their labor or skill, had imparted an additional value to the goods or chattels in their custody, though it was confined mainly to tradesmen. This statute has extended the right to others who before would not have been allowed to claim its benefits. Formerly, persons who pastured or fed "horses, cattle, hogs, sheep, or other live-stock," had no lien therefor. But although the statute has extended the common law in the respect referred to, and has specified a definite remedy for its enforcement, still, in the main, it is only declaratory of the common law, and must be interpreted in accordance with its principles. The lien under the statute is of the same nature it formerly was, and the same circumstances must combine to create it. There must be a possession of the thing, otherwise there cannot, without a special agreement to that effect, be any lien. The term "lien," as used in the statute, means the same it ever did,—the right to hold the thing until the payment of the reasonable charges for making, altering, repairing, or bestowing labor upon it. Possession of the article is a requisite essential.

Unless, therefore, the respondent had the actual possession of the wheat in question, he had no lien upon it for the labor he bestowed in heading and stacking it. He testified that he did have possession of the wheat, and the jury so found; but that was only a conclusion of law. Whether he had possession or not must depend upon the facts and circumstances surrounding the affair. According to his allegation and proofs, he was employed by the said William Burden, the proprietor of the crop, and premises upon which it was raised, to do the work referred to. This did not invest him with the possession of it any more than it would have invested him with the possession of Burden's cows, if the latter had employed him to milk them, or of his apples, fruit, and garden vegetables, if he had employed him to gather them. William Burden did not relinquish his own possession of the wheat because he employed the respondent to cut and stack it. It was left upon his premises, and his custody and control of it never ceased. The respondent had a sort of possession of the wheat, but it was wholly subordinate to that of Burden's. It was a possession in the nature of that of a servant over the goods of his master. There can be no doubt, it seems to me, upon this point, and that disposes of the case.

In *King v. Indian Orchard Canal Co.*, 11 Cush. 231, the latter party contracted with one Stearns to manufacture brick upon the company's land.

Stearns was to erect a brick factory, and furnish all the materials for the same, and complete it January 1, 1852. The company also stipulated that, during the continuance of the contract, Stearns might use sufficient ground, in some convenient place or places, for a brick-yard and lumber-yard, without charge, and also for one year after the expiration of the contract at a moderate rent. Stearns selected the place on the company's land for a brick-yard, and employed King, the plaintiff, to make and burn on said lot 2,000,000 of brick, on or before November 1, 1851; Stearns to furnish all the materials and apparatus necessary for making the same, and the plaintiff to perform the labor. In pursuance of this arrangement, the plaintiff finished on the sixth day of September, 1851, and his foreman remained on the yard, and continued to count out brick for Stearns until September 13, 1851, when he notified the latter that he had other work to do elsewhere, and could not count out any more, and that Stearns must do it for himself; that after that time Stearns' men did go on and count out the brick; that on the twentieth of September, 1851, Stearns sold to the company 1,594,876 of the brick so manufactured by the plaintiff, and the latter thereupon commenced an action against the company for their conversion, having before forbade the company from removing them until he was paid, and the latter having proceeded to take them after such notice. The question before the court was whether or not the plaintiff had a lien upon the brick for his charges in manufacturing them. BIGELOW, J., said: "Upon the undisputed facts of this case, it appears to us that the plaintiff fails to show any such possession of the property in question as will support the lien which he sets up in order to maintain this action. In the first place, he shows no right or interest in himself, either as owner, lessee, or tenant to the possession of the yard in which the brick was made and burned. * * * Upon these facts, it is manifest that the plaintiff never had any exclusive and unconditional possession of the property. It was, at most, only a mixed possession with Stearns, or, rather, a license to the plaintiff to enter upon and use the yard of Stearns' for the purpose of making and burning the brick. It is entirely clear that such a restricted and limited possession is insufficient to support a lien. It amounts to nothing more than the ordinary transaction of work done by one person in the manufacture of articles for another, upon the premises of the latter. The workman in such a case has, to a certain extent, possession of the property upon which his labor and services are expended; but it is a qualified and mixed possession, which can form no valid basis for a lien."

The principle here laid down is decisive of the present case, and the reasoning is unanswerable. There could, to my mind, be no greater absurdity than to hold that an employee of a farmer, to perform labor upon the farm, would be entitled to a lien for the work bestowed in cultivating the land, or harvesting the crop, in the absence of a special contract creating it, to be followed by an actual and physical change of possession in the nature of a pledge. The party who performs the labor or does the work in such a case has a qualified possession of the property upon which it is bestowed. The respondent had that character of possession of the wheat in this case, and it was that kind of a possession that the jury must have found he had, as they could not, under the pleadings and proofs, have found that he had the sole and exclusive possession of it, such as a person is required to have in order to claim a lien. The very fact that the wheat was stacked upon Burden's land, in the absence of such special agreement referred to, preclude the possibility of such a possession.

This view renders it entirely unnecessary to consider the other 35 grounds of error specified in the notice of appeal. The judgment of the circuit court must be reversed, and the complaint in the action dismissed.

(13 Or. 369)

SUKSENDORFF v. BIGHAM and others.

(Supreme Court of Oregon. April 26, 1886.)

1. ATTACHMENT—SUCCESSIVE ATTACHMENTS—AMENDMENT OF COMPLAINT—FORM OF ACTION.

If a complaint is plainly in tort, it cannot be amended to contract, so as to validate an attachment previously issued in the action; but where the complaint is so indefinite and uncertain that its real character cannot be determined, and the facts of the case are such as would sustain an action upon contract, the complaint can be amended so as to uphold the attachment, even against a subsequent attachment.

2. SAME—INCREASING AMOUNT CLAIMED.

In case of an amendment to a complaint, increasing the amount claimed, the lien of an attachment issued in the action will extend to the increased amount, even as against a subsequent attachment, if the amendment was necessitated by a merely clerical error in stating the amount in the original complaint; but where it did not clearly appear that the amendment was the result of such a clerical error, *held*, that the subsequent attachment should take precedence of the prior one, after applying upon the latter the amount originally claimed.

Appeal from circuit court, Multnomah county.

Suksdorff, plaintiff, and the Bank of Garfield County, defendant, appeal.

THAYER, J. The appellant Suksdorff commenced a suit in the court below against the respondents to have certain attachment proceedings taken by the latter against J. S. Danford and D. Ainsworth, partners under the name of Spokane County Bank, declared fraudulent and void, and to have attachment proceedings he had taken against said parties decreed to have priority over those of the respondents. It appears that the said Danford & Ainsworth, who evidently are a couple of knaves, engaged in the banking business at Spokane Falls, in Washington Territory, and received deposits, discounted notes, and dealt in exchange; that about the seventeenth day of September, 1884, they failed in business, having at the time a large number of promissory notes in the possession of the First National Bank of Portland, Oregon, which were held by the latter bank as collateral security for overdrafts drawn upon it by said Danford & Ainsworth; that on the twentieth day of September, 1884, the respondent Bigham commenced an action in the said circuit court against Danford & Ainsworth, to recover various claims on account of certain moneys deposited with them by divers parties which had been assigned to him, said Bigham, and thereupon filed an affidavit and undertaking for the purpose of procuring a writ of attachment to be issued in the said action, and which was thereupon issued by the clerk of said court, and under which said notes were attached; that subsequently to the commencement of the said action, and on the same day it was commenced, the respondents Webber & Foster also commenced an action in the said circuit court against said Danford & Ainsworth, on account of moneys deposited by the former with the latter, and also procured a writ of attachment to be issued in their action under which said notes were also attached. Subsequently, and on or about the sixth day of October, 1884, said appellant commenced an action against Danford & Ainsworth in said circuit court, on account of moneys he had deposited with them, and in which he sued out an attachment under which said notes were also attached. The suit was in the nature of a creditors' bill, and was brought on behalf of himself and all others in the same interest who would come in and contribute to the expense of maintaining it; and subsequently the Bank of Garfield County, and one F. Yandell, who had similar claims against said Danford & Ainsworth, and who had commenced actions thereon in said circuit court respectively, and sued out attachments therein, which were also levied upon said notes, were brought in and made defendants in said suit, and are also appellants herein. The attachments in favor of the appellants and Yandell were subsequent to those of the respondents.

The respondents filed answers in said suit, and, upon the hearing thereof,

the circuit court dismissed the complaint, and from the decree entered thereon this appeal is brought. The said Yandell did not, however, join in the appeal.

The appellants claim that the respondents were not entitled to have attachments issued in their said actions, for the reason that said actions were in tort, and not upon contract, and that their procurement of said attachment to be issued was a fraud on the appellants' rights in the premises.

No attachment against the property of another can legally issue in this state in any action except an action upon contract, expressed or implied, for the direct payment of money; and an attempt to procure the issuance of such process in any other kind of action is unauthorized, and the process, if issued, would be a nullity. But the respondents' counsel claims that their said actions were not in tort; that they were upon contract; and that they were entitled, under the law, to have attachments issued therein. Under the Civil Code of this state there are no forms of action in actions at law. It expressly abolishes them. Their nature and character must therefore be ascertained from an examination of the facts alleged constituting the cause.

The original complaint in Bigham's action is not a comely pleading, certainly. It would be difficult to describe its quality. The first count, which is more objectionable than any of the others, alleges, after the introductory part, the following: "And that on the twenty-sixth day of August, 1884, one John Bigham deposited with the defendants \$100, to be sent to Seaboard Bank, New York, and \$250 to be sent to First National Bank of Portland, Oregon; and that the defendants failed to send said sums to said Seaboard Bank of New York, and to the First National Bank of Portland, but converted the same to their own use, to plaintiff's damage in the sum of \$350." It is not easy to decipher what the pleader intended by this. The appellants' counsel insisted that his intention was to claim for a tortious conversion of the money, and that possibly may have been his idea. It is difficult to conclude what an attorney might mean when he employs such a jargon to express it. There is no possible way of reconciling his statement, if the several allegations contained in it are given the full meaning which each imports if separately considered. Depositing the money with a bank to be sent to another bank implies a purchase of exchange. No one would suppose for a moment that the deposit was made with the view that the identical money would be forwarded. The deposit itself would operate to transfer the particular money to the bank, and create the relation of debtor and creditor between it and the depositor; and the alleged breach, "that the defendants failed to send said sums," signifies that it was the *amount* of money deposited, and not the *same* money that was to be sent. The language is vague and very meager; but standing by itself, and in the light of its surroundings, I think it imports a contract to pay a sum of money in consideration of a deposit of the amount.

The pleader did not, however, stop there, but concluded with an allegation to the effect that the defendants converted the same to their own use, to plaintiff's damage of \$350. The appellants' counsel claims that this allegation was the gist of the action, and that it sounded in tort; but it will be noticed that the plaintiff in the action stated imperfectly a cause of action without this latter allegation. The statement that the money was deposited with the defendants therein as bankers, to be sent to the other banks, and that they failed to send said sums, contained a cause of action, though not stated with that definiteness and certainty required in a pleading. And the concluding portion of the complaint, "that there is now due plaintiffs from defendants the sum of \$2,737.83," is a makeweight towards establishing the claim as a debt. It may be argued, with much plausibility at least, that the action was for a wrongful conversion of the money; but I think it can be claimed with more reason that it was upon contract for the payment of the money. At all events, it cannot certainly be maintained that it was an ac-

tion for a tort any stronger than that it was an action upon contract. If the original complaint had confessedly been in tort, I do not think it could have been amended so as to have validated the attachment; but where a complaint is so indefinite and uncertain that its real character in that respect cannot be determined, and the facts of the case are such that an action upon contract for the payment of money will lie, I think it can be amended so as to uphold an attachment that has been issued in the action. The plaintiff's attorney in said action very prudently filed an amended complaint therein, which removed the objection considered, and I think, under the view expressed, that he had the right to so amend the pleading.

As to the complaint in Webber & Foster's action, there can be no question but that it was upon contract. I think that it is too obvious to require any consideration. But the appellants' counsel contends that, in the amendment of Bigham's complaint, the amount claimed in the original complaint, and which the attachment was sued out to secure, was enlarged from \$2,737.83 to \$3,087.88, and that it had the effect to render the attachment invalid, as against the appellants' attachment; and cites *Willis v. Crooker*, 1 Pick. 204; *Fairfield v. Baldwin*, 12 Pick. 388; *Page v. Jewett*, 46 N. H. 444. These cases seem to support the counsel's position; but it is claimed in later cases that there was an element of fraud connected with them, which influenced the determination of the court therein. *Felton v. Wadsworth*, 7 Cush. 587; *Mendes v. Freiters*, 16 Nev. 396.

I do not know how a court would be able to conclude that an amendment of the complaint, in an action in which an attachment had issued, would operate to dissolve the attachment, although a greater sum was demanded in the amended complaint than in the original, if the amendment were allowed in furtherance of justice. The attachment is only collateral to the action. The amendment, in such case, has no connection with it, and an exercise of the right cannot possibly mislead a subsequent attaching creditor to his injury, as his rights in the property attached are subject to such right of amendment. The Code provides that any pleading may be once amended by the party, of course without costs, and without prejudice to the proceedings already had, at any time before the period for answering shall expire, (Civil Code, § 97;) and thereafter, at certain stages in the action, such amendment may be allowed by the court, upon such terms as may be just and proper. It cannot be unlawful to exercise a privilege accorded by law, especially where it is secured and acted upon in good faith. If the amendment had been made for the purpose of obtaining an undue advantage over the appellants, it would present a different question, but there is not the slightest proof in the case that such was the object. On the contrary, it appears that it was in furtherance of justice, and that ought not to prejudice the said respondents. It is not shown from the record that the amendment included any new cause of action, or embraced any other claim than was contained in the original complaint; and I think it was virtually conceded on the argument that the discrepancy between the amounts claimed in the two resulted from an error of computation, made when the original complaint was drawn.

The appellants' counsel also claims that it is not shown in the amended complaint that the cause of action alleged therein had accrued when Bigham's action against Danford & Ainsworth, in which the attachment issued, was commenced. The allegations therein, concerning the \$100 item, are that on the fifteenth day of August, 1884, the defendants, in consideration of the sum of \$100 to them paid by John Bigham, by their bill of exchange, requested the Seaboard Bank of New York to pay said John Bigham \$100 at sight; also that the bill of exchange was presented to said Seaboard Bank on the fifteenth day of September, 1884, for acceptance, which was refused; that it was protested, and had not been paid. And a similar statement is set out in regard to the \$250 item. The counsel contends that these bills should

have been presented for payment instead of acceptance; that there are days of grace allowed on sight-bills, and therefore that the bills had not strictly been dishonored when the action was begun, on the twentieth day of September, 1884. This question was before the circuit court in said action. It appears from the record that a demurrer was interposed, on behalf of Danford & Ainsworth, to Bigham's complaint therein, which the circuit court overruled, and awarded a judgment in Bigham's favor, which was rendered long before the appellants commenced their said suit. In giving judgment in the said action, the circuit court necessarily determined that Danford & Ainsworth were liable upon said bills of exchange, and that decision cannot be reviewed in this proceeding. This court might impeach the judgment obtained in the said action for fraud, but it has no power to reverse it for error, except upon appeal therefrom. Consequently, whatever might be our view as to the correctness of the last point raised by the appellants' counsel, we cannot consider it, except so far as it bears upon the matter of fraud alleged in the complaint. The respondents' claims stood upon the same footing as the appellants', and, so far as I can discover, are equally meritorious. They all arose out of the defalcation and rascality of Danford & Ainsworth, and one was as much entitled to payment, so far as I can see, as the other. The respondents gained an advantage in the matter by being first in time, and a mere irregularity in their proceedings to enforce them is not evidence of fraud. I am not prepared to say that their cause of action did not mature when the bills of exchange were presented, and the drawees refused to accept them; but conceding that they should have been presented for payment, and the days of grace allowed, before protesting them, it is a mere technical objection, which a court of equity cannot consider in this kind of suit in the absence of actual fraud. I think the decree appealed from should be affirmed.

The chief justice concurs herein, except as to the effect of the amendment.

NOTE. This cause was reheard at October term, 1886, when it was held that, as it did not clearly appear that the difference between the sum claimed in the original complaint and that claimed in the amended complaint in *Bigham v. Danford & Ainsworth* was the result of a mere clerical error, the lien of the attachment levied in the cause would extend only to the sum claimed in the original complaint.

(18 Or. 523)

HOLLADAY v. HOLLADAY and others.

(Supreme Court of Oregon. June 17, 1886.)

USURY—FORFEITURE TO SCHOOL FUND—INTERVENTION BY STATE—INTEREST—TENDER.

Separate opinions of LORD, J., and WALDO, C. J. For original report, see 11 Pac. Rep. 260.

LORD, J. Nearly all the matters involved in this case are questions of fact. It was virtually conceded at the argument that the transaction out of which the suit arose was not an absolute sale, but more in the nature of a transfer of the property in trust, as a security for the payment of certain indebtedness admitted. In the result reached upon the facts I concur, and only add this explanation to say that, being satisfied from all the facts and circumstances that the transaction was not usurious, I do not deem it necessary to express any opinion as to the mode in which the state intervened, or to give any construction to the usury statute. As the state intervened upon the evidence of the defendant given in the main suit, and that evidence, in my judgment, being insufficient to sustain any proceeding for forfeiture under the usury laws, it is immaterial whether the mode of procedure adopted by the state is correct or incorrect, or what might be the proper construction of the statute. In this particular I shall therefore reserve my judgment.

WALDO, C. J., agreed with LORD, J., as to the matter of usury, and held also that the tender stopped the interest, and that it was not necessary, in a case like this, to keep the tender good by paying the money into court. *Van Husen v. Kanouse*, 13 Mich. 303.

(*26 Kan. 216*)

LOSCH v. PICKETT and another.

(*Supreme Court of Kansas. February 4, 1887.*)

1. PLEADING—CONSTRUCTION—PARTY BOUND BY.

A party should be bound by the allegations of his pleadings, deliberately made, and should not be allowed to obtain benefits from contradictory and inconsistent allegations therein, even if made in separate counts.

2. SAME—SPIRIT OF KANSAS CODE.

The spirit of our Civil Code is that a party shall state in his pleadings the real facts of his case, and not falsehoods or fictions. A thing cannot be true and untrue at the same time; and any pleading containing allegations made by the same party, both affirming and denying a particular thing, carries falsehood upon its face; and in such a case the court may consider as true such of the allegations as are against the pleader.

3. STATUTE OF LIMITATIONS—ACTION FOR FRAUD—CIVIL CODE KAN. § 18, SUBD. 8.

A cause of action for relief on the ground of fraud is barred by the two-years statute of limitations contained in section 18, subd. 3, of the Civil Code, if the fraud is discovered more than two years before the action is commenced; and *held*, that such statute is applicable to the present case.¹

4. LANDLORD AND TENANT—FAILURE TO PAY RENT—EVICTION—TAKING POSSESSION.

Where a person procures a lease of certain premises for the purpose of carrying on a business in connection with certain supposed mineral wells, and agrees to pay as rent therefor an amount greatly in excess of the rental value of the premises, and afterwards he forfeits his right to the premises by refusing to pay the rent, and the owner of the premises, in accordance with a stipulation in the lease, declares the lease at an end, and the lessee then determines to remove from the premises, and, in pursuance thereof, removes a portion of his property therefrom, and the lessor then, without the consent of the lessee, removes the remaining portion of the lessee's property therefrom, and takes the possession of the premises herself, and retains such possession, *held* that, by reason of the acts of the lessor, no cause of action has accrued in favor of the lessee.

(*Syllabus by the Court.*)

Error to district court, Shawnee county.

Jetmore & Son and Gleed & Gleed, for Losch, plaintiff in error. *C. M. Foster and Waters & Chase*, for Pickett and another, defendants in error.

VALENTINE, J. In the court below, as in this court, William Losch was the plaintiff, and Anna A. Pickett and William C. Hamilton were the defendants. The case was tried before the court and a jury, and, after all the evidence of the plaintiff was introduced, the defendants interposed a demurrer thereto, on the ground that it did not prove any cause of action, and the court below sustained the demurrer, and rendered judgment in favor of the defendants, and against the plaintiff, for costs; and to reverse this judgment the plaintiff brings the case to this court.

In order to have a proper understanding of the case it will be necessary to state the substance of both the pleadings and the evidence. The plaintiff's petition contained three counts, and in each count he set forth a separate cause of action. In the first count he alleged a conspiracy and fraud on the part of the defendants in procuring the plaintiff and T. R. Grandstaff to take an assignment of a lease of lot No. 90 on Harrison street, in the city of Topeka, Kansas, which lot contains one or two supposed mineral wells. The lease was for a term of nine years, commencing on February 1, 1881, and running to February 1, 1890, and was executed on January 28, 1881, by the defendant

¹ As to when the statute of limitations begins to run against a cause of action based on fraud, see *Duff v. Duff*, (*Cal.*) 12 Pac. Rep. 570, and note.

Pickett and her husband to the defendant Hamilton, and was assigned on the same day by Hamilton to the plaintiff, Losch, and T. R. Grandstaff, and on January 9, 1882, Grandstaff assigned his interest in the lease to the plaintiff. The fraud alleged is that the defendants represented to the plaintiff and Grandstaff that the mineral wells contained great quantities of never-failing mineral water, which were of great value in the cure of sickness and diseases, which representations, it is alleged, "were false and fraudulent, in this: that the said mineral wells did not possess and contain great or any quantities of mineral water, as aforesaid, but that the same became, and were at the time of said transfer by defendants to plaintiff, void of water, and destitute of mineral and medicinal properties; all of which facts were to the defendants then and there well known and understood." In the second count of the plaintiff's petition it is alleged "that the said mineral wells were and are of great value, and possess mineral and medicinal properties, thereby enabling the plaintiff to, and who would be enabled to, make great income, gains, and profits from the use, sale, and disposition thereof to sick patients and customers, and other persons who would use and patronize the same;" and that on July 10, 1883, the defendants wrongfully rescinded the lease, and ejected the plaintiff from the premises, and wrongfully retained a portion of the plaintiff's personal property attached to the premises. In the third count of the plaintiff's petition it is alleged "that the defendants are indebted to the plaintiff in the sum of \$5,000 for work and labor," etc., "furnished defendants at their special instance and request." There are other allegations in the plaintiff's petition, the material ones of which will be hereafter mentioned in this opinion.

The defendants answered to this petition separately; the defendant Pickett setting forth fifteen separate defenses, and the defendant Hamilton three. Among these defenses are the following: A general denial; the two-years statute of limitations; a defect of parties plaintiff; a misjoinder of causes of action; contradictory and inconsistent allegations in the petition, which defeat the first and second supposed causes of action.

The plaintiff, for reply to these answers, set forth that his action was commenced within two years after the discovery of the alleged fraud.

The evidence tends to prove the following facts: The leased premises belonged to Mrs. Pickett. She had, previous to January 28, 1881, leased the same to Hamilton, and his lease had not yet expired. On January 28, 1881, he procured the lease to be extended to February 1, 1890, and paid Mrs. Pickett \$100 additional for such extension. Mrs. Pickett, at the time, had notice that he was negotiating with Losch and Grandstaff, and that he expected to transfer the lease to them, but it does not appear that she ever authorized Hamilton or any other person to make false statements to Losch or Grandstaff, or to any one else. Hamilton, however, did make false statements to Losch and Grandstaff, representing to them that there was an abundance of mineral waters in the wells, when in fact there was not. Only one of the wells was considered as possessing mineral water, and the water in that well was at that time only such as had been brought from a distance and poured into it. It contained some kind of insects, which Losch as a witness called "wiggles," and which his wife as a witness called "wiggle-waggles." Of all this the plaintiff and Grandstaff had knowledge prior to the month of May, 1881. Indeed, they had sufficient knowledge of the wells, and their condition, prior to their purchase of the lease, to put them upon inquiry, and they should not have relied upon the statements of Hamilton or Pickett, or any other interested person. The evidence clearly shows that Losch and his wife knew the condition of the wells in February of that year, and that Grandstaff knew it in March, *and that the water gave out in April of that year.* Grandstaff, finding that the wells were not what they were represented to be, and that they were practically worthless, soon thereafter abandoned them in "disgust,"

and on June 28, 1882, left the state, and went to Colorado, where he still resides. The plaintiff cleaned out the wells, but that did them but little good. In September, 1881, he drilled the mineral well deeper, but even that was of but little benefit to it. On January 9, 1882, Grandstaff assigned his interest in the leased premises to the plaintiff, Losch. On July 1, 1882, the defendant Mrs. Pickett reduced the rent from \$50 per month to \$25 per month, which reduction was to continue for one year, and until the last of June, 1883, when she said she would make it favorable to the plaintiff. On July 1, 1883, the defendant Mrs. Pickett, through her husband and agent, demanded the rent of the plaintiff, Losch, for that month, at the rate of \$50 per month, but he refused to pay that amount, and tendered \$25. Up to that time the rent had been paid to the satisfaction of Mrs. Pickett. Under the lease, the rent was to be paid in advance, and the amount was \$50 per month, and for non-payment of the rent it was stipulated in the lease that the defendant Mrs. Pickett might, "of her own election, distrain for the rent due, or declare this lease at an end, and recover the same as if held by forcible detention; the said party of the second part [Losch and Grandstaff's assignor, Hamilton] hereby waiving any notice of such election, or any demand for the possession of said premises." On July 8, 1883, the defendant Mrs. Pickett gave notice to the plaintiff that the lease was terminated for the non-payment of rent, and for him to leave the premises. July 8 to 10, 1883, the defendant Mrs. Pickett removed the plaintiff's property from the premises, and took the possession of the premises herself, and has remained in the possession thereof ever since. The plaintiff at the time contemplated removing from the premises, and had already removed a portion of his property. He did not reside there, and was not present, when Mrs. Pickett removed his property from the premises. There were some other facts shown which we shall mention, if necessary, as we proceed with this opinion.

The first question to be considered, in this case is whether, under the first count of the plaintiff's petition, any cause of action was proved as against either of the defendants, Mrs. Pickett or William C. Hamilton; in other words, were the following material facts sufficiently made out by the evidence? *First*, that the alleged representations were made by the defendants, or either of them; *second*, that they were made in order to influence the plaintiff's conduct; *third*, that, relying upon them, the plaintiff did enter into the contract, and otherwise acted as was desired; *fourth*, that the representations were untrue; *fifth*, that the plaintiff suffered damage from the action which he was induced to take; *sixth*, that this damage followed proximately from the deception; *seventh*, that the discovery by the plaintiff of the alleged fraud was within two years before this action was commenced. We are inclined to think that the plaintiff failed in several particulars in making out his case as against Mrs. Pickett, and also failed in one or more particulars in making out his case as against Hamilton. The only fraud alleged in the plaintiff's petition is that the defendants falsely represented to the plaintiff and Grandstaff that the mineral wells contained great quantities of never-failing mineral water, which were of great value in the cure of sickness and diseases; but, considering the other allegations of the plaintiff's petition, were not these representations true? And, if they were true, then no cause of action was shown.

In the second count of the plaintiff's petition he alleges, among other things, as follows: "That the mineral wells were and are of great value, and possessed mineral and medicinal properties; thereby enabling the plaintiff to, and who would be enabled to, make great income, gains, and profits from the use, sale, and disposition thereof to sick patients and customers, and other persons who would use and patronize the same."

Now, if this allegation is true,—and as against the plaintiff the court below had the unquestionable right to assume that it was true,—no cause of

action was shown against either of the defendants. A plaintiff should in all cases be bound by his allegations deliberately made, but it may be claimed that in the first count of the plaintiff's petition he alleged directly the reverse of what he stated in the second count. Now, this is true; but a party to an action should not be allowed to obtain benefits from contradictory and inconsistent allegations deliberately made by himself in his pleadings. Our Civil Code does not contemplate any such thing. The spirit of our Civil Code is that a party shall state in his pleadings the real facts of his case, and not falsehoods or fictions. And when each party states what he believes to be true, and the real facts of his case, the court may know precisely where the parties differ. A thing cannot be true and untrue at the same time; and any pleading containing allegations made by the same party, both affirming and denying a particular thing, carries falsehood upon its face. *Butler v. Kaulback*, 8 Kan. 668, 671-673; *Wright v. Bacheller*, 16 Kan. 259; *Wiley v. Keokuk*, 6 Kan. 94, 105.

But, passing over everything else, the plaintiff's cause of action, which is founded upon an alleged fraud, did not accrue within two years before this action was commenced, nor was the alleged fraud discovered within two years before this action was commenced. On the contrary, the cause of action, if it ever existed, accrued, and the fraud, if it ever existed, was discovered, about two and one-half years before this action was commenced. This action was not commenced until August 4, 1883, while the exact condition of the wells was known to the plaintiff and to his partner, Grandstaff, and to the plaintiff's wife, who acted as his agent in carrying on the business, very soon after the time when the lease was transferred from Hamilton to the plaintiff and Grandstaff. Indeed, the evidence tends to show that, prior to the transfer of the lease, the parties knew that the water contained the insects which in their testimony they called "wiggles" or "wiggle-waggles;" and, in a very few days after the transfer of the lease, they knew that the wells were not such as they had been represented to be, and they knew that "the water gave out" in April, 1881. Soon thereafter they cleaned out the mineral well, but that did but little good. All this transpired, and the plaintiff had full knowledge thereof, more than two years before this action was commenced. It is true, the plaintiff did not know, until after August 4, 1881, that he might not find plenty of mineral water by drilling the wells deeper; and in that respect he is still ignorant. After August 4, 1881, he drilled the mineral well a few feet deeper, and did not find much water of any kind, and what he found was not good mineral water. But, suppose he had drilled the well still deeper,—say two, three, or ten, feet deeper,—does he know that he would not have found plenty of mineral water? Certainly not. But the question as to whether he might not have found mineral water by drilling the well deeper is not a material question in the case. The question is not what the wells might be made to be, but it is what they were in fact at the time of the transfer of the lease from Hamilton to the plaintiff and Grandstaff, and whether they were in fact such as they were represented to be. As to what the wells were in fact, the plaintiff and his wife and his partner, Grandstaff, well knew long before August 4, 1881. The plaintiff's cause of action was therefore barred by the two-years statute of limitations (Civil Code, § 18, subd. 8) long before this action was commenced.

The next question to be considered is whether, under the second count of the plaintiff's petition, any cause of action was proved as against either of the defendants. Now, it is not even claimed that any cause of action under the second count was proved as against Hamilton; but the plaintiff still claims that he proved a cause of action under that count against Mrs. Pickett. This alleged cause of action is that the wells were of great value; that the defendants wrongfully ejected the plaintiff from the premises, wrongfully deprived him of the use of the wells, and wrongfully retained a portion of the plain-

tiff's personal property which was attached to the premises. Now, the evidence shows that the plaintiff did not use the premises as a residence, or for any purpose, except in carrying on a business in connection with the mineral wells; that the premises were of no value to him except in such business, and in connection with the use of the mineral wells; that the premises were valuable only as the mineral wells made them valuable; that the mineral wells were of but little value; and that the whole premises were not worth near the rent which the plaintiff was under obligation to pay for them under the lease. The plaintiff alleges, in the first count of his petition, substantially that the mineral wells were worthless. He alleges, among other things, as follows: "That the said mineral wells did not possess and contain great or any quantities of mineral water as aforesaid; but that the same became, and were at the time of said transfer by defendants to plaintiff, void of water, and destitute of mineral and medicinal properties; all of which facts were to the defendants then and there well known and understood."

Of course, the court below had a right to assume, as against the plaintiff, that the foregoing allegations were true; and, if they are true, then the plaintiff never had any cause of action against the defendants as set forth in the second count of his petition. But, as before stated, the plaintiff's evidence also showed that the mineral wells were comparatively worthless,—indeed, worth much less than the rent which he was to pay for the premises. Under the lease he was required to pay \$50 per month as the rent for the use of the premises; but the evidence shows that the use of the premises was not worth anywhere near that amount. Hence no damage resulted to the plaintiff by reason of his being ejected from the premises. Also, under the evidence, the plaintiff had forfeited his right to the premises by the failure to pay the rent stipulated for; and the only wrong done by the defendant Mrs. Pickett was, not in ejecting him from the premises, but in doing so in an irregular manner. He no longer had any right to remain on the premises. Besides, the plaintiff was then intending to remove from the premises, and had already removed a portion of his property therefrom. It is also alleged that the defendant wrongfully retained a portion of the plaintiff's personal property attached to the premises. But there was no evidence sustaining this allegation. It is also claimed in the brief of the plaintiff's counsel that the plaintiff should recover for personal property injured. But there is no allegation in this count of the plaintiff's petition that would authorize a recovery for personal property injured. We think the plaintiff failed to prove any cause of action under the second count of his petition.

The third and last question to be considered is whether the plaintiff proved any cause of action under the third count of his petition. Now, the failure under this count was so complete and absolute that we need not waste words in discussing it. Indeed, we hardly think that the plaintiff claims that he proved any cause of action under this count.

Perceiving no material error in this case, the judgment of the court below will be affirmed.

(All the justices concurring.)

(36 Kan. 212)

WILCOX v. BYINGTON.

(*Supreme Court of Kansas. February 4, 1887.*)

1. **APPEAL—HARMLESS ERROR—SECURITY FOR COSTS.**

If the court abuses its discretion in not requiring a non-resident plaintiff, upon the motion of the defendant, to give additional security for costs, a judgment rendered in his favor will not be reversed solely for such error, because, after judgment, the defendant has no ground of complaint, as he is liable for all the costs embraced in the judgment rendered against him.

2. SAME—IMMATERIAL ERROR.

The supreme court will not reverse a judgment of the district court for errors which are wholly immaterial.

3. TRIAL—BY COURT—FINDINGS IN WRITING.

Where, in an action tried by the court without a jury, the judgment is rendered on March 30, 1885, and the motion for a new trial is not argued and decided until April 25, 1885, and no request or intimation is given to the court by either party that it is desirable that the court should state its conclusions of fact and law separately, in writing, before it announces its findings, and not until the motion for a new trial is overruled and final judgment entered, held, that the request is made too late, and the court commits no error in refusing, upon a request made at such time, to state in writing its findings.

(*Syllabus by the Court.*)

Error to district court, Shawnee county.

This was an action brought by Seymour L. Byington against H. H. Wilcox upon a written lease to recover the sum of \$1,000. The lease, with the indorsements thereon, was as follows:

"TOPEKA, KANSAS, December 28, 1868.

"I, Legrand Byington, of Johnston county, Iowa, have leased to H. H. Wilcox the stone house, well, cistern, and privy on lots numbered 47 and 49, on Quincy street, in Crane's addition to Topeka, for a period of four months from this date, with the privilege of eight months in addition, should I not in four months elect to occupy the same; and Wilcox agrees to keep the same in repairs, to pay the taxes for 1869, if his occupancy is for a year, and to pay thirty dollars per month, in monthly indorsements of payments on my promissory notes for purchase money held by him. Said Wilcox further stipulates that, in an emergency, I may occupy two stalls of his stable by a team of horses, free, and to keep his fences around the balance of the half block in such repair as will protect the shrubbery which may be placed upon the aforesaid lots 47 and 49.

"December 28, 1868.

LEGRAND BYINGTON.

HARVEY H. WILCOX."

Indorsements:

"DECEMBER 28, 1869.

"The within lease renewed from month to month until a sale of the two lots on which the house stands shall be effected, not to run more than twelve months without renewal.

LEGRAND BYINGTON."

"DECEMBER 28, 1870.

"Renewed for another year, the property subject to sale by Wilcox, for a commission agreed on.

LEGRAND BYINGTON, Guardian."

"DECEMBER 28, 1871.

"Renewed as above for another year, subject to sale by Wilcox, as above, for a commission of sale of two and one-half per cent.

LEGRAND BYINGTON, Guardian."

"NOVEMBER 28, 1870.

"Having conveyed the within property by deed to Seymour L. Byington, I assign this lease to him, to receive all rents therein secured, after full payment of said note held by Wilcox.

LEGRAND BYINGTON."

Byington gave bond for costs, with George W. Reed as surety, on March 3, 1884. On May 10, 1884, Wilcox made affidavit that Seymour L. Byington was a non-resident, and that George W. Reed, the surety, was wholly insolvent, and thereupon moved the court to require additional security. This motion was overruled. Trial had before the court, without a jury. The court rendered judgment in favor of the plaintiff for \$401.50 and costs. The defendant excepted, and brings the case here.

Frank Herald, for plaintiff in error. *Quinton & Quinton*, for defendant in error.

HORTON, C. J. All of the alleged errors in this case are trivial and unimportant. If the motion for additional security for costs ought to have been allowed, this is not a sufficient ground for a reversal of the judgment, as it appears the plaintiff below was successful upon his claim against the defendant below, the party making the motion. The officers interested in the costs seem to be satisfied with the action of the court in overruling the motion for other security. As the defendant is liable for all the costs included in the judgment rendered against him, he is in no condition to make any complaint; nor have any of his rights been prejudiced by the ruling. The lease was properly introduced in evidence, and there was no material error in the introduction of the renewals entered thereon, because, although the defendant in the court below had no knowledge of such renewals, as long as he retained possession or control of the premises, he must be considered to have held under the lease.

Legrand Byington had the right to sell and transfer the written lease to his son Seymour L. Byington, although he was a minor.

The written statement made by Legrand Byington in 1873, and the letter of Bradford Miller of February 3, 1873, were improperly admitted in evidence; but these errors are immaterial, as both Byington and Miller testified of their own recollection of the amounts severally stated by them. Byington figured up the amount of rent due from Wilcox from 1868 up to 1875. Miller testified that the amounts mentioned in his letter were paid by him for rent to Wilcox. The case was submitted to the court without a jury, and therefore the introduction of these immaterial papers were less likely to cause any prejudice.

The refusal of the court to state its findings of fact in writing was not, under the circumstances of this case, error. Judgment was rendered March 30, 1885. The motion for a new trial was filed the same day, but not argued until April 25, 1885. On that day the motion was overruled. The defendant below never made any request to the court to state its conclusions of fact and of law until after this motion had been overruled. Then it was too late. The request should have been made before the court announced its findings. It is the general rule of practice for the parties to request the court, either just before or at the close of the argument made in the case, to state its findings in writing. Clearly, the request should be made before the final decision of the court. We do not think the statute contemplates that a party to an action may wait until the trial is ended, the final judgment rendered, and his motion for a new trial overruled, before intimating to the court he desires the conclusions of fact and of law stated in writing. Section 290, Civil Code; *Green v. Williams*, 21 Kan. 68. In this case the trial court undoubtedly would have found specially, and would have stated in writing all of its findings, if the slightest intimation had been given before the final decision that such a thing was desired.

The claim that the action was barred by the statute of limitations is not tenable. The lease was sold and assigned by Legrand Byington to Seymour L. Byington on November 23, 1870. Seymour L. Byington was then a minor, and he commenced this action on December 17, 1883, within one year after he became of age. Section 17 of the Civil Code.

An examination of the evidence and judgment does not satisfy us that the assessment of the amount recovered is too large.

The omission of the clerk of the court to include the amount of the costs in the judgment as recorded is not a ground for setting the same aside. "The judgment will certainly authorize a correct taxation of the costs. If, however, the clerk should tax them erroneously, the court below will undoubtedly

correct the taxation on motion." *Linton v. Housh*, 4 Kan. 536, 541; *Clipperger v. Ingram*, 17 Kan. 584.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(36 Kan. 177)

NUZMAN and another v. SCHOOLEY.

(*Supreme Court of Kansas. February 4, 1887.*)

EXECUTION—EXEMPTION—"Two Cows"—HEAD OF FAMILY—COMP. LAWS KAN. 1879, CH. 38, § 3.

Under the fifth clause of section 3, c. 38, Comp. Laws Kan. 1879, which exempts "two cows," a person residing in this state, and being the head of a family, may claim as exempt two cows which he owns, although the cows are not actually used by him or his family, and although the cows are not necessary for the support of himself or his family.

(*Syllabus by the Court.*)

Error to district court, Jackson county.

Hoaglin & Crawford, for Nuzman and another, plaintiffs in error. *Keller & Noble*, for Schooley, defendant in error.

HORTON, C. J. Just prior to March 14, 1885, F. C. and Lewis Nuzman commenced an action before THOMAS BELL, a justice of the peace of Jackson county, and in this action two cows belonging to James Schooley were seized under an order of attachment issued by the justice. On March 14, 1885, the justice issued an order to sell the cows, returnable within 30 days. On March 19, 1885, James Schooley commenced his action before E. D. ROSE, a justice of the peace of Jackson county, to recover the possession of the cows, upon the ground that they were exempt from seizure and sale upon attachment, execution, or other process. In this action he recovered judgment, the court holding the cows exempt. This is the error complained of. After the cows were seized upon attachment, Schooley appeared before the justice issuing the order, and gave notice that he claimed the cows as exempt. The justice said to him that he would receive any evidence, by affidavit, upon the matter, but no affidavit or other evidence was presented. It is now urged that by refusing to comply with the request of the justice Schooley acquiesced in his decision and judgment, and, therefore, that the whole matter was *res adjudicata*. This is not so. In *Watson v. Jackson*, 24 Kan. 442, it was held that "the decision of a motion made before a justice of the peace, to discharge from seizure property taken on attachment, on the ground that it is exempt, is not conclusive; and the question of exemption may be tried thereafter in an action of replevin brought by the judgment debtor." It is next urged that the cows are not exempt because it does not appear from the record that they were used by, or were necessary for the support of, Schooley or his family at the time of the seizure. The statute reads: "Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution, or other process issued from any court in this state, the following articles of personal property: * * * (5) Two cows, ten hogs, one yoke of oxen, and one horse or mule; or, in lieu of one yoke of oxen and one horse or mule, a span of horses or mules, twenty sheep and the wool from the same, either in the raw material, or manufactured into yarn or cloth." Section 3, c. 38, Comp. Laws 1879. This section makes the articles therein named exempt, absolutely; and therefore the articles so named cannot be confined to such as the debtor is in the actual possession of, or such as are actually necessary for the support of himself or his family. The statute must be construed beneficially to the debtor. *Mallory v. Berry*, 16 Kan. 293.

The case comes to this court upon the findings of fact of the trial court, without the evidence; and all the terms of the lease under which one Speck holds the cows are not before us for our consideration. The findings show

that Schooley is the owner of the cows, and that they are the cows he had at the commencement of this action, and that the Nuzmans are trying to seize and sell his interest therein; therefore we think he is sufficiently a party in interest to maintain this action. Even if Schooley had 18 or 20 head of cattle just prior to the commencement of this action, he had the right to claim as exempt the particular animals in dispute. The election of what animals he would claim as exempt was with him, and not the creditor. "Where the debtor has a greater number of animals or articles than are enumerated as exempt, or where he has property which exceeds in value the limit of the exemption, the selection should be made before the sale; but our law does not prescribe when or by whom it shall be made. In view of the fact that the statute is enacted mainly for the benefit of the debtor and his family, it appears to us that the debtor should be accorded the privilege of making the selection at any time before the sale." *Rice v. Nolan*, 33 Kan. 28; S. C. 5 Pac. Rep. 437.

The judgment of the district court will be affirmed.
(All the justices concurring.)

(36 Kan. 202)

STRUBER v. ROHLFS.

(*Supreme Court of Kansas. February 4, 1887.*)

1. APPEAL—JUSTICE OF THE PEACE—RECORD—RENDITION OF JUDGMENT.

Where a party appeals from the judgment of a justice of the peace, the record of the case transmitted to the clerk of the district court by the justice must affirmatively show that the appeal was taken within 10 days from the rendition of the judgment; otherwise the district court may, on motion, dismiss the appeal.

2. SAME—NEGLIGENCE OF JUSTICE.

If the party appealing does all the law requires of him to entitle himself to an appeal, the justice cannot deprive him of this right by an omission to act, either through negligence or design.

3. SAME—MISTAKE IN RECORD.

Where facts material to appear in the record of a justice of the peace are untruthfully stated therein, they cannot be corrected or disposed of in a summary manner in the district court by affidavits upon a motion to dismiss the appeal.

(*Syllabus by the Court.*)

Error to district court, Washington county.

A. S. Wilson and *A. M. Hallowell*, for Struber, plaintiff in error. *Lowe & Smith*, for Rohlfs, defendant in error.

HORTON, C. J. The facts in this case are substantially as follows: On July 18, 1884, George Rohlfs filed his bill of particulars against Henry Struber, before a justice of the peace of Washington county; on July 23d the summons issued, returnable July 28th, at 10 o'clock A. M. Service of summons was made by leaving a copy of the same, with all the indorsements thereon, at the usual place of residence of the defendant. Struber and his family, however, were absent at the time. On the return-day, the plaintiff appeared, with his attorneys; but the defendant made default. After hearing the evidence of the witnesses, the court rendered judgment in favor of Rohlfs, against Struber, for \$247.25, together with costs. The defendant filed an appeal-bond, which was approved in writing by the justice, on August 8, 1884. After the case reached the district court, Rohlfs filed his motion to dismiss the appeal, upon the ground that the bond had not been approved and filed in time. Struber alleged he had no actual knowledge that he had been sued by Rohlfs, or that any judgment had been rendered against him, until August 7, 1884, the last day upon which an appeal could be taken; that he immediately prepared his appeal-bond, and, as soon as possible, went to the office and house of the justice, to present his bond and have the same approved; that upon his arrival at the house of the justice, about 11 o'clock of

the night of August 7th, he was found to be absent, attending a dance then going on; that he went in pursuit of the justice and found him, near midnight, two miles from his residence; that he then presented his bond, signed by the sureties, and that the justice accepted the same.

The sole question for our consideration is whether the trial court erred in dismissing the appeal. The statute provides that "the party appealing shall, within ten days from rendition of the judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs, conditioned—*First*, that the appellant will prosecute his appeal to effect, and without unnecessary delay; *second*, that if judgment be rendered against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant." Section 121, c. 81, Comp. Laws 1879. The statute further provides that an appeal shall be completed upon the filing and approval of the undertaking. Section 188 requires every justice of the peace to keep a book, denominated a docket, in which must be entered by him, if an appeal be taken, the undertaking, and the time of entering into the same, and by which party taken. The certified transcript which the justice transmits to the clerk of the district court, with the papers in the cause, should affirmatively show the appeal has been taken within 10 days from the rendition of the judgment; otherwise, upon motion of the appellee, the court may properly dismiss the appeal. Unless the undertaking is presented for approval at the office of the justice, or to the justice himself, within 10 days from the judgment, the district court commits no error in dismissing the appeal, if a motion be made therefor. There is nothing in the transcript of the justice of the peace, in this case, which shows the appeal was taken in time. If there are any facts material to appear in a transcript or record of the justice which are untruthfully stated therein, they cannot be corrected or disposed of in the district court in a summary manner upon affidavits. It is claimed, however, that the justice has failed to enter on his docket matters required to be of record, and therefore that these omissions may be supplied by affidavits. If the justice has sent up an incomplete transcript, a diminution of the record might have been suggested; and then, perhaps, upon an amended transcript, all the facts relating to the presentation, approval, and filing of the undertaking would have appeared. If Struber presented his bond, with sufficient sureties, at the office of the justice on August 7, 1884, during business hours, or if the justice accepted and verbally approved the undertaking at any time on August 7th, the appeal would be in time, although the filing and written approval by the justice were not entered until the next day, as a justice cannot deprive a party of his right to appeal by an omission to act, either through negligence or design. The omission of a justice to enter his written approval upon an undertaking at the date he accepts the same, or his failure to file the undertaking at the date of its approval, will not deprive a party of his appeal.

If the transcript and records of the justice show that an appeal is not taken in time, and the statements therein are untrue, a direct proceeding must be instituted to correct the record. The matter cannot be inquired into collaterally. In Iowa, the statute provides that "where an omission or mistake has been made by the justice in his docket entries, and that fact is made unquestionable, the circuit court may correct the mistake, or supply the omission, or direct the justice to do so." Section 3586, Code Iowa 1873. In this state we have no similar statute, and therefore the practice in Iowa is not permissible here.

The order and judgment of the district court will be affirmed.

(All the justices concurring.)

(19 Nev. 384)

STATE ex rel. DRURY v. HALLOCK. (No. 1,258.)*(Supreme Court of Nevada. February 1, 1887.)*

CONSTITUTIONAL LAW—TITLE OF STATUTES—GEN. ST. NEV. § 2308, AMENDING GEN. ST. NEV. § 2300—SALARIES OF MEMBERS OF THE LEGISLATURE AND SUPREME COURT JUDGES.

St. Nev. 1885, 99, (Gen. St. § 2308,) approved March 12, 1885, entitled "An act to amend an act entitled 'An act reducing and regulating the salaries and compensation of certain state officers, *justices of the supreme court, and attaches* of the state government of Nevada,' approved February 21, 1881," and which purports to reduce the salaries of members of the legislature, is absolutely null and void, as being in contravention of Const. Nev. art. 4, § 17, requiring that each law shall embrace but one subject, which shall be briefly expressed in the title.

Application for mandamus.

H. F. Bartine, for relator. J. D. Torreyson, for respondent.

HAWLEY, J. Relator is a member of the assembly of this state. He seeks, by the writ of *mandamus*, to compel respondent, as state comptroller, to draw a warrant in his favor at the rate of eight dollars per day for each day of service, as provided in section 7 of "An act reducing and regulating the salaries and compensation of certain state officers and *attaches* of the state government of Nevada," approved February 21, 1881. St. 1881, 43; Gen. St. § 2300. Respondent refuses to issue any warrant to relator, except for "seven dollars per day for each day of service," as provided in section 5 of "An act to amend an act entitled 'An act reducing and regulating the salaries and compensation of certain state officers, *justices of the supreme court, and attaches* of the state government of Nevada,' approved February 21, 1881," approved March 12, 1885. St. 1885, 99; Gen. St. 2308.

By a reference to the original act of 1881 it will be observed that certain state officers are named. The justices of the supreme court are not included or named therein. The legislature in 1885, after amending sections 1, 2, 3, 4, and 7 of the act of 1881, added a supplemental section reducing the salary of the justices of the supreme court, and injected the words "justices of the supreme court" into the title of the act of 1881 in such a manner that any person unacquainted with the facts would naturally suppose, upon examination of the amended act, that "justices of the supreme court" were included in the original act of 1881.

Is the amendatory act of 1885 constitutional? The constitution provides in plain, positive, and mandatory terms that "each law enacted by the legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only, but, in such case, the act as revised, or section as amended, shall be re-enacted and published at length." Article 4, § 17.

In determining the question whether the amendatory act of 1885 violates any of the provisions in this section of the constitution, it is deemed advisable to call attention to the fact that the legislature of 1881 passed "An act fixing the salaries of the justices of the supreme court of the state of Nevada," approved February 19, 1881. St. 1881, 43; Gen. St. 2291. It therefore appears that the legislature deemed it proper and wise to legislate upon the subject of "fixing the salaries of the justices of the supreme court," independent of the subject of "reducing and regulating the salaries and compensation of certain state officers and *attaches* of the state government." Does it not necessarily follow, from the facts already stated, that the attempt of the legislature in 1885 to amend the title of the act of 1881 by inserting therein an additional subject was in direct violation of the first clause of the section of the constitution above quoted? It may have been within the power of the legislature in 1881, as an original measure, to have adopted a title that would have

been broad enough to include both classes of state officers in one act; but, having adopted a limited title for each, and passed separate acts, it was not within the power of any subsequent legislature to amend the title of either act so as to include the matters legitimately pertaining to the other.

Under the provisions of the constitution, is it not made clear that the legislature of 1881, under the title "fixing the salaries of the justices of the supreme court," could not have embodied any provision in that act relating to the salaries of any other state officers, because the title was limited to the subject therein named? Is it not equally as plain that the legislature of 1881, in passing the act "reducing and regulating the salaries and compensation of certain state officers," did not intend to include justices of the supreme court or any state officers than those named in the body of the act? If this be true, then does it not logically follow that, in amending the act of 1881, the legislature would have no power to include any class of state officers not named in the original act?

"As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title. They are vested with no dispensing power. The constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so." Cooley, Const. Lim. 149.

The manner and methods pursued in preparing the so-called amended act of 1885 are extremely reprehensible, and have always been universally condemned. The constitutional provisions were either overlooked or intentionally ignored. The legislature did not properly refer to the act "approved February 21, 1881." The title of that act is essentially different from the title of the act specified in the amended act. The constitution declares that "no law shall be revised or amended by reference to its title only." This provision does not authorize the legislature to dispense with a reference to the title of the act sought to be amended. It was intended by the framers of the constitution that, in the revision or amendment of a statute, "the title of the act to be amended should be referred to." *Feibleman v. State*, 98 Ind. 520.

The proper method of complying with this clause of the constitution would be to correctly copy the title of the act referred to. If any other course is pursued, it might lead to endless confusion and uncertainty, which, among other things, the constitutional provision intended to prevent. This is made plain by reading the entire section of the constitution. In order to comply with its provisions not only must the title of the act to be amended be referred to, but the sections "as amended shall be re-enacted and published at length."

If the title of the original act had been correctly copied, (leaving out "justices of the supreme court,") then section 8 of the amended act of 1885, which relates exclusively to the salary of the justices of the supreme court, would have to be declared unconstitutional, because the title of the original act only embraced *certain* state officers and *attaches* of the state government, and, as before stated, the justices of the supreme court were not named in the act. We have already shown that an amendatory act cannot include any other subject than that embraced in the act to be amended, and "matter properly connected therewith." Therefore, if the words "justices of the supreme court" could be treated as surplusage, and stricken out of the title of the amended act, it would be our duty to declare all of the provisions of the amended act relating to the salary and compensation of the state officers and *attaches* of the state government named in the act of 1881 valid, and section 8, relating

to the salary of the justices of the supreme court, void. *State v. Bankers, etc., Ass'n*, 23 Kan. 501; *Burlington & M. R. R. Co. v. Saunders Co.*, 9 Neb. 511; S. C. 4 N. W. Rep. 240; *Wisner v. Mayor of Monroe*, 25 La. Ann. 598; *People v. Briggs*, 50 N. Y. 565; *Chiles v. Monroe*, 4 Metc. (Ky.) 75; *State v. Persinger*, 76 Mo. 347; *Stone v. Brown*, 54 Tex. 340.

The substance of all the authorities which discuss the effect of the law in cases where the act is broader than the title is thus clearly stated by Judge Cooley: "But, if the act is broader than the title, it may happen that one part of it can stand because indicated by the title, while as to the object not indicated it must fail." Cooley, Const. Lim. 148.

If the provisions of the amendatory act of 1885 only related to matters that were included in the original act, then we would be authorized to treat the words "justices of the supreme court" as surplusage, and exclude them from the title; because in such a case it would clearly appear that no one had been, or could be, misled by the improper insertion of the words in the title. Mistakes and errors in the use of words, which are not calculated to mislead as to the subject of the act, will be regarded by the courts as mere clerical mistakes, in nowise impairing the validity of the law. *School Directors Dist. No. 5 v. School Directors Dist. No. 10*, 73 Ill. 249; *Plummer v. People*, 74 Ill. 363; *City of Winona v. Whipple*, 24 Minn. 65; *State v. Lake City*, 25 Minn. 404; *State v. Elvins*, 32 N. J. Law, 362; *Comstock v. Judge of Superior Court*, 39 Mich. 196; *Wilson v. Spaulding*, 19 Fed. Rep. 304; *Walnut v. Wade*, 108 U. S. 683.

But this is a different case. In the amended act under consideration, it is manifest that the words "justices of the supreme court" did not creep into the title innocently, or by any mere clerical mistake or inadvertency. They were inserted purposely and designedly. It was a premeditated attempt to embody in one act amendments to two different and distinct acts, relating to different subjects, by adding to the title of one act the subject-matter of the other, so that one might be used as an inducement for the passage of the other. Its tendency and evident design was to impose upon the members of the legislature by injecting the words "justices of the supreme court" into the middle of the title in such a manner as to lead them to believe that the words were embodied in the title of the original act, and was a part of the statute sought to be amended; whereas, the truth was that the act fixing the salary of justices of the supreme court had no connection whatever with it. One of the objects of the constitutional provision was to avoid and prevent just such legislation as was attempted to be accomplished in this case.

"The practice of bringing together into one bill subjects diverse in their nature, and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. * * * The framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design when required to pass upon it." *People v. Mahaney*, 13 Mich. 494.

"The object of this constitutional provision is obvious and highly commendable. A practice had crept into our system of legislation, of ingrafting upon subjects of great public benefit and importance, for local or selfish purposes, foreign and often pernicious matters; and rather than endanger the main subject, or for the purpose of securing new strength for it, members were often induced to sanction and actually vote for such provisions, which, if they were offered as independent subjects, would never have received their support. In this way, the people of our state have been frequently inflicted with evil and injurious legislation. * * * To remedy such and similar evils was this

provision inserted into the constitution, and we think wisely inserted." *Davis v. State*, 7 Md. 160.

All the authorities upon this subject are substantially to the same effect. *State v. Silver*, 9 Nev. 231; *State v. County Com'rs*, 19 Nev. —; S. C. 10 Pac. Rep. 901; *Sun Mut. Ins. Co. v. Mayor of New York*, 8 N. Y. 253; *Stewart v. Father Matthew Soc.*, 41 Mich. 72; *State v. McCracken*, 42 Tex. 385; *Walker v. Caldwell*, 4 La. Ann. 297; *State v. Town of Union*, 83 N. J. Law, 352; *State v. Ranson*, 78 Mo. 78; Cooley, Const. Lim. 142, and authorities there cited.

In *State v. Lancaster Co.*, 17 Neb. 85, S. C. 22 N. W. Rep. 228, where the legislature in the title of an amended act, also inserted an additional object to repeal other provisions of the statute having no relation to subjects embraced in the original act, the court declared that the attempted repeal was a nullity, but held the other portions of the act valid upon the ground "that the invalid portion did not have, and could not have had, the effect to induce the legislature to pass the amendment in question;" but, in this connection, the court expressly declared that the rule would be different in cases "where it is impossible, from an inspection of the act itself, to determine which part of the act is void and which valid."

In the present case it is evident that one portion of the act was specially designed as an inducement to pass the other, and it is impossible for us to determine, from an inspection of the act itself, which portion, if either, would have passed without the other. It therefore becomes our plain and imperative duty to declare the entire amendatory act of 1885 absolutely null and void.

"If the title to the act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says it shall embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, and holding the act valid as to the one and void as to the other." Cooley, Const. Lim. 148. See, also, *Davis v. State, supra*; *People v. Hills*, 35 N. Y. 452.

Let the writ issue as prayed for in relator's petition.

(19 Nev. 391)

STATE ex rel. STEVENSON v. TUFLY. (No. 1,260.)

(Supreme Court of Nevada. February 3, 1887.)

CONSTITUTIONAL LAW—AMENDMENT—ENTRY ON JOURNALS OF LEGISLATURE.

Where an amendment was proposed to the constitution of Nevada, authorizing the investment of moneys pledged to educational purposes in the bonds of any of the states of the United States, and no entry of the same was made upon the journal of either house of the legislature, the omission was held fatal to the adoption of the amendment.

Application for mandamus.

The Attorney General, for relators. Wm. M. Stewart, for respondent.

BELKNAP, J. This is an amicable proceeding brought for the purpose of testing the validity of an amendment to the constitution authorizing the investment of moneys pledged to educational purposes, in the bonds of any of the states of the United States.

Section 1 of article 16 of the constitution prescribes how amendments may be made without calling a convention. It reads as follows: "Any amendment or amendments to this constitution may be proposed in the senate or assembly; and, if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their respective journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published for three months next preceding the time of making such

choice. And if, in the legislature next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner, and at such time, as the legislature may prescribe; and, if the people shall approve and ratify such amendment or amendments by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments shall become a part of the constitution."

At the eleventh session of the legislature, the following proposed amendment was agreed to:

"Resolved by the assembly, the senate concurring, that section three of article 11 of the constitution of the state of Nevada be amended so as to read as follows:

"Sec. 3. All lands, including the sixteenth and thirty-sixth sections in every township, donated for the benefit of public schools in the act of the thirty-eighth congress to enable the people of the territory of Nevada to form a state government; the thirty thousand acres of public lands granted by an act of congress approved July 2, A. D. 1862, for each senator and representative in congress; and all proceeds of lands that have been or may hereafter be granted or appropriated by the United States to this state, and also the five hundred thousand acres of land granted to the new states under the act of congress distributing the proceeds of the public lands among the several states of the Union, approved A. D. 1849, provided that congress make provisions for or authorize such diversion to be made for the purpose herein contained; all estates that may escheat to the state; all of such per cent. as may be granted by congress on the sale of lands; all fines collected under the penal laws of this state; all property given or bequeathed to the state for educational purposes; and all proceeds derived from any or all said sources,—shall be, and the same are hereby, solemnly pledged for educational purposes, and shall not be transferred to any other fund for other uses, and the interest thereon shall from time to time be apportioned among the several counties in proportion to the ascertained number of the persons between the ages of six and eighteen years in the different counties, and the legislature shall provide for the sale of floating land-warrants to cover the aforesaid lands, and for the investment of all proceeds derived from any of the above-mentioned sources, in United States bonds or bonds of this state, or the bonds of such other state or states as may be selected by the boards authorized by law to make such investments: provided, that the interest only of the aforesaid proceeds shall be used for educational purposes, and any surplus interest shall be added to the principal sum: and provided, further, that such portions of said interest as may be necessary may be appropriated for the support of the state university."

No entry of the proposed amendment was made upon the journal of either house, and the question presented is whether or not this omission was fatal to the adoption of the amendment.

An inquiry based upon similar facts and constitutional provisions was recently presented to the supreme court of Iowa. In pronouncing the amendment invalid, the court employed the following language, which we adopt: "The object of the provision [entering the amendment upon the journals] cannot be doubted or misunderstood. It is to preserve, in the manner indicated, the identical amendment proposed, and in an authentic form, which, under the constitution, is to come before the succeeding general assembly. No better mode could have been adopted, when it is considered that, to be effective, the proposed amendment must be agreed to by the succeeding general assembly. This thought is much strengthened by the consideration that the proposed amendment is only required to be entered on the journals of the first general assembly which acts thereon. This distinction, to our minds, is significant, and enhances the importance of the constitutional injunction that

the proposed amendment shall be entered on the journals of both houses of the general assembly which first agrees thereto." *Koehler v. Hill*, 60 Iowa, 543; S. C. 14 N. W. Rep. 738, and 15 N. W. Rep. 609.

The court considered the omission fatal, notwithstanding a vote of the people had approved the proposed amendment, and declared that, if any provision of the constitution should be regarded as mandatory, it is when it provides for its own amendment.

The remarks of Judge Cooley made in considering the construction to be placed upon constitutional provisions are pertinent and instructive. He says: "In all we have said upon this subject, we have assumed the constitutional provision to be mandatory. * * * The fact is this: That whatever constitutional provision can be looked upon as directory merely, is very likely to be treated by the legislature as if it were devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And, if the legislature habitually disregarded it, it seems to us that there is the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by the habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed." Cooley, Const. Lim. 183.

"In *Collier v. Frierson*, 24 Ala. 108, it appeared that the legislature had proposed eight different amendments to be submitted to the people at the same time. The people had approved them, and all the requisite proceedings to make them a part of the constitution had been had, except that, in the subsequent legislature, the resolution for their ratification had by mistake omitted to recite one of them. On the question whether this one had been adopted, we quote from the opinion of the court: 'The constitution can be amended in but two ways,—either by the people, who originally framed it, or in the mode prescribed by the instrument itself. If the last mode is pursued, the amendments must be proposed by two-thirds of each house of the general assembly; they must be published in print at least three months before the next general election for representatives; it must appear from the returns made to the secretary of state that a majority of those voting for representatives have voted in favor of the proposed amendments; and they must be ratified by two-thirds of each house of the next assembly after such election, voting by yeas and nays, the proposed amendments having been read at each session three times on three several days in each house. We entertain no doubt that, to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are those acts required, or those requisitions enjoined, if the legislature or any department of the government can dispense with them? To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against any amendment which is not shown to have been made in accordance with the rules prescribed by the fundamental law.' " Cooley, Const. Lim. 40.

At the last general election a majority of the electors of the state ratified

the amendment, and we were asked at the argument to give to this fact such consideration as it may deserve. The suggestion is doubtless based upon the fact that, under our form of government, all political power originates with the people. The bill of rights contained in our constitution declares that "all political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same whenever the public good may require it."

In commenting upon reservations of this character, Judge Cooley says: "Although, by their constitutions, the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to, and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, in their sovereign capacity, can only be of legal force when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute; and if by any portion of the people, however large, an attempt should be made to interfere with the regular working of the agencies of government at any other time or in any other mode than as allowed by existing law, either constitutional or statutory, it would be revolutionary in character, and must be resisted and repressed by the officers who, for the time being, represent legitimate government." Cooley, Const. Lim. 751.

We conclude that amendments to the constitution can be made only in the mode provided by the instrument itself. A proposed amendment, if agreed to by a majority of each house of the legislature, must be entered upon the journals, so that no doubt may arise as to its provisions. The yeas and nays must be entered in order to ascertain whether the requisite number have agreed to the amendment. It is then to be referred to the next legislature, and is to be published for three months preceding the election, so that the members may, if the people desire, be elected specially to consider it. And, finally, the proposed amendment must be submitted by the legislature to a vote of the people. These provisions were intended to secure care and deliberation on the part of the legislature and people, and are exclusive and controlling.

The amendment was not constitutionally adopted. The statute enacted for the purpose of executing its provisions is unconstitutional, and respondent properly refused to comply with its requirements. *Mandamus* denied.

(*Colo.* 404)

PEOPLE *ex rel.* SEELY v. MAY, Treasurer, etc.

(*Supreme Court of Colorado.* January 24, 1887.)

- 1. MUNICIPAL CORPORATION—COUNTY INDEBTEDNESS—CONSTITUTIONALITY.**—Constitutionality of Art. 11, § 6. The limitation imposed upon county indebtedness by Const. Colo. art. 11, § 6, includes debts contracted by the county authorities under the direct authority of the legislature, as well as those contracted by them under their general statutory powers.

- 2. SAME—VALID ASSIGNMENTS OF REVENUE UNCOLLECTED.**

A county which has reached the constitutional limit of indebtedness may constitutionally make assignments of the annual revenue accruing from taxes levied but uncollected for the current year, provided such assignments are not in excess of the amount covered by the annual levy for the year in which such assignment is made, and the warrant or instrument of assignment is expressly made payable out of the incoming revenue for the current year, and is an assignment *pro tanto*, without recourse by the county, of such fund.

3. SAME—COUNTY WARRANT IN EXCESS OF LIMIT.

A county warrant issued after the constitutional limit of indebtedness has been reached by the county, which is general in form, and does not purport to be payable from any particular fund, or out of the revenue from the taxes of any specified year, is not a valid assignment under Const. Colo. art. 11, § 6.

Mandamus to treasurer of Lake county.

This case is now considered by the court on the pleadings for the third time. It was first presented upon a demurrer to the original petition, (*People v. May*, 8 Colo. 485; S. C. 9 Pac. Rep. 34;) it was again submitted upon a demurrer to the answer, (*People v. May*, 10 Pac. Rep. 641;) while the present discussion takes place upon a demurrer to the replication. At each of these stages of pleading different questions have been submitted, examined, and adjudicated.

Aside from the omission of section 6, art. 11, of the state constitution in full, the present opinion sufficiently recites the facts. This section gives rise to the questions now determined. It reads as follows: "No county shall contract any debt by loan in any form, except for the purpose of erecting necessary public buildings, making or repairing public roads and bridges; and such indebtedness, contracted in any one year, shall not exceed the rates upon the taxable property in such county, following, to-wit: Counties in which the assessed valuation of taxable property shall exceed five millions of dollars, one dollar and fifty cents on each thousand dollars thereof; counties in which such valuation shall be less than five millions of dollars, three dollars on each thousand dollars thereof. And the aggregate amount of indebtedness of any county for all purposes, exclusive of debts contracted before the adoption of this constitution, shall not at any time exceed twice the amount above herein limited, unless when in manner provided by law the question of incurring such debt shall, at a general election, be submitted to such of the qualified electors of such county as in the year last preceding such election shall have paid a tax upon property assessed to them in such county, and a majority of those voting thereon shall vote in favor of incurring the debt; but the bonds, if any be issued therefor, shall not run less than ten years, and the aggregate amount of debts so contracted shall not at any time exceed twice the rate upon the valuation last herein mentioned: provided, that this section shall not apply to counties having a valuation of less than one million of dollars."

Teller & Orahood and *Markham & Dillon*, for plaintiffs. *D. E. Parks*, Co. Atty. Lake Co., and *H. B. Johnson*, for defendant.

HELM, J. Under the replication, and the demurrer thereto, counsel argue and submit for adjudication the following questions, viz.: *First*, does the limitation imposed upon county indebtedness by section 6, art. 11, of the state constitution, include debts contracted by operation of law? *Second*, can counties which have reached the constitutional limit of indebtedness, and have issued warrants in excess thereof, meet their current expenses as they arise by assignments of the annual revenue (thus appropriating the whole of such revenue, if necessary) accruing from taxes levied, but uncollected?

1. The section of the constitution above mentioned was, at a former stage of the pleading in the case at bar, carefully considered by this court. *People v. May*, 10 Pac. Rep. 641. It was then held that the expression in said section, "and the aggregate amount of indebtedness of any county for all purposes * * * shall not at any time exceed twice the amount above herein limited, unless," etc., operates as a "plain limitation of county indebtedness, irrespective of its form." Counsel for petitioner were at that time contending that this limitation applies only to debts contracted "by loan." Treating our opinion as decisive against that particular construction of the language in question, they now ask us to say that the inhibition reaches such debts only as are the result of voluntary contracts made by the county authorities. They seek to have us distinguish between the *purpose* for which a debt is created and the *manner* of its creation. In other words, if we rightly under-

stand their position, they assert that, as between two items of county expenditure which are equally necessary, the constitutional limitation of indebtedness having been reached, a debt created for one by the voluntary contract of the commissioners would, conceding the correctness of our former opinion, be forbidden and void, while a debt in connection with the other, directly resulting from action under legislative enactment, might be perfectly valid.

Should the position of counsel be sustained? The phrase "for all purposes" seems to include debts without regard to the method of their contraction. The language itself does not discriminate between purposes governing *legislative action*, and purposes controlling the conduct of *county authorities*. It apparently covers every kind of indebtedness, voluntarily authorized or voluntarily contracted. Whether the same be incurred in one way or another, whether created for what may be termed necessary running expenses, or in the consummation of other legitimate municipal objects, the inhibition appears to be equally applicable. The constitutional limitation having been reached, a debt for the statutory fee of an officer, or a statutory liability in connection with any other municipal employment or expense, is apparently as much inhibited as is indebtedness for labor performed or materials furnished under contract with the commissioners. Such we say is, in our view, the plain import of the language referred to. And, unless the same section or other sections of the constitution contain provisions inconsistent with this view, or unless there exist some objection so cogent as to demonstrate that the framers of the constitution could not have foreseen and intended such a construction, its adoption becomes a legal necessity.

We shall consider briefly the principal reasons advanced by counsel for petitioner to support their views in the premises. We preface such consideration, however, with the suggestion that all debts binding upon counties are authorized by statute. The county authorities exercise no power that is not conferred by the constitution or by the legislature. They make no contract, and incur no municipal liability, that does not find its warrant, directly or indirectly, in express legislative or constitutional enactment. Any action on their part which is not thus sanctioned would be *ultra vires*, and of no binding force as against the corporation. Hence it may truly be said that debts arising from express contract with the county commissioners are indirectly incurred by operation of law.

In the first place, we are told that such a construction of the provision in question as the one suggested, would produce conflicts between different parts of the constitution itself; that since this construction of section 6 disables certain counties from incurring debts for the payment of officers' fees, and other necessary running expenses, the business of such counties will not be efficiently transacted, and they will, to a great extent, be shorn of their usefulness. Thus, say counsel, the beneficent constitutional provisions relating to county organization and government will, as to certain counties, be largely, if not completely, neutralized. The argument *ab inconvenienti* is also appealed to; and the serious public disasters that would result from the stoppage of the wheels of county government, because of the inability to incur debts, are strongly depicted.

If there were room in the language before us for judicial construction, and if counsel's assumptions were true, these arguments would receive great consideration. But the vitality of the constitutional provisions to which counsel refer does not depend upon the ability of counties to create indebtedness; nor do the apprehended consequences necessarily follow from the inhibition against further liability. The constitutional provision before us simply prohibits "indebtedness" beyond a certain sum. It does not limit the amount of *taxes* the county authorities shall levy to defray county charges for a given year. The members of the constitutional convention were not dealing with

the subject of county expenses or expenditures, provided the county "pays as it goes." Their purpose was to protect the municipal credit, and to relieve the people of the oppressive burdens that always result from a large corporate indebtedness. If the running expenses are necessarily heavy, or if the people are inclined to extravagance, and indulge in what might be termed municipal luxuries, still the credit remains good, and the evils against which the convention legislated do not exist, provided these expenses, whether necessary or unnecessary, economical or extravagant, are paid when incurred. This provision, using the language of Mr. Justice ELBERT (10 Pac. Rep. 641,) "is simply a declaration that the county, within certain limits, shall live within its income, and not that its income shall be more or less." So far, therefore, as the constitution is concerned, without the privilege of incurring further indebtedness, sufficient funds may be raised for the payment of all current county expenses. We shall presently see that these funds can be thus applied, and hence that, regardless of indebtedness, all county business may be transacted as usual.

In this connection the case of *Potter v. Douglass*, 87 Mo. 239, relied upon by counsel, should perhaps be noticed. Important differences exist, in regard to the subject under consideration, between the constitutions of Missouri and Colorado. These differences are perhaps sufficient to justify the weight given in that case to the argument *ab inconvenienti*, which is the principal ground of the decision. But had the court been construing constitutional provisions precisely the same as our own, and had they held that debts contracted by operation of law were not within the limitation, we should decline to accept their position as controlling.

We are urged to again consider the effect of legislative and executive interpretation. This subject was discussed at some length in the opinion filed when the cause was submitted upon the demurrer and answer. To the views then expressed we shall add but a single suggestion. We may accede to counsel's request, and apply the rule which gives significance to such construction, notwithstanding the apparent clearness of the language under discussion, and we may allow proper weight to such action of the legislature and the county officers as can justly be deemed interpretation by them adverse to our views; yet, after so doing, the considerations upon which we rely are not overcome, and our conclusion remains unchanged.

It may be true, as counsel contend, that a judgment for damages against a county, growing out of the negligent or tortious conduct of its officers or agents, constitutes a liability regardless of its indebtedness. Such is the view taken, under a constitutional provision substantially similar in this regard, by the supreme court of Illinois. *Bloomington v. Perdue*, 99 Ill. 329. But this fact does not sustain the position urged upon us. It is clear that the language under consideration deals with indebtedness that is reasonably anticipated as a result of voluntary action by the legislature or county authorities,—such indebtedness as springs from express or implied contracts. Involuntary liability, arising *ex delicto*, is a subject that is not contemplated by the provision.

In conclusion upon this branch of the case, we may inquire, why should the constitutional convention have intentionally left unrestricted the amount of county indebtedness that might arise *by operation of law*? Experience has demonstrated, and the members of this convention knew, that through such an opportunity the wise purpose of the provision would be largely evaded. If there were no control of legislative discretion in the passing of laws which might operate to create county indebtedness, it is plain that the great evil under consideration by the convention would be but imperfectly avoided. In view of the language used here as elsewhere in the constitution, we cannot suppose that, while the convention distrusted the wisdom of county authorities in the matter, they had unbounded confidence in the judg-

ment of the legislature. A limitation of county indebtedness, binding upon the legislature as well as the county authorities, was only a reasonable and a wise precaution.

2. We now turn our attention to the second question stated at the beginning of this opinion. As already suggested, the constitution does not limit the power of county authorities in connection with the levy of taxes for county purposes. The maximum amount to be thus raised is a subject left to the discretion of the legislature. That body has fixed a maximum rate, which is, in its judgment, amply sufficient to meet all reasonable current expenses. Should the limit thus named, however, prove inadequate for this purpose, it is to be presumed the legislature will hasten to make the necessary increase. Hence there can be no real ground for the apprehension of great inconvenience, provided the annual income from taxes can be used in defraying the annual expenses. Upon this subject we entertain no serious doubt. It is, we think, a sound doctrine that, though a municipal corporation be indebted to the constitutional limit, valid appropriations of its revenue may be made, in anticipation of the collection thereof, to meet the ordinary expenses of the current fiscal year. *Grant v. City of Davenport*, 36 Iowa, 399; *State v. Medbery*, 7 Ohio St. 531; *Fuller v. Heath*, 89 Ill. 296; *State v. McCauley*, 15 Cal. 455; *Law v. People*, 87 Ill. 400; *Koppikus v. State Capitol Com'rs*, 16 Cal. 253; *People v. Pacheco*, 27 Cal. 207; *City of Springfield v. Edwards*, 84 Ill. 626.

These cases, it will be observed by inspection thereof, do not discuss the subject with reference to counties. But the constitutional provisions construed are substantially similar in this respect to the one before us, and we have no hesitancy in applying the foregoing principle to such municipalities in Colorado.

There can be no *legal indebtedness* beyond the constitutional limit. After such limit is reached, therefore, warrants or other instruments representing supposed municipal liability are of no *legal* force or effect. The annual taxes cannot be collected at the beginning of the fiscal year, and hence necessary labor or materials can, in certain counties, seldom be paid for in cash when furnished. Therefore the question is, how shall the cost of such labor or materials be discharged without money in the treasury, and without incurring indebtedness? Upon this question the cases are not fully in accord. We shall leave counsel to examine for themselves the various decisions that have been rendered in other states, and proceed to give briefly *our* conclusions upon the subject.

If the written assignment of a portion of the incoming revenue be accepted as *payment in full* for labor or materials furnished to the county, no debt is incurred. Using the language of a decision cited above, "one thing is simply exchanged for another." Since, in such case, the assignee takes all the risk if the taxes are not collected, relying simply upon his right to compel the proper officers to perform their duty in the premises, no liability, contingent or otherwise, attaches to the county. But the taxes from which the revenue assigned is to accrue must have been levied previous to such assignment. It is a plain legal as well as business principle that no valid assignment can take place of a fund that has no existence either in fact or in law. When appropriations of the kind above mentioned have been made of revenue to accrue from taxes previously levied, the sum thus appropriated is in legal contemplation already collected. *Grant v. Davenport, supra*; *Law v. People, supra*.

It is hardly necessary to remark that assignments made in *excess* of the amount covered by the annual levy would be clearly illegal.

Counties may provide, under the funding statute, for the payment of all outstanding orders constituting a legal indebtedness. Such an indebtedness, therefore, when thus disposed of, does not interfere with the use of the current general revenue to defray the current expenses. And counties, in all cases,

have the power to so adjust their affairs that valid warrants may issue in payment of such expenses as they accrue, provided, of course, that the transactions accord with the foregoing views regarding the creation of debts. We discover no constitutional objection to the county's securing a sum of money, in anticipation of such expenses, with which to defray them when incurred, the power so to do being previously conferred by statute, if the essential condition be complied with; that is to say, if the party advancing the money accept the county's assignment of uncollected revenue as *payment in full*. In such case there is still simply an "exchange of one thing for another." A part of the anticipated revenue is exchanged for *money*, instead of labor or materials.

But, whatever form the particular transaction may take, its effect must be that of an assignment *pro tanto*, without recourse, by the county, of the fund to accrue from the current levy of taxes, and the warrant or instrument of assignment must be expressly made payable out of the incoming revenue for the current year. Since all persons must know the law, it is not absolutely necessary that the assignment should state on its face that it is accepted in full satisfaction of the claim on account of which it is given, and that no liability is incurred by the county because of its issue. The instrument issues, is accepted, and must be construed, as though all constitutional and statutory provisions bearing upon its legality were expressly set out among its written or printed terms and conditions. *Fuller v. Heath, supra.*

The warrant now in controversy was issued after the constitutional limit of indebtedness had been reached by the county. It is general in form. It does not purport to be payable from any particular fund, or out of the revenue from the taxes of any specified year. Nor do counsel claim, in the pleadings or argument, that, when the instrument issued, it was the intention to restrict in any manner the county's liability for the supposed indebtedness represented thereby. This warrant cannot be treated as an assignment under the views herein expressed.

The demurrer to the replication must therefore be sustained.

(9 Colo. 450)

ROGERS *v.* PEOPLE.

(*Supreme Court of Colorado. January 24, 1887.*)

BAWDY AND DISORDERLY HOUSES—CITY OF DENVER—EXCLUSIVE POWERS IN RESTRICTING DISORDERLY HOUSES—CONSTITUTIONALITY OF ACT OF 1885—GEN. ST. COLO. § 839—CONST. COLO., ART. 6, § 28.

The Colorado statute of 1885 conferring upon the city of Denver power by ordinance exclusively to prohibit and suppress dance and disorderly houses, has the effect of suspending, within the corporate limits of that city, the operation, *pro tanto*, of Gen. St. Colo. § 839, enacting a penalty for the keeping of such houses, and such act of 1885 is not unconstitutional as rendering the powers and jurisdiction of the courts unequal, or in contravention of Const. Colo. art. 6, § 28.

Error to criminal court, Arapahoe county.

Rogers & McCord, for plaintiff in error. *Theo. H. Thomas, Atty. Gen.*, for the People.

HELM, J. The principal question presented in this case may be briefly stated as follows: Does the statute of 1885 which confers upon the city council of Denver power, by ordinance, "exclusively to prohibit and suppress * * * dance-houses, bawdy-houses, disorderly houses, houses of ill fame or assignation, or any place for the practice of lewdness or fornication within said city," have the effect of suspending, within the corporate limits of the city, the operation, *pro tanto*, of section 839 of the General Statutes, which reads as follows: "If any person shall be guilty of open lewdness, or other notorious acts of public indecency, tending to debauch the public morals, or shall keep open any tippling or gaming house on the Sabbath day or night, or

shall maintain or keep a lewd house or place for the practice of fornication, or shall keep a common, ill-governed, and disorderly house, to the encouragement of idleness, gaming, drinking, fornication, or other misbehavior, every such person shall, on conviction, be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding six months?"

This general provision was adopted upwards of 20 years ago, and has never been repealed. The special act above mentioned is the later of the two. Therefore, if both are valid, and if both cannot be given full force and effect, the former must give way to the extent of the conflict existing between them.

The original charter and various amended charters enacted for the government of the city of Denver, in so far as they do not refer to matters within the expressly enumerated constitutional inhibitions, are not obnoxious to objection under section 25, art. 5, of the constitution, which treats of local or special legislation. And, in general, a legislative amendment of the charter will not be reviewed by this court for the purpose of determining whether, under the concluding sentence of this constitutional provision, the changes incorporated could be made by general law. *Brown v. City of Denver*, 7 Colo. 305; S. C. 3 Pac. Rep. 455; *Carpenter v. People*, 8 Colo. 116; S. C. 5 Pac. Rep. 828; *Darrow v. People*, 8 Colo. 426; S. C. 8 Pac. Rep. 924.

The use by the general assembly of the word "exclusively," in conferring power to prohibit and suppress bawdy-houses, indicates a design to place that matter entirely under the control of the city council. A provision relating to the prohibition and suppression of bawdy-houses has existed in the charter since 1874, but until the last session of the legislature the authority thus vested in the council was not exclusive. This fact demonstrates that the word "exclusively" could hardly have found its way into the enactment through inadvertence or mistake. The intention of the legislature in the premises is too plain to admit of serious doubt.

The pleadings show that the city council accepted and duly exercised the authority conferred; that an ordinance was passed in strict conformity with the statute in question, and fully covering the subject. Under the circumstances, unless the general assembly was powerless to delegate such exclusive control, or unless the legislative action be in conflict with some constitutional provision other than the one above mentioned, it follows that all prosecutions for committing the forbidden act within the limits of Denver must take place under the city ordinance.

Can the general assembly confer upon the council exclusive legislative control over this subject? A house of prostitution is a constant menace to the public peace and good order of the community in which it exists. It is a nuisance, and its keeping a misdemeanor, at common law. Its suppression and punishment are proper subjects of police regulation. In one form or another the authority to prohibit and suppress is very generally given to cities and towns, and quite as generally exercised by them. It is true, the general policy of our statutes and of the common law is to wholly inhibit these places, and it is also true that the people of the entire state are, to some extent, interested in the suppression thereof. But, in the *first* place, the statute gives the council no authority to *license or regulate*—they can only prohibit and suppress—the evil; and, *secondly*, the existence of such houses within the corporate limits is a matter that peculiarly concerns the citizens of Denver. They, more than the people elsewhere, are brought into contact therewith, and suffer through the vicious influences emanating therefrom. Moreover, the subject is one with which, from its very nature, the local authorities can more intelligently and effectively deal than can the general assembly. It is a matter fairly pertaining to the province of "local self-government." It was competent for the legislature to give the city council legislative control. Cooley, Const. Lim. 2:8, and note. See, also, page 261. And we discover no sufficient reason for holding that this authority shall not be made

exclusive and plenary, controlled only by such express constitutional inhibitions or mandates as may be found applicable. *State v. Clarke*, 54 Mo. 17; *State v. DeBar*, 58 Mo. 395; *Davis v. State*, 2 Tex. App. 425; *Berry v. People*, 36 Ill. 425; *State v. Gordon*, 60 Mo. 383; *Hetzer v. People*, 4 Colo. 45; *Huffsmith v. People*, 8 Colo. 175; S. C. 6 Pac. Rep. 157; *Seibold v. People*, 86 Ill. 33, and cases.

In *Berry v. People* and *State v. Gordon*, above cited, the offenses charged were gambling and disturbance of the peace, respectively. In the cases of *Hetzer*, *Huffsmith*, and *Seibold v. People*, the prosecutions related to tippling-houses, or the vending of intoxicating liquors. But, so far as the delegation of exclusive legislative control is concerned, we think these decisions may fairly be cited in support of our conclusion in the case at bar.

It is insisted that the power "to prohibit and suppress" does not include the power to provide for punishment. This proposition is not tenable. The right to pass ordinances usually carries with it "the incidental right to enforce them by reasonable pecuniary penalties." 1 Dill. Mun. Corp. §§ 338, 376, and note 1; Bish. St. Crimes, § 21. Besides, section 18 of the act in question reads as follows: "The city council is hereby authorized to provide for the punishment of all offenses against the ordinances of the city, by imprisonment," etc. Having the authority to pass an ordinance to prohibit and suppress bawdy-houses, and having power "to provide for the punishment of all offenses against the ordinances," it follows that the council is authorized to provide for the punishment of those who violate the ordinance imposing this particular inhibition. The phrase "to provide for the punishment," as used, confers at least concurrent power over the subject of punishment. Such power, must, of course, be exercised subject to constitutional requirements in relation to courts, their procedure and practice.

But a further and more embarrassing question is presented. Section 28, art. 6, of the constitution, provides as follows: "All laws relating to courts shall be general, and of uniform operation throughout the state; and the organization, jurisdiction, powers, proceedings, and practice of all the courts of the same class or grade, so far as regulated by law, and the force and effect of the proceedings, judgments, and decrees of such courts severally, shall be uniform."

Since the effect of the act now under consideration is to repeal, within the corporate limits of Denver, a part of section 839 of the General Statutes, and since no prosecutions for offenses committed within the city can be maintained under the provision thus repealed, the indirect result is that the territorial jurisdiction of the criminal court of Arapahoe county over certain misdemeanors is correspondingly curtailed; while the power of the criminal courts in Lake and Pueblo counties to entertain prosecutions throughout those counties for such offenses, under the general statute referred to, remains the same as before. Therefore, counsel contend the uniformity of jurisdiction required by the constitution among the criminal courts, which are unquestionably courts of the same class or grade, is by virtue of the Denver statute destroyed.

Section 13, art. 14, of the constitution, commands the legislature to provide by general law for the organization and classification of cities and towns. It limits the number of such classes to four, and requires that the powers and restrictions of all cities or towns belonging to the same class shall be similar. This provision clearly authorizes the granting of different powers and different restrictions to the different classes of municipal corporations mentioned. And there is clear constitutional authority for bestowing upon one class, within certain limits, exclusive legislative control over a given subject pertaining to local self-government, while another class is allowed only concurrent power in connection therewith.

If the existing general act relating to cities and towns placed in the first class all cities having a population of 30,000 or upwards, and conferred upon

them the identical powers specified in the special charter before us, Denver could, at present, be the only city of this class. But, if Denver was reincorporated under such general law, there would be produced the exact result we are now discussing; that is to say, the *exclusive* power to prohibit and suppress bawdy-houses would be exercised by Denver alone, a part of section 839 of the General Statutes would be suspended within its corporate limits, and the territorial uniformity of jurisdiction of the criminal courts would thus suffer the self-same disturbance of which counsel complain. But if the legislature, in its wisdom, should see fit to repeal section 839, aforesaid, the disturbance would at once cease, and entire territorial uniformity would be restored. A like result would also follow such repeal where, as in the case at bar, the supposed want of uniformity is produced by a *special* act which is otherwise constitutional.

Thus it appears that the view urged upon us in this connection leads inevitably to the following, among other curious, conclusions, viz.: That the constitutionality of a statute may, in a given instance, be made to depend, not upon its character or its *status* with reference to the constitution, but upon its relation to some other legislative enactment; and that in such case while each act, standing alone, would be perfectly valid, the co-existence of both renders one of them unconstitutional and void.

In construing constitutional as well as statutory provisions, the cardinal rule is to discover and enforce the intention of those who made them. Hence we are led to inquire, what was the purpose of the framers of the constitution when they inserted section 28 of article 6, and what was the purpose of the people when, in their sovereign capacity, they adopted it? It is a well-known fact that, under our territorial government, laws providing for the organization, jurisdiction, and procedure of courts of the same grade were often widely different. This diversity was sometimes as great "as if [to use the language of Mr. Justice BECK in *Ex parte Stout*, 5 Colo. 509] such courts were located in different states or territories." It is unnecessary to dwell upon the inconveniences and evils resulting from such a condition of affairs, or to detail the advantages arising from uniformity in these respects throughout the state. The importance and value of such uniformity are obvious to all interested persons, particularly to all members of the bench and bar.

It was doubtless with a view to preventing, under the new government, the existence of such mischievous confusion in this regard that said section 28 was adopted. The attention of the constitutional convention was directed to those laws which had been or would be passed by the legislature on the subject of courts, their jurisdiction and procedure. The members of that body did not contemplate, and were not considering, general legislation, with reference wholly to other matters. Their leading design, in framing the provision before us, evidently was to compel such legislation as would remedy the existing evils in this respect, and to have all laws thereafter adopted in relation to courts general, and of uniform operation throughout the state; also to require that statutes providing for the organization, and defining the jurisdiction, practice, or procedure, of courts of the same class or grade, be so drawn as to secure to such courts an organization, jurisdiction, practice, and procedure in all respects similar. This section was not intended to inhibit the passage of statutes entirely upon other subjects, and sanctioned by other constitutional provisions, which, however, might incidentally and remotely operate to disturb, for the time being, the territorial uniformity of jurisdiction possessed by courts of the same class or grade.

We feel compelled to overrule the objection in this behalf urged. In the *first* place, the statute conferring upon the city council of Denver exclusive authority to prohibit and suppress the evil mentioned is sanctioned by the constitution itself. *Second.* It does not deal, nor was it intended to deal, in any manner with courts or their jurisdiction. It was simply designed to

place in the hands of the city council legislative authority to pass an ordinance prohibiting and suppressing the evil, together with the incidental authority to prescribe a penalty for the violation thereof. The power of designating a court in which prosecutions for the offense should take place, or of prescribing the jurisdiction and procedure of such court, is not sought to be given, nor is there any attempt to exercise it. *Third.* As we have already seen, the effect of this statute is simply to suspend, within the corporate limits of Dehver, the operation of a part of said section 839, which general law does not refer to courts, or purport to prescribe the jurisdiction or procedure of any class of courts. On the contrary, it was passed solely for the purpose of recognizing as misdemeanors certain acts therein enumerated, and designating the punishment that should be inflicted upon persons found guilty thereof.

To say, under all the circumstances, that there is such a conflict between the statutory provision assailed and section 28, art. 6, of the constitution, as invalidates the former, would be to adopt a rule of constitutional interpretation of which we find in the books no sufficient recognition. Besides, it would, in our judgment, lead to a vast amount of uncertainty and litigation; for, by thus giving an effect to constitutional provisions not intended by the convention or the people, necessary legislation would be rendered more difficult than it is, and many beneficent statutes would fall. Upon this view we rely with confidence; but, were we to admit that the question is a doubtful one, there would still, under the authorities, be no ground for judicial interference.

We are aware of the principle that in law, as a general thing, that which cannot be done directly cannot be done indirectly. But, as we have tried to show, this principle has no real application to the case at bar. Any clear legislative attempt to evade indirectly a constitutional provision would be as promptly held void as a direct assault thereon couched in the most unambiguous terms.

The branch of the discussion relating to the constitutional provision which clothes district courts with "original jurisdiction of all causes, both at law and in equity," will not be considered. The subject is not fairly involved in the case, and our views thereon would be *obiter dicta*.

From the foregoing conclusions it appears that the plea to the indictment was good, and that the demurrer thereto should have been overruled. The judgment is accordingly reversed.

(5 Utah, 91)

BURROWS *v.* GUEST.

(*Supreme Court of Utah.* January 21, 1887.)

WAYS—ESTABLISHMENT BY DEDICATION—TURNPIKING AND USE OF A PORTION—DEDICATION OF THE WHOLE.

In determining the extent of the dedication of a strip of land claimed to be a public highway by user, where it is shown that the owner through whose land the strip runs received his title under a deed conveying half of said strip as half of a street four rods wide, that only two rods in width of the said strip has been turnpiked and traveled, and the owner had cultivated the rest, the public right will not be held to be confined to the portion traveled, but the extent of the dedication is a matter of fact to be determined from the circumstances of the user, in which determination the user of and expenditure therein is a part, evidence of a dedication of the whole, the width of adjacent highways, and the recognition of the street in the owner's deed, should be considered, and the continued use of a portion by the owner is not inconsistent with the easement.¹

Action of trespass *quare clausum.* Judgment for plaintiff. Defendant appeals.

Baskin & Van Horne, for Burrows, respondent. *Snow & Snow*, for Guest, appellant.

¹See note at end of case.

HENDERSON, J. The complaint in this cause alleges a trespass *quare clausum*, and describes the close as a strip of land forty-six rods east and west, by four rods north and south, and being the land between lot 10, block 40, and lot 1, block 33, of Ten-acre plat, Big Field survey, Salt Lake county, Utah territory; and complains that the defendant entered thereon, and dug up, cut down, and destroyed fruit and shade trees and fruit-bearing bushes thereon growing, to the plaintiff's damage, etc.

The defendant answered to this complaint that the premises, and all thereof, were, at the time of the alleged trespass, a highway, and were situated in road-district No. 4, Salt Lake county; that the defendant was road supervisor for said district; and that, in committing the acts complained of, he acted under the direction and order of the county court as such supervisor.

The cause was tried before a jury, and on the trial the plaintiff put in evidence a patent from the United States to John Eddins, dated June 5, 1871, conveying the lands in question, with other lands, by government subdivision, and a deed from Eddins to himself, dated April 24, 1876, conveying the lands in question and other lands by the following description: "All of lots 1 and 16, in block 40, Ten-acre plat, Big Field survey, together with one-half of the adjacent streets, containing in all 21.48 acres, more or less; also that eastern portion of lot 2, block, plat, and survey aforesaid, together with one-half of the adjacent street, containing in all ninety-two hundredths (.92) acres, more or less, and all that south half of the eastern portion of lot three, (3,) block, plat, and survey aforesaid, containing forty-three hundredths (.43) acres, more or less; also all that northern portion of lot ten, (10,) in block thirty-three, (33,) plat and survey aforesaid, together with one-half of the adjacent streets, containing in all eight and fifty-two hundredths (8.52) acres, more or less, which is included within the limits of lots three (3) and four (4) of section nineteen, (19,) township one (1) south, of range one (1) east, Salt Lake meridian."

And the plaintiff testified in his own behalf as follows: "The land described in the complaint is not a part of lots 1, 16, or 3, of Block 40, or lot 10 of Block 33, referred to in my deed from Eddins. It is a narrow strip, referred to in my deed as a street. It lays between lot 1 of block 40 and lot 10 of block 33. It is what defendant claims as a street. It opens in the state road, and runs west to the Church farm. This strip is four rods wide. The land mentioned in my deed is a part of this Ten-acre plat, Big Field survey, spoken of. The 4 by 46 rods described in the complaint is the street in controversy. The trespass by defendant, Guest, was committed on this street. There is a water-ditch running west along the south side of this strip. It is about a rod north of the south line of this strip in controversy. Defendant, Guest, is road supervisor of the road-district in which this land is situate. He came to me at the time mentioned in the complaint, and said he had been ordered by the county court of Salt Lake county to widen out this street to its full width. I objected, and forbid him and his men from doing it. I had a great many trees growing on the south side of this street, between the water-ditch and the south line of the street. I planted them there. They have been growing for a good many years. They were fruit trees, plum and currant bushes, locust and mulberry trees. That is how I have been in possession of this street. Defendant, Guest, cut out those trees, and dug up the dirt, and put it to the center of the street. It was in widening this street, as supervisor, that defendant committed this trespass. It is because of this that I brought this suit. I have no improvements on this street north of the water-ditch. My house and barn are across the north line on lot 1. This strip, 4 by 46 rods, described in the complaint, is laid out in the Ten-acre plat, Big Field survey, as a street, but it has never been used by the public generally as a road. The north part of it, about three rods in width, has been traveled over and used by various persons in that vicinity owning land west of me. It has been trav-

eled over by them on foot, by horse, and with wagon. It has been used principally by people in that vicinity to haul hay over it in the summer time. This street was turnpiked by the county in 1873; that is, the three rods in width on the north side of it was."

The defendant gave evidence tending to show that the survey and plat mentioned in the deed from Eddins to plaintiff was made as early as 1849, and that the plat was filed in the offices of the surveyor general of Utah, and of the county recorder of Salt Lake county, over 30 years prior to the alleged trespass, and had been generally acted upon and received as correct during all that time, and offered the same in evidence as showing the location and width of streets; but it was rejected by the court, because it was not shown to have been made by authority of the government; but that part of the plat and survey showing the particular land in question was admitted in evidence, from which it appeared that the land in question was surveyed, and platted as a street running east and west between lots 1, block 40, and 10 of block 33, and continuing on, past said lots, both east and west, to other intersecting streets.

One Brockbank testified, among other things, as follows: "Poll taxes have been worked out on that road since 1871. The true width was four rods. It was turnpiked in 1873, on the north side, and that was the portion of the road mostly used. In early days it was wet, swampy land, and was principally used in summer time. After it was turnpiked it was better, but two loaded hay teams could not well pass each other then in very wet weather, on account of which it was ordered widened in the spring of 1879. There never has been any objection to the use of this as a road, to my knowledge. That in 1873 and 1874, he [Brockbank] repaired and turnpiked said road from the state road west, its full length, to the Church farm; that he did this, under the direction of the county court of Salt Lake county, which paid for these repairs. The total paid by the county for these repairs was \$593."

Defendant also gave evidence tending to show that said street had been used as a public highway for over 30 years; that he was road supervisor of the district in which the lands were situated; and that the acts complained of were done in the line of his duty as such.

The following statement of the trial judge is contained in the statement on motion for a new trial: "Both the witnesses of the plaintiff and defendant testified that no portion of the platted street had ever been used by any person as a road, except a strip in the center of the same about two rods wide; that there was a ditch on each side of this strip, and that the street runs east and west; and that the plaintiff had been in uninterrupted possession of the land lying up to and along the line of the south ditch for more than eight years continuously before the institution of this suit; that he had planted thereon fruit and shade trees and currant bushes, and used a considerable portion thereof as meadow land; that the same was embraced by the deed of Eddins, and the premises described in the complaint; and that the principal damage done to the plaintiff by the defendant, Guest, was caused by digging up a portion of said trees and bushes, and destroying a portion of said meadow land. As to the alleged destruction and possession of the strip between said ditches there was a conflict in the testimony. That the street as platted was four rods wide, and the alleged trespass was within the four rods."

The defendant requested the court to submit to the jury, as a question of fact to be determined by them, whether the land in question was or was not a highway; and by his sixth and seventh requests asked the court to charge the jury as follows:

"(6) You are further instructed that it is not necessary that a dedication be made by deed or other special form; nor is any special form of acceptance of such dedication necessary to be made. It is solely a question of intent on the part of the person to dedicate, and on the part of the public to accept. If,

therefore, you believe from the evidence that the road in controversy was used by the public as a road, with the knowledge of plaintiff or his grantor, or other persons claiming the property now claimed by plaintiff, without objection by such person so claiming the same, with intention to appropriate the same as a public road, and that Salt Lake county has expended money in repairs and improvements of the same, then you are instructed that this evidence may be received by you as tending to show a dedication to and acceptance by the public for road purposes.

"(7) If the jury believe from the evidence that the land described in the complaint has been dedicated to the public as a road, and that public use has been made of only a part of the same, then you are instructed that such use relates to the entire width of the road as originally laid out and dedicated. If, therefore, you find that the road in controversy was originally laid out and dedicated as four rods in width, and that there has been a public user only of three or less number of rods in width, you are instructed that such user of a part may be considered as evidence tending to show an acceptance of the whole as laid out and dedicated."

All of which were refused, and the jury instructed as follows:

"If the jury find from the evidence that that portion of the premises described in the plaintiff's complaint on which his trees and shrubbery stood, was never used as a road, and that the plaintiff was in possession of the same at and before the date of the alleged trespass, then the defendant, Guest, has not shown any facts in justification of his acts in digging up the trees and removing the ground which was so possessed by the plaintiff, and the plaintiff is entitled to recover whatever damages he has sustained by reason thereof. There is no evidence in this case tending to show any dedication, for the purpose of a road, of any portion of the premises described in the complaint, except that portion between the two ditches on each side of the traveled street, and as to whether there has been a dedication of that portion as a public road is a question for the jury; but in any event, if the jury find in accordance with the first instruction, the plaintiff is entitled to the damages which he has sustained for the trespass committed by the defendant on the premises outside of the ground between said ditches."

The jury returned a verdict for the plaintiff, upon which judgment was entered, and, after motion for new trial, the case comes to this court on appeal by the defendant, alleging error in refusing to receive in evidence the plat and survey, and in refusing to give the instructions asked for.

This record presents to us the question as to what may be considered in determining the width and limits of a highway established by user. The trial judge, while submitting to the jury the fact as to whether a highway had been established over a part of the land, charged the jury that there was no evidence tending to establish a dedication of any part of said land except a narrow strip through the center thereof, upon the theory that the limits of a highway could not be shown to extend beyond the portion actually used and covered by the traveled track, and that the owner's continued possession and use of a strip along the south side thereof, as before stated, was conclusive evidence against its dedication for the use of the public as a highway. In this there was error. The question should have been submitted to the jury. When a highway is established by user merely over a tract of land of the usual width of a highway, or over a tract of land where, by a survey and plat which has been recognized and adopted by the owner, a street or highway of a certain width is laid out, the right of the public is not limited to the traveled part, but such user is evidence of a right in the public to use the whole tract as a highway, by widening the traveled part or otherwise, as the increased travel and the exigencies of the public may require. *Sprague v. Waite*, 17 Pick. 309; *Barclay v. Howell's Lessee*, 6 Pet. 498; *Hannum v. Belchertown*, 19 Pick. 311; *Irwin v. Dixion*, 9 How. 10; *Bumpus v. Miller*, 4 Mich. 159; *Ang. Highw.* § 155.

In this case there was evidence showing that the public had been using portions of this street continually as a highway for over 30 years; that the public had from time to time improved, widened, and repaired the road at great expense, without objection from the plaintiff or his grantor; and the plaintiff received his title to the premises by a deed which not only expressly recognized this street, but recognized it as a street four rods wide, and including all the land in question. This was evidence which should at least have been submitted to the jury, tending to show that the dedication extended over the land in question. Its weight was for the jury, aided by proper instructions from the court. Ang. Highw. §§ 142-149; *Gould v. Glass*, 19 Barb. 195; *Daniels v. People*, 21 Ill. 439; *Pettingill v. Porter*, 3 Allen, 849.

In determining the extent of the dedication, all the circumstances may be considered,—the width of the highways in the vicinity of the land in question, the width of highways in a system of which the one in controversy forms a part, any circumstances of recognition by the owner of the fee and the public of definite and fixed limits. It is but matter of common understanding and experience that it is desirable and usual that streets and highways should be and are of uniform width; and when a plat or survey of a tract of land is in existence showing uniform width of streets, and the public are entering upon and improving the streets pursuant to the general plan of such survey, it is evidence, more or less strong, according to circumstances, against the owners of such lands who have knowledge thereof, and who have in any way recognized such plan and survey, when the public by user establish a highway on one of such platted streets, and commence to improve the same, that the dedication by such owners is of the extent as platted, and that it is a question of fact for the jury. The continued use of the lands by the plaintiff was not absolutely, as matter of law, inconsistent with the easement created by the right of way as a highway. The owner of the fee has the right to use the land in any way not inconsistent with the requirements of the public. Ang. Highw. §§ 301-311. It was a circumstance which, with all the other facts, should have been submitted to the jury. *Barclay v. Howell's Lessee, supra*.

The question as to whether the land in question was a highway should have been submitted to the jury, and the defendant's requests to that effect should have been given. For this error, the judgment and decision should be reversed, and the cause remanded for a new trial, with costs to the appellant.

ZANE, C. J., and BOREMAN, J., concurring.

NOTE.

The width of a highway to which the public is entitled by prescription is determined by its actual use. *McKay v. Doty*, (Mich.) 30 N. W. Rep. 591; *Davis v. Clinton City Council*, (Iowa,) 10 N. W. Rep. 768. After a highway has been in use during the time limited for the acquisition of titles by prescription, its course must be as it has been used, and not as originally laid out, *Strong v. MaKeever*, (Ind.) 1 N. E. Rep. 502; but it has been held that the fact that part of a highway is not used does not cause its abandonment, if the other part is worked and traveled, *Stevenson's Appeal*, (Pa.) 6 Atl. Rep. 286; *Moore v. Roberts*, (Wis.) 25 N. W. Rep. 664; *State v. Wertzel*, (Wis.) 22 N. W. Rep. 150.

(6 Mont. 379)

UNITED STATES v. WILLIAMS and another.

(*Supreme Court of Montana*. January 26, 1887.)

1. PUBLIC LANDS—ACTION TO RECOVER FOR TIMBER CUT—COMPLAINT.

In an action by the United States to recover the value of cord-wood alleged to have been cut by the defendants on the public lands of the United States, a complaint which alleges that defendants had cut so many cords of wood from timber growing on the public lands, and the value thereof, and other formal matter, shows a sufficient cause of action to put defendants on their defense.

2. SAME—CAUSE OF ACTION—JOINER.

In such an action the complaint is not demurrable, on the ground of joining two causes of action, for charging the cutting of trees and timber generally, and also the cutting of trees and timber less than eight inches in diameter, contrary to the statute, the cause of action in both being the unlawful cutting of timber.

3. EVIDENCE—JUDICIAL NOTICE—REGULATIONS OF SECRETARY OF THE INTERIOR—REV. ST. MONT. DIV. 1, § 625.

The rules and regulations as to the cutting of timber upon the public lands of the United States prescribed by the secretary of the interior under Laws U. S. Forty-fifth Congress, (2d Sess.) c. 150, will be considered such an act of the executive department of the United States as the courts will take judicial notice of under Rev. St. Mont. div. 1, § 625; and it is not necessary to set out such rules in a complaint seeking to recover for an infringement thereof.

4. CONSTITUTIONAL LAW—LAWS U. S. FORTY-FIFTH CONGRESS, (2D SESS.) CH. 150, AS REGULATIONS FOR CUTTING OF TIMBER, DECLARED CONSTITUTIONAL.

Laws U. S. Forty-fifth Congress, (2d Sess.) c. 150, enacting that timber growing on the public mineral lands in Montana may be cut for building, agricultural, mining, and other domestic purposes, "subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the undergrowth growing on such lands, and for other purposes," is constitutional, and the rules and regulations of the secretary of the interior made thereunder are not unconstitutional, as trenching upon the domain of the legislative department of the government.

5. PLEADING—DEMURRER—NATURE OF ACTION—REV. ST. MONT. DIV. 1, § 83.

Under Rev. St. Mont. div. 1, § 83, a demurrer will not lie to a complaint in civil action on the ground that it cannot be ascertained therefrom whether the action is in the nature of an action of replevin, or of trover or of trespass.

Appeal from district court, Deer Lodge county.

Action to recover value of wood cut on public lands. Demurrer to complaint. Plaintiff appeals.

Robt. B. Smith, U. S. Atty., for the United States. *W. W. Dixon*, for respondent.

MCLEARY, J. This was an action brought by the United States against Henry Williams and A. H. Smith to recover the value of 28,000 cords of wood alleged to have been cut by the defendants on the public lands of the United States, in violation of law. The defendants demurred to the complaint, and the court sustained the demurrer, and, the United States district attorney declining to amend his complaint, the case comes to this court on the correctness of the ruling sustaining the demurrer, and the judgment thereupon rendered in favor of the defendants.

The grounds of the demurrer are stated in the records as follows: *First*. That said amended complaint does not state facts sufficient to constitute a cause of action. *Second*. That said amended complaint does not state facts sufficient to constitute a cause of action as to the alleged trees cut which were less than eight inches in diameter. *Third*. Said amended complaint is ambiguous, unintelligible, and uncertain, in that (1) it cannot be ascertained therefrom whether the action is in the nature of an action of replevin or of trover or of trespass; and (2) it does not set out or recite the alleged rules and regulations prescribed under the statute of the United States, and contrary to which the trees and timber are alleged to have been cut. *Fourth*. Two causes of action are attempted to be improperly united in said amended complaint; that is to say: (1) A cause of action for cutting trees and timber generally, contrary to the statute; and (2) a cause of action for cutting trees and timber less than eight inches in diameter, contrary to the alleged rules and regulations prescribed under the statute.

We will consider these several grounds of demurrer in their regular order, as they appear in the record.

As to the first ground of demurrer, we would say that the complaint states more than sufficient facts to constitute a cause of action. The timber growing upon the public lands of the United States is the property of the government, and is not liable to be appropriated by the first comer, regardless of the rights of property. It would seem hardly necessary to announce so plain

a proposition, did it not appear to be an idea fixed in the minds of some people, at least, that whatever is found upon the public lands belongs to the finder. This error has doubtless grown up from a misunderstanding among the people generally of the term "public lands," and which has doubtless been fostered by the extreme liberality of the government towards its citizens in the use of the timber growing thereon. The mere allegation in the complaint that the defendant had cut 28,000 cords of wood from timber growing upon the public lands, and alleging the value of the wood, and other formal matters, would be sufficient to put the defendants on their defense. *Kimball v. Lohmas*, 31 Cal. 156-160. If they had the right to cut the timber under the license granted by congress, for certain purposes, then they should plead that license, and set up the facts bringing them within the law. It is not necessary for the United States attorney to negative every possible fact or circumstance by which the defendants might be justified in taking the timber from the public lands. Such particularity is not necessary, even in criminal pleadings, and certainly cannot be required in a civil action. The facts, and only those facts, must be stated, which constitute the cause of action. If more should be stated, the allegation thereof would be stricken out on motion. Nothing which constitutes matter of defense should be averred in the complaint. *Smith v. Richmond*, 19 Cal. 479; *Green v. Palmer*, 15 Cal. 415; *Canfield v. Tobias*, 21 Cal. 351.

The second ground of demurrer is the same as the first, but applies only to the trees alleged to have been cut which are less than eight inches in diameter. What we have already said applies with equal force to this ground of demurrer, and no further notice of this point is necessary.

The third ground of objection seeks to try this complaint by the common-law forms, and objects that "it cannot be ascertained therefrom whether the action is in the nature of an action of replevin or of trover or of trespass." We do not believe that it is necessary to try the pleadings under our Code, by the rigid rules of the common law. That procrustean bed has long since been broken by legislation. *Daniels v. Andes Ins. Co.*, 2 Mont. 84; *Kimball v. Lohmas*, 31 Cal. 158. There is in Montana but one form of civil action. Rev. St. div. 1, § 1. This applies as well to the courts sitting for the trial of causes arising under the constitution and laws of the United States as to the courts when sitting under the territorial laws; and, when the United States come into the courts in civil actions, they occupy the same position as other litigants. *U. S. v. Ensign*, 2 Mont. 399.

All the complaint needs to contain, after the title of the action, the name of the court and county, and the names of the parties, is "a statement of the facts constituting the cause of action in ordinary and concise language," with a prayer for the appropriate relief. Rev. St. div. 1, § 83. It is not necessary that the complaint should set out or recite the alleged rules or regulations of the department of the interior, made for the protection of the timber on the public lands, referred to in the third paragraph of the complaint. If the whole of that paragraph had been omitted, the complaint would still have been sufficient. No allusion to the rules and regulations of the interior department was necessary. If the timber was cut in accordance with those rules and regulations, that was a matter of defense which should have been pleaded by the respondents.

It is assumed by both parties that, if the court could take judicial notice of these rules and regulations of the department of the interior, made for the protection of timber, then the complaint is in this respect sufficient. This is no doubt correct in practice, (Story, Eq. Pl. § 24; Moak's *Van Santv. Pl.* 254,) and as an examination of the terms of the complaint in regard thereto will show. Then, is it incumbent on the court to take judicial notice of these rules and regulations? Under our statute, "courts take judicial notice of whatever is established by law, of public and private official acts of the legislative, executive, and judicial departments of this territory and of the United States."

Rev. St. Mont. div. 1, § 625. Doubtless our courts will take judicial notice of the fact that the powers of the national government are divided among the three great departments, the legislative, the executive, and the judicial; and, again, of the subdivision of the business of the executive department among the various subdepartments, of which the department of the interior is one, —all these facts being matters "established by law."

Can the rules and regulations prescribed by the secretary of the interior for the protection of timber be classed as public or private acts of the executive department of the United States? If so, the courts of this territory will take judicial notice thereof, under the third subdivision of section 625 of the first division of the Revised Statutes. It certainly was not the intention of the legislature to limit the acts of which judicial notice will be taken to the personal acts of the president or the governor. Such a limitation could serve no useful purpose, and would be without reason. There is no doubt that courts would take judicial notice of the extension of a pardon, or the issuance of a commission, or an order removing an officer, or the issuance of a land patent. *Patterson v. Winn*, 5 Pet. 241; *Yount v. Howell*, 14 Cal. 468; *Wetherbee v. Dunn*, 32 Cal. 108. But many of the most important acts of the president are performed through heads of departments. In the very nature of the existing order of things, the extent of this country, the magnitude of the interests involved, and the immense mass of business required to be transacted by the executive department of the government, it would be impossible to dispose of it without confiding it, in a great measure, to the care of the cabinet officers, yet, whatever the president does through these officers, is to be regarded in law as an act of the executive department. Then, may not the rules prescribed by the secretary of the interior be so considered? Nothing appears more reasonable. There could be no question in regard to the matter if the act of congress required them to be approved by the president. But although his approval is not, in express terms, required by the law, is it not reasonably to be inferred that he is cognizant of them, and that they meet his approval? It would seem so. From the importance of the subject, and the fact that the prescribing of those rules is the personal act of the secretary himself, we think that they may fairly be considered an act of the executive department of the United States. But as the act of congress of the third of June, 1878, requires the secretary of the interior to prescribe the rules and regulations under which the persons permitted so to do may fell and remove timber, this fact certainly gives such rules and regulations sufficient force to allow the court to take judicial notice thereof in interpreting and carrying into execution this very act of congress. *Wade, Notice*, 729.

Under this view of the case, the court below should have taken judicial notice of these rules and regulations, which would have relieved the district attorney from the necessity of pleading them *in extenso*. This being settled, the complaint should have been held sufficient in this respect, and the demurrer on that point overruled.

Another argument in favor of this view is that, *ab inconvenienti*, these rules and regulations make a large printed pamphlet, and it would require great labor to set them out *in hac verba* in the complaint, or even to plead them in substance. It seems to us that it was to meet just such cases as this that the statute in regard to judicial notice was enacted. It seems to us that this provision of the Code should be liberally construed in favor of the dispatch of the public business, and in furtherance of justice.

The decisions on the subject of judicial notice are not very numerous, and very few of them reach the precise point in question, as provided for in our statutes. We will, however, review some of them.

In California it has been decided that courts will take judicial notice of the territorial limits of the jurisdiction of district courts, (*People v. Robinson*, 17 Cal. 371,) of the regular terms of the district courts, and of the contiguity of the counties composing the districts, (*Boggs v. Clark*, 37 Cal. 241;) these being

matters "established by law." It has also been decided in California that the courts of that state could take judicial notice of an act of congress, and the compliance therewith in obtaining the confirmation of a Mexican grant, (*Semple v. Hagar*, 27 Cal. 168;) and, further, that judicial notice will be taken of the signature of the president, and the seal of the United States, to a land patent offered in evidence, (*Yount v. Howell*, 14 Cal. 468;) and the same is declared to be the common law by Justice STORY in *Patterson v. Winn*, 5 Pet. 241. In 1867 the supreme court of California decided that courts ought at least to go so far as to take notice as to who fill the various county offices within their jurisdiction, and the genuineness of their signatures. *Wetherbee v. Dunn*, 32 Cal. 108.

In Texas, where there is no statute similar to ours, it has been decided that the court will take judicial notice that the city of Galveston is in a county of that name, in the state of Texas, (*Solyer v. Romanet*, 52 Tex. 568;) and that the court will take judicial notice of the existence of a railroad corporation which has been recognized by a general act of the legislature, (*Railroad Co. v. Knapp*, 51 Tex. 577.) But it is also held by the same court that a court will take judicial notice of the fact that a certain person is a county judge of a certain county when, and only when, his official acts come in review before it. *Eucus v. Womack*, 48 Tex. 230.

In the case of *Russell v. Hoyt*, 4 Mont. 420, 421, S. C. 2 Pac. Rep. 26, this court, in its opinion, uses the following language: "Courts will take judicial notice of what is generally known within the limits of their jurisdiction,—of the division of a state or territory into towns or counties, of the leading geographical features of the land, of the position of important cities and towns, and of the government surveys of the public lands,—but we are not aware of any principle or authority that would authorize or require a court to take judicial notice of the place where mere private property is situated, or its distance from the seat of government of the political division within which it is situated. Only matters of public importance and notoriety are within the scope of what courts will take judicial notice of. Matters of mere private concern, as the location or situation of a farm, or a mining claim, or their distance from the seat of government, are not within the operation of the principle. The act of May 8, 1873, was by its terms in force from and after its passage. If the defendants were within the exception, they ought to have made that fact to appear by proof."

This case was appealed to the supreme court of the United States, and there reversed on this very point; that court holding that the court should take judicial notice of the distance from the territorial capital of a certain mine proven by the public maps and surveys to be within a certain township within Lewis and Clarke county. Mr. Justice FIELD, in delivering the opinion of the court, says: "It is undoubtedly true that judicial notice is not taken of purely private concerns when they are not connected with or necessarily involved in a matter of a public nature; but it is otherwise when they are so connected or involved. For example, a court will take notice of the boundaries of the state or territory where it holds its sessions, and of judicial districts, and municipal subdivisions within it. If the public surveys have established the distance from its capital to any such subdivision, the court will take notice of the fact; and, if private property be shown to be within that subdivision, its distance, also, from the capital, will be judicially noticed,—notice of the general fact also embracing all the facts included in it. In the present case, the court below was required to take notice of the extent of its jurisdiction, not only of the subjects placed by law under its cognizance, but of its extent territorially. It should have known judicially whether the laws of the territory, which it was appointed to expound, were in operation with reference to a subject brought before it in the regular course of procedure. It was bound to know whether they were in force in the township designated in the county of Lewis and Clarke, on the thirteenth day of May, 1883, and that necessarily

involved a knowledge of its distance from the capital of the territory. It may be that the judge's information on the subject was at fault, and calculation and inquiries on the subject may have been necessary. Such is the case with reference to a great variety of subjects of general concern, of which courts are required to take judicial notice. Information to guide their judgment may be obtained by resort to original documents in the public archives, or to books of history or science, or to any other proper source. In this case, it appears by the government maps of the territory, upon which the public surveys are marked, that the distance from the seat of government to the nearest point of the township in which the mining ground in controversy is situated, exceeds seventy-five miles. The act of May 8, 1873, was not, therefore, in force there on the thirteenth of May, the day of the discovery of the Mammoth lode. The court, having become informed on this subject, should have so declared, and its conclusion would not have been open to contest before the jury." *Hoyt v. Russell*, 117 U. S. 404, 405; S. C. 6 Sup. Ct. Rep. 883.

Is it attempted improperly to join two causes of action in this complaint, as set out in the fourth paragraph of the demurrer? We do not think so. The cause of action on which the complaint is based, is the illegal cutting of timber. It matters not that the pleader has gone somewhat into particulars, and alleged that a portion of this timber was more than eight inches in diameter, and a portion less than eight inches in diameter. As to the larger timber, it is true that the defendants may possibly, under certain circumstances, have had a right to cut it for certain purposes, while, as to that less than eight inches in diameter, they could have had no right to destroy it, or to remove it from the public lands. If they claim the license, they should plead it, and bring themselves within the rules of the interior department. In the absence of the statute granting the license, and the rules regulating it, if they cut the timber as alleged, they are simply trespassers, and they are called upon to show the facts justifying their acts in taking the timber as alleged, or to deny the taking altogether.

And it is further argued by respondent that the act of congress, in so far as it authorizes the secretary of the interior to make rules and regulations relative to the cutting of timber from the public lands, is unconstitutional and void.

Let us examine the terms of the law itself. Chapter 150, Laws Forty-fifth Congress, (2d Sess.,) reads as follows: "That all citizens of the United States, and other persons, *bona fide* residents of * * * Montana, * * * shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, * * * subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the undergrowth growing upon such lands, and for other purposes."

Rev. St. Mont. p. 34, § 3, same chapter, makes it a penal offense to violate the provisions of the act, or any rules and regulations in pursuance thereof, made by the secretary of the interior. With the penal section we have nothing to do in this case.

And certainly no one has a right, independently of the statutes, to cut the timber on the public lands of the United States. The statute is the license to certain persons to cut and remove the timber belonging to the government, for certain specified purposes. Certainly, congress, in its generosity granting this permission, had the right to do so upon proper conditions, and to provide that the use of the license given should be restricted by rules and regulations to be prescribed by the proper cabinet officer for the protection of the property of the government. Such a restriction was not a delegation of legislative powers, and cannot by any fair process of reasoning be so construed. The rules and regulations of the secretary of the interior, made under this statute, are not in this sense laws, and cannot be so considered. As well might the regulations of the treasury department, or the rules of the supreme court

of the United States, or the rules of the post-office, be considered laws, as the rules under consideration.

The principle of constitutional law forbidding the delegation of legislative powers was never intended to have any such effect. It would be impossible for congress to prescribe every detail governing the administration and management of every department of government; and, if it were possible, it would not be wise. The making of the rules and regulations for the protection of the timber and undergrowth, growing upon the public lands, does not trench upon the domain of the legislative department of the government, and does fall within the principles laid down by Judge Cooley in chapter 5 of his work upon Constitutional Limitations. In our opinion, the law of congress upon this subject is clearly constitutional; and it is the duty of the courts to enforce it whenever their judicial powers are properly invoked.

For the error of the court below in sustaining the demurrer to the complaint, the judgment is reversed, and the case remanded.

BACH, J., (*concurring*.) While I agree with the majority of the court as to the result, I cannot consent to that portion of the opinion which relates to the question of judicial notice. I do not believe the law to be that the court below was bound to take judicial notice of the rules established by the secretary of the interior relating to the cutting of timber on the public domain.

Subdivision 3 of section 625 of the Code may be properly divided so as to read the "private acts" and "the official acts" of the several departments mentioned therein. Looking at the section in this way, we find no new rule of evidence, or of judicial notice, save and excepting the rule therein contained relating to the private acts of the departments therein mentioned. As to the public acts of the legislative, executive, and judicial departments of the territory and of the United States, our courts would take notice of them without the aid of a statute. See 1 Greenl. Ev. § 5; Whart. Ev. § 317. This rule applies with unusual force to territorial courts; for they own their origin to the United States government. As to the private acts of those several departments, the section quoted from the Code probably does make a new rule of evidence. At least it settles a disputed question; for many authorities have held that courts would not take judicial notice of such private acts. See *Dole v. Wilson*, 16 Minn. 525, (Gil. 472.) In the case of *U. S. v. Wilson* it was held that the court would not take judicial notice of a pardon because it is the private, though official, act of the president. 7 Pet. 160. Our Code changes that rule, and includes private as well as public acts.

However that may be, we are not considering the private act of a legislative, judicial, or executive department of the government of the United States. The rule of the secretary of the interior is the act of which it is held the court should take judicial notice. I cannot consider the secretary of the interior as the executive of any department. He is but the trusted head of one department, of which the president of the United States is the executive, as he is of every one of the departments. Before the adoption of the constitution, and while that document was under consideration, the most bitterly fought proposition was, "Shall we have one or several executives?" The result of the contest was section 1 of article 2 of the constitution, which declares: "The executive power shall be vested in a president of the United States of America." It is too late for the legislature of Montana to change that provision. The secretary of the interior is not one of the legislative departments of the United States government; for all legislative powers are vested in the congress of the United States by section 1, art. 1, of the constitution. And the same document provides for the judicial powers, of which the secretary of the interior is not one.

As to the rules in question, they are in no sense the act of the president. If they became a law subject to his approval, they would be subject to his veto power. The law referred to was approved by the then president, who

by signing the same merely authorized the secretary of the interior to pass such rules as he, the secretary, thought proper. The rules thus made were in no way the act of the president. They were the rules of the secretary of the interior, relating to the conduct of his particular department; and the court below had no more judicial notice of those rules than of any other rule which the secretary of the interior may have passed for the dispatch of business in his department.

Neither do I think that subdivision 2 of said section 625 makes it obligatory upon the court to take judicial notice of the rules referred to. That subdivision reads: "Whatever is established by law." These rules were not established by law. They were established by the secretary of the interior. The law referred to established merely his power to post rules; and, if the rules had been proved, it would have been incumbent upon the court below to take judicial notice of the act which gave the secretary power to establish such rules.

The learned justice who wrote the opinion in this case finds peculiar force in the words of the statute which provides that the secretary may prescribe rules, etc. This power, thus given to the secretary, is very much like the power given to municipalities which derive their power to pass ordinances from a statute; yet courts do not take notice of ordinances passed by the legislative branch of such corporations. When the ordinances are proved, then the courts take judicial notice of the law which gave power to the corporation to pass such ordinances; and they take judicial notice of the extent of the power; but the use of the power must be proved. In other words, neither the rules of the secretary, nor the ordinances of municipal corporations, become a part of the laws which authorize but do not enact them.

In the case of *Hensley v. Tarpey*, 7 Cal. 288, the court say: "The courts of this state are not bound to take official notice of the rules adopted for the regulation of the various departments of the federal government, or those established by the board of land commissioners or surveyor general of the United States for California." Yet such rules, if they are the act of the president at all, are his public official acts, of which the supreme court of California would have taken notice judicially, by reason of common-law rules of evidence governing such cases. But, not being the acts of the president, the court, in my opinion, properly held that such rules had to be proved.

Upon the other portions of the opinion I concur with the majority, and therefore agree that the judgment of the court below should be reversed.

(6 Mont. 397)

BUTTE CITY SMOKE-HOUSE LODE CASES.

MURRAY v. BUOL and others. **SAME v. OWSLEY and others.** **SAME v. McNAMARA and others.** **SAME v. LOUIS and others.** **SAME v. TALENT and others.** **SAME v. REINS and others.** **SAME v. RICHARDSON and others.** **SAME v. THORNTON and others.** **SAME v. BEAL and others.** **SAME v. JACOBS and others.** **SAME v. NESSLER.** **SAME v. SIMON HAUSWIRTH and others.** **SAME v. K. HAUSWIRTH, Ex'r, and others.** **SAME v. STEELE and others.** **SAME v. P. J. HAMILTON and others.** **SAME v. SANDS and others.** **SAME v. J. L. HAMILTON.** **SAME v. HAUSER and others.** **SAME v. BARNARD.** **SAME v. MORRIS and others.** **SAME v. DAVIS.** **SAME v. J. L. HAMILTON and others.** **SAME v. FIRST NAT. BANK OF BUTTE.** **SAME v. COHEN and others.** **SAME v. DOVENSPECK and others.** **SAME v. DELLINGER and others.** **SAME v. BOWES.** **SAME v. ROACH.** **SAME v. SCHNIED and others.** **SAME v. ORNSTEIN, Adm'x, etc.** **SAME v. FOSTER.** **SAME v. LAVALLE and others.** **STEVENS G. S. & M. Co. v. MILLS.**

(*Supreme Court of Montana. January 21, 1887.*)

1. **MINING CLAIM—PATENT—RESERVATION OF RIGHTS CLAIMED UNDER BUTTE TOWN-SITE PATENT DECLARED VOID.**

No title was acquired under the United States patent to the town-site of Butte, issued September 26, 1877, to any portion of the Smoke-house quartz-lode mining

claim, located in 1875, and to which patent was issued on March 15, 1881; and the exception to the last-mentioned patent, excepting and excluding therefrom all town-property rights upon the surface, and all houses, buildings, structures, lots, blocks, streets, alleys, and other municipal improvements on the surface of the said mining claim not belonging to the grantees therein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same, did not impair the title of the grantees, acquired by their location, and compliance with the laws, to the absolute ownership of the lands embraced within the boundaries of their claim; and the defendants, claiming under the town-site patent, have lost their rights, if any they had, over said claim, by failure to file their adverse claim before the said patent issued.

2. SAME—NOT AFFECTED BY TOWN-SITE PATENT, WHICH CAN CONFER NO TITLE IN MINING CLAIM.

An exception in a town-site patent, excluding from its operation all mines, mining claims, and possessions held under existing laws, is an exception required by the law, and is made by the law itself, and is conclusive upon the question that the government did not, and did not intend by such town-site patent to, convey any valid mine, mining claim, or possession held under existing laws; and it is therefore impossible, under a patent to a town-site, to acquire any interest in any valid mine or mining claim, or in the surface thereof.

3. SAME—TOWN-SITE PATENT—NO DEFENSE TO EJECTMENT UNDER MINING PATENT.

Claimants claiming title, under a town-site patent, to the surface ground of a mining claim over which the town-site is extended, are not relieved by such town-site patent from setting up their adverse claims on notice of application for a patent to the mining claim, and their failure to assert their claims before such patent is issued bars them from doing so thereafter.

4. SAME—OWNER OF MINING CLAIM NOT AFFECTED BY TOWN-SITE PATENT.

The owner of a valid mining claim over which a town-site is extended by United States patent is not required to file an adverse claim to such patent, as his claim is expressly excepted by law, and the usual exception inserted in such town-site patent from its operation.

5. SAME—MINING CLAIM LOCATION—INTENDS A GRANT—RIGHTS UNDER, NOT RESTRICTED BY TERMS OF PATENT.

A valid location of a quartz-lode mining claim on the public mineral lands of the United States is a grant from the government to the locator thereof, and carries with it the right, by compliance with the law, of obtaining a full and complete title to all the lands included within the boundaries of the claim, which by the location are withdrawn from sale and pre-emption; and the patent, when issued, relates back to the location, and is not a distinct grant, but the consummation of the grant, which had its inception in the location of the claim; and therefore the land-officers have no right to insert in the patent any exceptions or reservations diminishing or curtailing the rights acquired by the location.

6. SAME—PATENT TO MINING CLAIM—RESERVATION IN VOID.

There is no law authorizing the United States land-office to exclude from a mining-claim patent the right to surface ground; and a reservation in such a patent, excluding therefrom the right to all lots, blocks, streets, alleys, houses, and municipal improvements on the surface of the claim, is necessarily void.

7. SAME—CONCLUSIVE AT LAW AS TO TITLE.

The issuance of a patent to a quartz-lode mining claim is conclusive, as to the title to the land within its limits, upon the court in an action at law.

Appeal from district court, Deer Lodge county.

Thirty-three actions in ejectment. Judgments for plaintiff Murray. Defendants appeal.

These actions, called the "Smoke-house Lode Cases," are on all fours with the *Silcer Bow M. & M. Co. v. Clark*, 5 Pac. Rep. 570, and *Talbott v. King*, 9 Pac. Rep. 435. The facts being otherwise sufficiently stated in the opinion, it is only necessary to add that the Smoke-house mining claim, under which the plaintiff claims, was located in 1875, and it is not disputed that all acts requisite to maintain title were performed in respect thereof up to the issuance of the patent in 1881. Application for the Butte town-site patent was made in June, 1876, and the final entry for such town-site was made in July, 1876, and the patent issued in September, 1877. The exception referred to in the opinion as being contained in the Smoke-house patent was as follows: "Excepting and excluding, however, from these presents, all town-property rights upon the surface; and there are hereby expressly excepted and excluded from the same all houses, buildings, structures, lots, blocks,

streets, alleys, and other municipal improvements on the surface of the above-described premises not belonging to the grantees herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same." The Butte town-site patent, which was prior in date, contained the following: "No title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession, held under existing laws of congress." Judgment was given in each case for plaintiff, from which defendants appeal.

Knowles & Forbis, for appellants. *W. W. Dixon*, for respondent.

WADE, C. J. The foregoing cases are actions in the nature of ejectment, the plaintiff and respondent claiming title and the right of possession under the Smoke-house quartz-lode mining claim, issued March 15, 1881, and the defendants and appellants in each case claiming title and right of possession under the patent of the Butte town-site, issued on the twenty-sixth day of September, 1877. These causes arise under the same patents, and in every material respect are similar to each other, and to the case of *Talbott v. King*, 6 Mont. —, S. C. 9 Pac. Rep. 434, (decided by this court at the January term, 1886,) and are parallel to the case of *Silver Bow M. & M. Co. v. Clark*, 5 Mont. 378, S. C. 5 Pac. Rep. 570, (decided by this court at the January term, 1885;) but as the court, under the act of congress of July 10, 1886, has been reorganized since these decisions were rendered, by increasing the number of justices, and by the appointment of two justices who did not take a part in those decisions, we have considered the questions involved herein as still open, and as if presented here for the first time.

The theory of the decisions in the case of *Talbott v. King* and in the case of *Silver Bow M. & M. Co. v. Clark* is that a valid location of a quartz-mining claim on the public mineral lands of the United States is a grant from the government to the locator thereof, and carries with it the right, by a compliance with the law, of obtaining a full and complete title; that, after such a location, the lands included within its boundaries are withdrawn from sale and pre-emption; that the patent relates back to the location, and is the consummation of the grant, which by the location had its inception; that a valid location, kept alive by representation and a compliance with law, gives to the locator, or his grantees, the right to the exclusive possession and enjoyment of the surface of the claim located; that the office of an adverse claim is to have determined, by a court of competent jurisdiction, the right to such possession; that, if an adverse claim is not made at the time and in the manner prescribed by law, the same is thereafter barred; that the issuance of a patent to a quartz-lode mining claim is conclusive upon the court in an action at law; that the discovery, location, marking, and bounding, and all proceedings up to the issuance of the patents, were regular and as required by law; that it is impossible, under a patent to a town-site, to acquire any interest in any mine of gold, silver, cinnabar, or copper, or in any valid mining claim or possession, held under existing laws; that, as to any such mine or mining claim or possession, a patent to a town-site did not take hold of, operate upon, or in any manner affect it; that an exception in a mining-claim patent, excluding therefrom all lots, blocks, streets, alleys, houses, and municipal improvements on the surface of the claim, is unauthorized and void; that an exception in a town-site patent, excluding from its operation all mines, mining claims, and possessions held under existing laws, is an exception required by the law, and is made by the law itself, and is conclusive upon the question that the government did not, and did not intend by such town-site patent to, convey any valid mine, mining claim, or possession held under existing laws.

We believe that the theory upon which the cases of *Talbott v. King* and *Silver Bow M. & M. Co. v. Clark* were decided, is correct, and the decisions in those cases are hereby approved and confirmed.

The theory of appellants seems to be that the town-site patent conveys all

the grounds included within the boundaries of the town-site, regardless of prior conveyances to other parties; that, in the issuance of such a patent, the officers of the government decided that the grounds within the boundaries of the town-site were not valuable for mineral purposes; that the words in the patent excluding from its operation all mines, mining claims, and possessions held under existing laws, was not an exception that excluded any lands from the Butte town-site; that the issuance of the Smoke-house patent did not decide that the premises embraced therein was a valid mining claim and possession at the date of the issuance of the town-site patent; that, if the failure to contest the application for the Smoke-house patent waived all rights to such mining claim, then the failure of the Smoke-house claimants to contest the town-site application was a waiver of any rights to the grounds embraced in the town-site patent; that the grant derived from the location of a mining claim is an independent grant from that derived from a patent to the same ground, and that the location of a mining claim is not the first step towards the obtaining of a patent for such claim; that the patent issued for the Smoke-house mining claim was an adjudication by the land department that all lots, blocks, streets, alleys, etc., should be excepted from such patent; that the grantees accepted the patent to the Smoke-house mining claim with those exceptions in the same, and are bound thereby; that the applicants were not barred from proving their alleged estoppel; and that, as both these parties claim by patents, the court should have gone back of the patents, and determined from the proof who had the better right.

We do not think the acts of congress in relation to acquiring title to mining claims and town-sites warrant or uphold this theory of appellants. Why should the court have gone behind the patents, and ascertained from the proofs which of these parties had the better right, when it was not possible for either to have acquired any right or title to the property of the other by virtue of his patent? Their patents do not cover or touch the same property. By the express terms of the law, and by the express terms of the town-site patent, all valid mines, mining claims, and possessions held under existing laws were excluded from the operation of that patent. At the time of the issuance of the town-site patent in 1877, the Smoke-house location had, for more than two years, been a valid mining claim and possession. This is evidenced by the subsequent issuance of a patent for such mining claim in pursuance of a location in 1875. There are no authorities that dispute the doctrine that the patent relates back to the location, and protects it. The location is the inception of the grant, of which the patent is the consummation. The government does not go through the performance of making two grants of one mining claim to the same person, or to his successors in interest.

The Smoke-house location, being a valid mining claim at the time, was expressly excepted from the operation of the town-site patent, and it was not possible by such a patent to have obtained any interest therein or title thereto. There is no conflict between a town-site patent and a mining-claim patent, and can be none. They evidence separate and distinct grants, and cannot conflict with one another. The one conveys a mining claim, an independent grant, and the other conveys ground for a town-site, from which, by the law, all valid mining claims and possessions are excluded. Many valuable mines, mining claims, and possessions are held and owned by perfect titles, over which town-sites have been extended, and there can be no conflict between them. The two titles take hold of and affect property that is entirely separate and distinct.

The officers of the land department had no authority to convey a mining claim by the issuance of a town-site patent, and no authority to convey a town-site by the issuance of a mining-claim patent. At the time of issuing the town-site patent, they had no authority to declare that the Smoke-house location was not a valid mining claim and possession; and, having no such au-

thority, they excluded from the operation of the town-site patent all mines, mining claims, and possessions, as the law required.

But it is said that the patent issued for the Smoke-house claim was an adjudication by the land department that all lots, blocks, streets, and alleys should be excepted from such patent. If this be true, then the land department can make adjudications without authority of law. The Smoke-house location carried with it the right to the exclusive possession and enjoyment of all the surface ground included within the boundaries of the location. This right is given by an act of congress; it is the very essence and substance of the title to quartz-mining claims; and, having a valid location, this title and grant cannot lawfully be taken away or defeated. There is no law authorizing the land-officers to exclude from a mining-claim patent the right to such surface ground, and consequently any attempt to do so is necessarily void. The patentee of such a patent is entitled to what the law gives him, and his rights cannot be abridged or taken from him by the unauthorized or unlawful acts of any one. There is no force in the proposition that the land department adjudicated the surface ground of the Smoke-house patent, or that the grantees of such patent are bound by an unlawful exception. Their rights are defined by the law, and in asserting them they do not encroach upon any rights acquired by the town-site patent.

And now, why should the owners of the Smoke-house location have filed an adverse claim to the application for the town-site patent? They knew that the town-site patent, when issued, would exclude from its operation all valid mines, mining claims, and possessions, and therefore they had no adverse claim. They could not object to the issuance of the town-site patent, for it could not interfere with or in any manner affect the Smoke-house location. Suppose they had filed an adverse claim, they would have been informed that they were meddling with what did not concern them. They would have been told that the town-site patent, when issued, could not touch the Smoke-house location.

But it is contended that, if it was not necessary for the Smoke-house owners to make an adverse claim to the town-site application, therefore the town-site claimants were in like manner relieved from filing their adverse claims to the Smoke-house application for a patent. It is also said that the town-site claimants were the owners by the patent at the time the Smoke-house application for a patent was made, and, having a patent, they were relieved from making any adverse claim to the Smoke-house application. It is also argued that adverse claims to applications for patents to mining claims can only be made by those who claim some interest in the property as a mining claim, and therefore that those who claimed the surface ground of the Smoke-house location, for the purpose of lots, blocks, streets, and alleys, were relieved from the necessity of making an adverse claim to the Smoke-house application. It does not follow that because the Smoke-house owners were not required to make an adverse claim to the town-site application for a patent, therefore that the town-site owners were relieved from making adverse claim to the Smoke-house application. The town-site application was not adverse to the Smoke-house location; but the Smoke-house application for a patent, which was the assertion of a right to the exclusive possession and enjoyment of the surface ground included within the boundaries of the location, called upon every one claiming any interest in the surface ground to set up their adverse claim. And the mere fact that the town-site claimants held under a patent from which all valid mining claims and possessions are excluded, did not relieve them from setting up their adverse claim.

Claimants under a town-site patent are not relieved from making an adverse claim, if they have one, to an application for a patent to a mining claim within the boundaries of the town-site. In such a case both parties would claim the exclusive right to the possession and enjoyment of the ground,—the one by his discovery and location of a mining claim, the other by virtue

of his deed from the probate judge. If there had been no discovery, or no location according to law, an adverse claim by the lot-owner would have shown this condition, and defeated the application for a patent; and when this application was made, was the time for the town-site claimant to make known his adverse claim; and if, by his laches or neglect, he permitted the statutory time to pass, he thereby lost his right.

The opinion of Mr. Justice FIELD in the case of *Deffeback v. Hawke*, 115 U. S. 392, S. C. 6 Sup. Ct. Rep. 95, rendered in the supreme court of the United States at the October term, 1885, is instructive, and covers many of the points and propositions in the cases before us. In that case the plaintiff relied upon a patent of the United States for the land in controversy, issued under the laws for the sale of mineral lands. The defendant set up as ground for equitable relief, against the enforcement of the rights of the plaintiff, under the patent, that his grantor occupied the land as a lot in the town-site of Deadwood, and made improvements thereon, before the plaintiff claimed it as mining ground, or took proceedings to procure a title. The defendant therefore denied the right of the plaintiff to acquire the premises as a mining claim on the town-site, and he also contended that, if the plaintiff had that right, the patent issued to him should have contained reservations excluding from its operation the buildings and improvements of the defendant, and whatever was necessary for their use and enjoyment.

In deciding the case Justice FIELD said: "In the present case there is no dispute as to the mineral character of the land claimed by the plaintiff. It is upon the alleged prior occupation of it for trade and business, the same being within the settlement or town-site of Deadwood, that the defendant relies as giving him a better right to the property. But, the title to the land being in the United States, its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character. And those proceedings had gone so far as to vest in the plaintiff a right to the title before any steps were taken by the probate judge of the county to enter the town-site at the local land-office. The complaint alleges, and the answer admits, that on the twentieth day of November, 1877, the plaintiff applied to the United States land-office at Deadwood to enter the land as a placer mining claim, and that on the thirty-first day of January, 1878, he did enter it as such, by paying the government price therefor. No adverse claim was ever filed with the register and receiver of the local land-office, and the entry was never canceled nor disapproved by the officers of the land department at Washington."

Here is a recognition of the doctrine that lot-owners in a town-site, even though the town-site entry had not been perfected, should have filed their adverse claims, if any they had, to the application for a patent to mining ground, and that their failure so to do barred their right.

Justice FIELD continues: "The right of the government, therefore, passed to him; and, though its deed, that is, its patent, was not issued to him until January 31, 1882, the certificate of purchase, which was given to him upon the entry, was, so far as the acquisition of title by any other party was concerned, equivalent to a patent. It was not until the twenty-eighth of July following that the probate judge entered the town-site. The land had then ceased to be the subject of sale by the government. It was no longer its property. It held the legal title only in trust for the holder of the certificate. *Witherspoon v. Duncan*, 4 Wall. 210, 218. When the patent was subsequently issued, it related back to the inception of the right of the patentee."

And so we say that, by the location of the Smoke-house claim, the ground included within its boundaries ceased to be the subject of sale by the government. It was no longer the property of the government. It held the legal title in trust for the locator of the claim, or his grantees; and, when the pat-

ent was subsequently issued, it related back to the inception of the right of the patentee, which was the location of the claim.

Speaking of reservations and exceptions of municipal improvements in a patent to a mining claim, Justice FIELD fully justifies all we have said on that subject. His language is as follows: "The position that the patent to the plaintiff should have contained a reservation, excluding from its operation all buildings and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of congress. The land-officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law, and the conditions which it prescribed. The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location, as well as to the land beneath the surface."

Speaking of the possibility of acquiring title to a mineral claim by virtue of a town-site patent, Justice FIELD continues: "While we hold that a title to known valuable mineral land cannot be acquired under the town-site laws, and therefore could not be acquired to the land in controversy under the entry of the town-site of Deadwood by the probate judge of the county in which the town is situated, we do not mean to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry."

That is equivalent to saying, what we have already said in this decision, that the town-site patent took hold of the non-mineral lands included within its limits, but did not touch or in any manner affect the mining claims therein; and hence that the patent to the Butte town-site did not affect the Smoke-house location; and, further, that there is not and cannot be any conflict between a town-site and a mining-claim patent.

The decision of Justice FIELD continues: "The act of congress relating to town-sites recognizes the possession of mining claims within their limits; and in *Steel v. Smelting Co., etc.*, 106 U. S. 447, [S. C. 1 Sup. Ct: Rep. 389,] we said that 'lands embraced within a town-site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes; its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown up on what was, at its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established.' It would seem, therefore, that the entry of a town-site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government; the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residences or business under the town-site title."

In the case of *Sparks v. Pierce*, 115 U. S. 412, S. C. 6 Sup. Ct. Rep. 102, it is said that a patent to a mineral claim is itself evidence that all the requirements of the law for its sale have been complied with.

And so the smoke-house patent was itself evidence that, in the discovery, the location of the claim, and in all proceedings up to the issuance of the patent, the law had been complied with. The Smoke-house location was known to exist before the town-site entry. This patent related back to the location in 1875, and fixes the mineral character of the claim at that time, and at all subsequent times, up to the date of the issuance of the patent in 1881. It was, therefore, a valid mining claim and possession in 1877, when the town-site patent was issued, and necessarily excepted therefrom.

The judgment, in each of the foregoing cases is hereby affirmed, with costs.

(6 Mont. 409)

KING and others v. THOMAS and others. SAME v. McCUALEY and others.
SAME v. KINGSBURY and others.

(*Supreme Court of Montana. January 21, 1887.*)

1. MINING CLAIM—SILVER KING MINING CLAIM—NOT AFFECTED BY BUTTE TOWN-SITE PATENT.

The facts being on all fours with the facts in *Murray v. Buol, ante*, 858, both as to the town-site patent and the mineral patent, held, following those cases, that the town-site patent to Butte City does not cover the mineral ground included within the limits of the Silver King lode, but that the said lode is expressly reserved from the operation of the same by the terms of the patent itself, and by the act of congress, and that the exceptions made by the mineral patent are unauthorized by law, and void, and that the Silver King patent conveys a perfect title to the surface ground in controversy, to which the defendants have no claim whatever.

2. SAME—STATUTE OF LIMITATIONS—MINING CLAIM—ISSUE OF PATENT.

The statute of limitations cannot run against a mining claim until the patent thereto has been issued, any state or territorial legislation to the contrary notwithstanding.

Appeal from district court, Silver Bow county.

Three actions in ejectment. Judgments for plaintiffs King and others. Defendants appeal.

Knowles & Forbis, for Thomas and others, appellants. *Wm. Scallon*, for King and others, respondents.

MCLEARY, J. These three cases were argued and submitted together, and really involve the same questions, except, in the last case, the defendants, Kingsbury and others, do not insist on the statute of limitations, having offered no evidence in support of that plea.

The facts may be briefly stated as follows: The application for the Butte town-site patent was made on the tenth day of June, 1876, and the final entry for such town-site was made on the twenty-fifth day of July, 1876, and the town-site patent was issued upon such application and entry, and was dated September 26, 1877. The respondents claim title to the premises in controversy under and by virtue of the Silver King quartz-lode location, made on the fourteenth day of March, 1877, and upon which location patent was issued on the thirteenth day of September, 1881. The land in question is covered by the Silver King quartz-lode claim, and lies within the corporation and town-site of Butte, and is laid off in streets and alleys, lots and blocks; and some of the lots are improved, and have been occupied since the years 1878 and 1881. The court below, after a trial by jury, and verdict for the plaintiffs, rendered judgment for the plaintiffs, and from this judgment the defendants appeal.

The questions raised in the court below, and in this court, are the following: *First*, what is the proper construction of the patent for the town-site of Butte? *Second*, what is the proper construction of the patent of the Silver King quartz-lode mining claim? *Third*, had the defendant the right to prove, by extrinsic evidence, that the lands embraced within the boundaries of the town-site patent were not mineral in their character? *Fourth*, if the defendants have not a good title, under the town-site patent, have they had possession of the premises long enough to bar the action under the statute of limitations?

The construction of the town-site patent and the mineral patent may be considered together; and for a correct interpretation of them it is scarcely necessary to do more than to refer to the opinion of this court, just read in the cases of *Murray v. Buol, ante*, 858, and the 32 other cases, commonly called the "Smoke-house Lode Cases." In that opinion, the whole case, in all its branches, has been carefully reconsidered, and the case of *Silver Bow M. & M. Co. v.*

Clark, 5 Mont. 406, S. C. 5 Pac. Rep. 570, and the case of *Talbott v. King*, 9 Pac. Rep. 434, have been carefully reviewed.

In the cases of *Deffebach v. Hawke*, 115 U. S. 392, S. C. 6 Sup. Ct. Rep. 95, and *Sparks v. Pierce*, 115 U. S. 412, S. C. 6 Sup. Ct. Rep. 102, in which the same doctrines are announced, have been carefully compared with the cases cited from the previous decisions of this court, and it is believed that the Montana cases have been virtually sustained by the supreme court of the United States. The town-site patent, in all these cases referred to, as heretofore decided by this court, is the same,—that of the city of Butte. The mineral patents, being those of the Pawnbroker lode and the Smoke-house lode, are entirely similar to that of the Silver King lode. Then the conclusion inevitably follows that the town-site patent does not cover the mineral ground included within the limits of the Silver King lode, but that the same is expressly reserved from the force of the same by the terms of the patent itself, and by the act of congress, and that the exceptions made by the mineral patent are unauthorized by law, and void, and that the Silver King patent conveys a perfect title to the surface ground in controversy, to which appellants have no claim whatever.

Ought the court to have permitted the defendants, who are here appellants, to prove by extrinsic evidence that the lands embraced within the town-site patent were not mineral in their character? All the cases hereinbefore cited decide this question in the negative. If this fact could have been proven, the time to make such proof was before the patent to the mining claim was issued. This fact had to be determined by the proper authorities before the patent could be issued; and having once been determined, and the mining patent issued, that document is conclusive evidence of the mineral character of the lands which are included within its limits. This question, since the decision of the *Pawnbroker Case* in 1885, (5 Mont. 406, and 5 Pac. Rep. 570,) has not been an open one in this territory. We do not feel inclined to disturb that decision, and those which have confirmed it on this point.

This brings us to the fourth question, which is the statute of limitations.

It is insisted by the appellants that the statute of limitations began to run with the issuance of the patent for the town-site of Butte, on the twenty-sixth of September, 1877. It is contended by the respondents that the statute of limitations did not begin to run until the issuance of the patent for the Silver King mine, on the thirteenth day of September, 1881. The complaints were filed on the tenth day of September, 1885, and the statute of limitations runs in five years. Rev. St. Mont. div. 1, tit. 3, cc. 1, 2, pp. 45, 46. So that it appears that, if the position insisted upon by the appellants is correct, the action is barred; and, on the contrary, if that assumed by the respondents is correct, the running of the statute was arrested in time by the filing of the suit. The appellants also claim that the statute of limitations was set in motion by the location of the mining claim, which, as we have seen, was on the fourteenth of March, 1877, and accordingly that the action was barred. Appellants Thomas and others offered to prove possession of the land in controversy since 1878. Appellants McCauley and others offered to prove possession of the land in controversy since 1881. As has been heretofore stated, the appellants Kingsbury and others do not claim under the statute of limitations, having offered no evidence under that plea.

The evidence offered by the defendants McCauley and others is not sufficient, since occupation since the year 1881 would not be long enough to bar an action commenced in 1885, (Rev. St. div. 1, §§ 33-36;) so the position assumed by the appellants applies only to the first case, and in behalf of Thomas and others.

Did the statute of limitations begin to run with the issuance of the town-site patent? That patent, as before stated, contains the following express reservation: "No title shall hereby be acquired to any mine of gold, silver,

cinnabar, or copper, or to any valid mining claim or possession held under existing laws of congress." The Silver King location was a "valid mining claim, held under existing laws of congress," and was, by the very terms of the town-site patent, excluded from its operation and effect. Then, certainly, as to this mining ground, the town-site patent could not afford a basis for the statute of limitations, nor set the same in motion.

The cases referred to by counsel for appellant on this point (*Meehan v. Forsyth*, 24 How. 175; *Dredge v. Forsyth*, 2 Black, 563) are not analogous to the case at bar. In one of these cases the supreme court says: "Fee-simple title is granted to the patentee, and his heirs, of the described tract, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, subject, however, to the rights of any and all persons claiming under the before-mentioned acts of congress. Looking at the language of the patent, it is clear that the saving clause was designed merely to exonerate the United States from any claim of the patentee, or his assigns, in the event that any other person should prove a superior title." 2 Black, 570.

This is not the case here. The mining ground is expressly excluded from the force and effect of the patent, not only by the language of the patent itself, but also by the act of congress. Rev. St. U. S. § 2392. But the respondents appear to be correct in the position that the statute of limitations did not begin to run until the issuance of the mining patent. The statute of the territorial legislature cannot interfere with "the primary disposal of the soil," (Rev. St. U. S. § 1351;) and it is for this reason that it has been held in so many cases that the patent must issue before the statute of limitations is set in motion.

In a well-considered case, the supreme court of the United States says: "With respect to the public domain, the constitution vests in congress the power of disposition, and the making of all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the modes of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right, or embarrass its exercise; and, to prevent the possibility of any interference with it, a provision has usually been inserted in the compacts by which new states have been admitted into the Union that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present constitution, with the further clause that the legislature shall not also interfere 'with any regulation that congress may find necessary for securing the title in such soil to the bona fide purchasers.' The same principle which forbids any state legislation interfering with the power of congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession of and enjoyment of the property granted, by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land; and it would amount to a denial of the power of disposal in congress, if these benefits, which should follow upon the acquisition of title, could be forfeited, because they were not asserted before that title was issued." *Gibson v. Chouteau*, 13 Wall. 99, 100. The same doctrine is announced and referred to in the following cases: *Henshaw v. Bissell*, 18 Wall. 269, 270; *Manly v. Howlett*, 55 Cal. 98; *Hagar v. Speck*, 48 Cal. 408; *Gardiner v. Miller*, 47 Cal. 570.

The authorities above cited settled the proposition of the appellants, that the statute began to run against the mining claim from its location, and de-

cided it adversely to the position assumed. The law imposes on the miner certain duties and obligations necessary to be performed before a patent can issue, and certain delays are indispensable in the performance of these preliminary requisites; and after all has been done that can be done by the mining claimant, the consummation of the title rests entirely with the government. For these very sufficient reasons the statute of limitations does not begin to run against him from the date of his location, but only after the patent has issued, and the government has finally disposed of the soil, and the miner has become the absolute owner thereof. Then the appellants cannot claim to defeat this action on the plea of the statute of limitations.

The judgment of the district court having been rendered in full accord with the former decisions of this court, and being in all things correct in principle, it is in each case hereby affirmed.

(71 Cal. 586)

In re MAHON, Judge, and another. (No. 20,255.)

(Supreme Court of California. January 24, 1887.)

1. APPEAL—PROCEEDINGS AFTER REMAND—MODIFYING JUDGMENT.

When, by order of the supreme court of California, the superior court has been directed to enter a judgment, and, upon return of the cause, a judgment has been inadvertently entered which does not accord with the directions of the supreme court, the superior court has power to amend such judgment so as to make it conform to the supreme court's order.

2. SAME—DISCRETION OF JUDGE OF LOWER COURT—CONTEMPT.

When the direction of the supreme court to the superior court to enter a judgment is not specific, but leaves room for the exercise of any discretion in the court below, that court has a judicial power to determine whether an order as entered does or does not conform to the direction of the supreme court. For an error in deciding that a judgment does not accord with the direction of the supreme court, a judge of the superior court cannot be held as for a contempt.

In bank. Application for order to show cause why respondents should not be punished for contempt.

Proceedings to punish E. B. Mahon, superior judge of Martin county, California, and his clerk, for contempt in not entering interest on a judgment in compliance with the order of the supreme court in the case of *McCue v. Tunstead*, 65 Cal. 507; S. C. 4 Pac. Rep. 510. The order directed the court below "to enter judgment in favor of plaintiff on the findings." Judgment was rendered and caused to be entered for the possession of the property in dispute, or its value, \$1,000, together with damages for its detention since the date of said findings, "or interest on said value in the sum of \$490, and costs." Upon motion, an order modifying this judgment was made.

Jas. S. McCue, for petitioner. *E. B. Mahon, in pro. per.*, for respondents.

BY THE COURT. On the first appeal in *McCue v. Tunstead* the order of this court did not lay down, in precise terms, the judgment to be entered in the court below. It, however, determined that the plaintiff was entitled to a judgment, and (read in the light of the opinion) that the horse, the subject of the action, was exempt from execution. In other respects the form or scope of the judgment was left to the court below, with the limitation that it must be a judgment "upon" or one supported by the findings. The superior court was referred to the findings, was called on to ascertain what they were, and judicially to interpret them. This examination and interpretation of the findings, and the determination of the conclusions of law to be declared from them, involved the judicial function, and made the direction of this court something very different from a merely ministerial duty imposed upon an officer.

When, by order of this court, the superior court has been directed to enter a judgment, and, upon return of the cause, a judgment has been inadvertently

entered which does not accord with the direction of the supreme court, there can be no doubt that the superior court has power to amend such judgment so as to make it conform to our order. And when the direction is not specific, but leaves room for the exercise of any discretion in the court below, that court has a judicial power to determine whether an order as entered does or does not conform to the direction of this court. For an error in deciding that a judgment does not accord with the direction of this court, the judge cannot and ought not to be held as for contempt.

Moreover, the modification of the judgment of which the plaintiff herein complains was an amendment which, to the extent of the change, made it conform to the order of this court. In *McCue v. Tunstead*, 65 Cal. 507, S. C. 4 Pac. Rep. 510, it was directed that the court below "enter judgment for the plaintiff upon the findings." This mandate was not obeyed in the first instance, since there was no finding on which could be based that part of the judgment which provided for damages for the detention of the property since the date of the findings, "or interest on said value in the sum of \$490," etc. There is a finding that the plaintiff had taken possession of the horse, and retained possession up to the trial, and there is no finding that he had suffered any damage by reason of the detention of the property prior to its recapture.

It is clear, from what has been said, that the clerk of the superior court was not guilty of contempt.

Ordered that the proceedings as for contempt be dismissed.

NOBMANN v. SUPERIOR COURT OF SAN FRANCISCO. (No. 11,809.)

(*Supreme Court of California*. February 9, 1887.)

APPEAL—UNDERTAKING—GRANTING TIME TO FILE NEW UNDERTAKING.

Upon appeal to the superior court, where an *insufficient* undertaking had been filed in time, and, upon motion to dismiss, the court granted appellant leave to file a sufficient undertaking within five days, *held*, that the superior court had power to make the order authorizing appellant to file a new undertaking in lieu of the insufficient undertaking; following *Gray v. Superior Court*, 61 Cal. 337.

In bank. Application for writ of prohibition.

J. J. Coffey, for petitioner. *W. B. Daingerfield*, for respondent.

BY THE COURT. Application for a writ to prohibit said court from further hearing of the action of *Nobmann v. Fairbanks*, on appeal in said superior court, on the ground that an undertaking on appeal was not filed within the time prescribed by law. It appears that an *insufficient* undertaking was filed in time, and, after a motion was made to dismiss the appeal on that ground, the court made an order granting appellant leave to file a sufficient undertaking within five days, which appellant did, and the motion to dismiss was denied. Petitioner contends that the court had not the power to make the order, and that the order, and all proceedings under and by virtue of it, are null. On the authority of *Gray v. Superior Court*, 61 Cal. 337, the application for a writ of prohibition in this case is denied.

(72 Cal. 12)

CRAMER v. TITTEL. (No. 11,723.)

(*Supreme Court of California*. February 9, 1887.)

APPEAL—UNDERTAKING—SURETY—CORPORATION—CONSTITUTIONALITY OF CAL. ACT OF MARCH 12, 1885.

The California act of March 12, 1885, authorizing the acceptance of a corporation as sole and sufficient surety in an undertaking on appeal, is a general law, and not an amendment to Code Civil Proc., and therefore not objectionable for not stating that object in its title. It is not void as against the provisions of section 25, art. 4, Const., that the legislature shall pass no special law regulating the practice of courts

of justice in cases when a general law can be made applicable, although section 941, Code Civil Proc., provides that such undertaking shall be signed by two sufficient sureties; reversing *Cramer v. Title*, 11 Pac. Rep. 852.

In bank. Appeal from superior court, city and county of San Francisco.

Motion to dismiss an appeal, on the ground of failure to file an undertaking as required by law. An undertaking was filed with one surety, viz., the Pacific Surety Company. The company was incorporated under the laws of California, and executed the undertaking under the act of March 12, 1885. St. Cal. 1885, p. 114. That act authorized the acceptance, as sole and sufficient surety, of any corporation incorporated for the purpose of making bonds and undertakings. The general statute concerning appeals requires that the undertaking on appeal be executed by at least two sureties. Section 941, Code Civil Proc. The constitution, article 4, § 25, prohibits the legislature from passing a special law regulating the practice of courts of justice, and in all cases when a general law can be made applicable.

Robert Ash, John H. Boalt, and Hall & Rodgers, for appellants. *J. J. Coffey and W. H. Tompkins*, for respondent.

BY THE COURT. We are of opinion that the undertaking in this case is valid. The statute is a general law, and not an amendment to the Code of Civil Procedure in the sense of the provision of the constitution referred to. The statute is constitutional.

Motion to dismiss appeal denied.

(72 Cal. 17)

ROWLAND v. MADDEN and others. (No. 11,220.)

(*Supreme Court of California*. February 10, 1887.

EXECUTORS AND ADMINISTRATORS—ACTION AGAINST—PLEADING—ISSUE—PRESENTATION OF CLAIM.

In a suit against the executors of the plaintiff's deceased wife, to recover from her estate moneys belonging to the community alleged to have been misappropriated by her, an allegation in the complaint that a verified claim for the amount was presented to defendants, and rejected by them, is material and must be proved. THORNTON, J., dissents.

In bank. Appeal from superior court, San Francisco.

Moses G. Cobb, for appellant. *A. N. Drown and W. H. Fifield*, for respondent. See S. C. 12 Pac. Rep. 226.

McFARLAND, J. After full argument on rehearing, we see no reason to depart from the conclusion heretofore reached in this case. 12 Pac. Rep. 226. Appellant complains that the judgment heretofore rendered by this court rests too largely upon technical grounds. We are disposed to look through technical difficulties, and mere questions of pleading and practice, to the real legal merits of a case, when we can do so without violating well-settled principles; but the rule that the proofs must correspond to the averments is too grave to be totally disregarded. Appellant's real cause of action, if he has any, lies in the alleged fact that his wife, now deceased, about 13 years before her death got possession of some \$3,000 in money, of community property, and secretly used it as her own separate property; appellant believing all the time that she had paid it out on certain debts which she represented the community to be owing, but which had no existence. Now, this action is brought against the defendants as executors of the last will of the deceased wife. The complaint charges an indebtedness of the estate, and that a creditor's claim for the same, duly verified, was presented to defendants in accordance with sections 1493 and 1494 of the Code of Civil Procedure, and was by them rejected; and its prayer is for a money judgment to be paid out of the estate in due course of administration. Clearly, in such a case, there must be proof of the presentation of the claim to the executors.

But if we were permitted to look further into the case we could see nothing to warrant a reversal of the judgment. If we could disregard the pleadings, and treat the action as one in the nature of an action of replevin to recover the money, not as a debt, but as specific community property belonging to the husband,—in which case defendants should not have been sued as executors,—then appellant would fail, because the money, or any specific property or fund to which it can be traced and identified, is not shown to have come into the possession of respondents. If the money may be considered as property subject to a trust, and it cannot be identified either in its original or in any substituted form, then, although appellant might rely upon the personal liability of the trustee, he has no special claim upon her general estate superior to that of other creditors. In that view his position towards the estate is simply that of other contract creditors, and his claim should have been presented to the executors. *Lathrop v. Bampton*, 31 Cal. 23.

These views of the case make it unnecessary to notice other points which are ably presented by counsel for respondents.

Judgment and order affirmed.

We concur: MORRISON, C. J.; SHARPSTEIN, J.; MCKINSTRY, J.

PATERSON, J. I concur in the judgment.

THORNTON, J. I dissent.

(73 Cal. 317)

CHANDLER v. PEOPLE'S SAVINGS BANK and others. (No. 11,524.)

(*Supreme Court of California*. February 10, 1887.)

APPEAL.—PROCEEDINGS BELOW AFTER REMAND.

Where a judgment is reversed on the ground that a certain finding is not supported by the evidence, the entire case should not be tried anew, but only the issue erroneously decided. THORNTON, J., dissenting.

Commissioners' decision. In bank.

Appeal from superior court, Sacramento county.

H. O. Beatty, Beatty & Denson, and A. L. Hart, for appellant. J. McKenna, for respondent.

SEARLS, C. This cause was here in 1882, upon two appeals, one by the plaintiff from part of a judgment in favor of the intervenor, and the other by the intervenor from a part of the judgment in her favor, and from an order denying a new trial, in the superior court of Sacramento county. Upon the plaintiff's appeal, and as to him, the judgment was affirmed. 61 Cal. 396. Upon the appeal of the intervenor it was held that a finding of the court below as to the interest on certain monthly balances in favor of Chandler, from December, 1865, until October, 1878, amounting to \$2,710, was not supported by the testimony, and therefore that the finding was erroneous, and the judgment as to the intervenor was reversed, and the cause remanded for further proceedings, according to the views therein expressed. 61 Cal. 401. The cause was brought up again in 1884, upon an appeal by the plaintiff, and from the record it appeared that certain evidence offered by the plaintiff, and tending to show that the balances in his favor were of a kind which entitled him to interest thereon, was ruled out, and this court said, in speaking of its former decision: "As we understand the judgment in the case, a reversal was ordered because the finding was not sustained by the evidence, and the cause was remanded for further proceedings according to the views expressed in the opinion. Certainly this order of the court left the inquiry as to interest open, as if no trial had been had on it. The plaintiff was at liberty in a new trial, if in his power, to show that the balances were of the kind which

bore interest. The offers of the plaintiff which were ruled out were made with this view; that is, to show that the balances were of the character which entitled him to have interest on them. Civil Code, § 1917. The court should have allowed these offers. In our view, the case was open for a new trial, subject to the views expressed by the court," etc.,—and the judgment was reversed, and the cause remanded for a new trial, subject to the views expressed by this court. 65 Cal. 498, 11 Pac. Rep. 791.

Upon the cause again coming up in the court below, the sense of the court was taken as to the extent of the new trial granted by this court under the decision last above referred to, and the court held "that a new trial was only granted as to the character of the balances mentioned in the opinion of the court on intervenor's appeal (61 Cal. 401) as to their being interest-bearing, and that the burden of the proof was on the plaintiff." Counsel for plaintiff excepted to said decision, and asked that intervenor introduce her proof in support of her complaint of intervention, which she declined to do, whereupon plaintiff moved for a nonsuit as against the intervenor, upon the ground that she had introduced no evidence, etc. The motion was overruled, and plaintiff excepted. The court then heard testimony in reference to the character of the balances mentioned in the decisions, and excluded testimony relating to other portions of the case. Written findings were filed, covering the whole case, upon which judgment was entered in favor of intervenor, ordering a sale of the mortgaged premises, and that the proceeds, to the extent of \$8,435.81 and costs be paid to her, etc. The question presented is this: Was it the duty of the court below to proceed to try the entire case anew, or could it confine the testimony to the issue erroneously decided, and in other respects pass upon the issues in the light of the testimony already before it, or adopt the facts already found upon such testimony?

Under the former decision in this cause we are of opinion it was not incumbent on the court below to try the entire cause anew, and that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J., dissenting.

(4 N. M. [Gild.] 72)

REDEWILL v. GILLEN.

(*Supreme Court of New Mexico. January 19, 1887.*)

1. SALE—CONDITIONAL—DELIVERY—SUBSEQUENT PURCHASER WITHOUT NOTICE.

Where plaintiff sells and delivers a piano, under an agreement by which the purchaser is to pay for it by installments, and until full payment the piano is to remain the property of the seller, and on default the possession thereof may be resumed by the seller on repayment of installments paid, less a monthly rent and an agreed sum as damages, and, the purchase money being unpaid, the purchaser sells the piano, with other goods, to defendant who claims to be a purchaser in good faith, plaintiff can replevy the piano from defendant, who obtains no right he can assert in respect to it.¹

2. SAME—REPLEVIN—PURCHASER—PROOF OF BONA FIDES.

Where, in an action of replevin against a purchaser, defendant bases his defense on a purchase in good faith and for value, he must prove that he had no knowledge of plaintiff's ownership.

Appeal from district court, Grant county.

Action of replevin. Judgment for plaintiff. Defendant appeals. *Fielder & Fielder*, for appellant. *Murat Masterson*, for appellee.

¹See note at end of case.

BRINKER, J. This was an action of replevin for a piano. On the thirtieth day of November, 1883, plaintiff delivered to one Charles Morse the piano in question, and at the time of delivery the following agreement was executed:

"This is to certify that I, Charles Morse, have this day leased of A. Redewill a square Pease piano, style O, sq., number 80,158, manufactured by C. D. Pease & Co., valued at two hundred and fifty dollars, in gold coin, subject to the following conditions, to-wit:

"(1) Seventy-five dollars to be paid by me to A. Redewill, as rent therefor, on December 10, 1883, and twenty-five dollars to be paid on the tenth day of each month thereafter as such rent for seven months, with interest on regular deferred payments at the rate of one per cent. per month;

"(2) And, should I fail to make any of the above payments as specified, I hereby agree to surrender said piano to A. Redewill in as good condition as when received, customary wear by careful usage excepted; provided that, if I am not required to surrender said piano upon a failure to make any payment when due, I agree to pay to said A. Redewill two per cent. per month on such deferred payments until paid.

"(3) And I further agree that said piano shall not be removed from the premises No. ——, Deming, New Mexico, now occupied by me, for any purpose or use whatsoever, (removal from danger of fire excepted,) without the consent of A. Redewill.

"(4) It is expressly understood and agreed that until all of said sum of two hundred and fifty dollars, with interest thereon as aforesaid, is paid, the said piano is to remain the property of the said A. Redewill, and I have no power or right to dispose of the same; but when all of said sum of \$250, with interest thereon as aforesaid, is paid, then the title of the said piano is to invest in me, and the said A. Redewill is to give me a bill of sale of the same.

"(5) It is also agreed that, in the event that I shall fail to make either of said monthly installments at maturity, the said A. Redewill may at his option take possession of the said piano, and cancel this contract on refunding the money already paid by me, after deducting therefrom \$10 per month rent, and expenses of removal, and the sum of \$50 as liquidated and assessed damages, which I hereby promise and agree to pay said A. Redewill in the event that I shall fail to perform the terms of this contract.

"In witness whereof I have hereunto set my hand, in Deming, New Mexico, this thirtieth day of November, 1883.

A. REDEWILL,
"CHARLES MORSE."

The piano remained in the possession of Morse, under this agreement, until the fourth day of March, 1884, when Morse sold it, with all his other household goods, including saloon fixtures, etc., and a house situate upon leased lots in Deming, to the defendant. In April of that year the plaintiff, who appears to have been a resident of the state of California, came to Deming, and demanded the piano of defendant, who refused to deliver it to him.

On the trial plaintiff, on his direct examination, testified that he had "leased or sold" the piano to Morse. On cross-examination he reiterated this statement, and said that Morse had never paid him a cent on it, and that it was worth \$250. Defendant testified that he bought and paid for the piano, together with the house and all the personal property, in a lump, of Morse, in good faith, for the sum of \$1,150; that nothing was said about the price of any particular article; and that, before he purchased, he had the county records examined for incumbrances on the property and found none. The property which defendant purchased from Morse consisted of a house of three rooms, one billiard table, one set of balls and cues, and one set of pool-balls, a lot of whisky, case goods, fancy liquors and champagne, the piano in question, an iron safe, two sets of pins and balls for use in a bowling alley, three

stoves, all the kitchen and bed-room furniture, including beds and bedding, one sewing-machine, and \$150 worth of millinery goods.

Idus L. Fielder, one of the defendant's attorneys, testified that the house would sell for \$500 or \$600. The sale from Morse to defendant was concluded in the afternoon of March 4th, and Morse left Deming that night, and his whereabouts have ever since been unknown.

The court instructed the jury, in substance, that the agreement set out above was a lease, and that no title to the piano passed under it to Morse, and that, therefore, Morse could convey none to defendant. Defendant duly excepted to this instruction, and insisted upon this exception in his motion for a new trial. The court overruled his motion for a new trial, and to this ruling defendant also excepted.

The defendant does not say, nor was there any testimony to show, that he had no knowledge of the contract under which Morse held the piano. He contents himself with saying that he bought the piano in *good faith*, and that there was no incumbrance upon it of record. The term "good faith" has a well-defined meaning; and when used to qualify a purchaser, means one who buys honestly for a valuable consideration, *and without notice*. 1 Burrill, Law Dict. 213; Wade, Notice, § 67, and cases cited. In a more restricted sense, it may mean that the purchaser took the property, and paid for it, intending that the title should pass to him without any interest being reserved to his vendor. In this case, the defendant, having contented himself with merely examining the records for the purpose of finding incumbrances, and saying nothing about what information he may have received from other sources, we are inclined to think that in his testimony he used the term in its restricted sense; especially so when we remember that he bought the goods in mass for \$1,150, without naming the price of a single article,—the purchase embracing a house worth \$500 or \$600, a piano worth \$250, millinery goods worth \$150, a billiard table, three stoves, household and kitchen furniture, and a number of other articles. *Copland v. Bosquet*, 4 Wash. C. C. 589.

We do not hold that it was necessary for defendant to have made inquiry as to how Morse held the piano, unless there were circumstances casting suspicion upon his title. *State v. Merritt*, 70 Mo. 275; *contra, Coggill v. Railroad Co.*, 3 Gray, 550. Upon this we express no opinion; but we do hold that, if the defendant had no knowledge or information on the subject, he should have proved it. *Copland v. Bosquet, supra*. Want of knowledge will not be presumed, in the absence of proof, when defendant relies upon a purchase in good faith and for value.

Defendant insists that the court erred in instructing the jury that the agreement was a lease, and that defendant obtained no title by his purchase. In support of his contention he cites us to the following adjudged cases and text-books: 5 N. W. Rep. 758;¹ 7 N. W. Rep. 67;² 3 N. W. Rep. 713;³ *Vaughn v. Hopson*, 10 Bush, 337; *Wait v. Green*, 36 N. Y. 556; *Fosdick v. Schall*, 99 U. S. 235; *Hervy v. Rhode Island Locomotive Works*, 98 U. S. 664; *Heryford v. Davis*, 102 U. S. 235; *Williams, Pers. Prop.* 98; *Wait, Act. & Def.* 538-636; *Benj. Sales*, (4th Amer. Ed.) § 457.

The cases in the Northwestern Reporter we have been unable to examine,

¹ *Ordway v. Smith*, 5 N. W. Rep. 757. The purchaser at a guardian's sale does not acquire a taxable title until the deed is given, and the sale confirmed.

² *Beurmann v. Van Buren*, 7 N. W. Rep. 67. One who buys goods with the sole intent of getting payment for an honest debt is not affected by the fact that the seller may intend to defraud his creditors if he does not share such intention, and the burden of proof as to such intent and participation is upon the party attaching the sale.

³ *Pash v. Weston*, 3 N. W. Rep. 713, holding that an *ex parte* instrument purporting to be a bill of sale, and which provided that title to the chattel in dispute should remain in vendor until paid for, and which was dated, executed, and filed nearly two months after the sale had taken effect, did not give constructive notice to a subsequent purchaser.

because the books are not accessible. We were unable to find them in any other publication, because counsel have adopted the inexcusable practice of referring in their brief merely to the volume and page, without giving the names of the parties.

Fosdick v. Schall, supra, is not in point. That was a contest between the lessor of railroad cars and a mortgagee of the railroad, with all of its property, rights, and franchises. The mortgage was executed by the railroad long before the cars were delivered. The mortgagee sought to hold the cars as after-acquired property, inuring to his benefit. The court held that this could not be done; that while it was true that the mortgage would attach to the cars as after-acquired property, still it would only attach to the interest of the railroad company, and if any one held a title superior to that of the railroad, the mortgagee would take subject to such superior title; and, if such title was asserted, it must prevail.

In *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664, an engine was delivered to Conant & Co. under a written lease very much like the one now under consideration, in which it was provided that a cash payment should be made upon the engine, and certain other payments, amounting in all to the value of the engine, should be paid monthly as rent; that, upon the payment of the last installment of such rent, the engine would be sold and transferred to Conant & Co., but until that time it should remain the property of the lessor, without any right or authority on the part of Conant & Co. to sell, encumber, or otherwise dispose of it; that, if default should be made in the payment of any installment, Conant & Co. should redeliver the engine to the lessor in 30 days, or permit it to come upon the railroad where the engine was, and take it away. The engine was attached in a suit against Conant & Co., and sold to Hervey, who had no notice of the lessor's claim. In replevin by the locomotive works against Hervey for the possession of the engine, it was held that, under the laws of Illinois, a recovery could not be had, citing *McCormick v. Hadden*, 37 Ill. 370; *Ketchum v. Watson*, 24 Ill. 591; *Murch v. Wright*, 46 Ill. 488.

If the Illinois cases were binding authority, there could be no doubt of the soundness of defendant's position. The case of *Murch v. Wright* is very similar to this, and it appears to be in harmony with the well-settled rule in that state. Judge BREESE, in *Brundage v. Camp*, 21 Ill. 330, in a very able and exhaustive opinion, reviewing a long list of authorities, concludes that, in all cases where the owner has put it in the power of one person to impose upon others by being the apparent owner of personal property, the transaction will be held a sale passing title if the apparent owner afterwards sells to a *bona fide* purchaser. And in *Murch v. Wright, supra*, it is held that in such case the fact that the instrument by which the property passes to the first vendee is called a lease will not change the character of the transaction.

The case of *Heryford v. Davis, supra*, arose upon the construction of an instrument called a lease, as affected by the Missouri mortgage act. The contract recites that A., a manufacturer of cars, agreed to loan to the Keokuk & Kansas City Railway, for hire, certain cars, to be used on the railroad of the second party, for four months; that A. acknowledged the receipt of three notes and thirteen bonds of the railway company as collaterals for the notes; and that A. should hold said notes, and collect them at maturity, and hold the proceeds for the safe custody and return of the cars when demanded.—the railway company to have the right to purchase the cars upon the payment of a sum equal to the aggregate of the notes given for the rent and interest, but until such payment the railway company had no right, title, or interest in the cars, but they should remain the property of A.; that if default should be made in any of the payments, A. should retain all payments made, and sell the cars at public sale, and after paying himself the full price of the cars, and interest, the surplus should go to the railway company. These cars, while in

possession of that railway company, were levied upon by one of the creditors of that company as its property. Under the statute, A. made demand of the sheriff for the cars, claiming them by virtue of the above contract. The sheriff notified the creditor of this claim, and the creditor gave him an indemnifying bond, and ordered him to proceed to a sale of the property, which was done. A. afterwards brought suit upon this indemnifying bond for damages. The court held that, while the contract was called a lease, and the cars stated to be loaned for hire, it was in fact a sale and a mortgage back; that no matter what language was used, or by what name the parties christened the contract, it should be construed according to the intention of the parties, gathered from its terms; that, although the word "hire" was industriously used, it was manifest no hiring was intended. No price for the hire was mentioned. In every railment or letting for hire a price or compensation for hire was essential. This may be a reasonable compensation. No such compensation was provided or contemplated. The railway company was not given an option to buy or not. It was compelled to pay the notes, or the property would be sold for that purpose. The court say: "This was in no sense a conditional sale, but the giving of property as a security for the payment of a debt, and was the very essence of a mortgage, and, because not recorded, void, under the chattel mortgage act of Missouri."

The difference between that case and this is very manifest. Here, compensation for the hire is fixed; exorbitant it may be, but compensation, nevertheless; and here, also, there is provision made for the return of the property to the owner, and the refunding to Morse of whatever he may have paid in excess of such compensation, and \$50 agreed upon as damages. No provision is made for a sale in the event of default by Morse in making payments, but the vendor is to resume possession of his property, with the rent and damages agreed upon, and then the contract was to be canceled, and the parties to be towards each other as if they had never contracted. No relation of creditor and debtor existed, and therefore the agreement could not be held a chattel mortgage within the provision of our statute. Section 1587; Comp. Laws, 1884.

The case of *Vaughn v. Hopson, supra*, was a conditional sale of a mule, for which a note was given with security. To the note was attached this memorandum: "This note is given for a mule, and the mule is bound, or the title remains in Hopson until he gets his money," and was signed by Hull, the maker of the note. Hull sold the mule to Ricketts, and Ricketts sold it to Vaughn. After an unsuccessful attempt to collect the note by suit, Hopson brought replevin against Vaughn for the mule. The case was very carefully considered, and a number of authorities examined. The conclusion was that the facts disclosed a conditional sale, with an unconditional delivery, and therefore the property passed to Hull, and from him to the last vendee, whose title was good against the original vendor.

In *Wait v. Green, supra*, the following facts appear: Catharine Comins sold and delivered a horse to Billington, and took his note for \$100, due in five months. Under the note, on the same paper, was the following, signed by Billington: "Given for one bay horse. The said Mrs. Comins holds the said horse as her property until the above note is paid." Mrs. Comins transferred the note and memorandum to Wait. Billington sold the horse to Green, for a full consideration, and without notice of the condition upon which the original sale was made. Wait demanded the horse of Green, who refused to comply with the demand. Thereupon Wait brought suit for damages for the detention. The court held that, although the sale and delivery were conditional, Green being a *bona fide* purchaser from Billington, he would be protected in his title; citing 2 Kent, Comm. 498; *Haggerty v. Palmer*, 6 Johns. Ch. 438; *Buck v. Grimshaw*, 1 Edw. Ch. 146; *Caldwell v. Bartlett*, 3 Duer, 352; *Covill v. Hill*, 4 Denio, 323; *Beavers v. Lane*, 6

Duer, 238; *Fleeman v. McKean*, 25 Barb. 474; *Keeler v. Freeman*, 1 Paige, 312; *Western Transp. Co. v. Marshall*, 37 Barb. 509; *Smith v. Lynes*, 5 N. Y. 41; *Crocker v. Crocker*, 31 N. Y. 507.

These Illinois, Kentucky, and New York cases proceed upon the principle that, when one of two innocent persons must suffer by the fraud of a third, the one who puts it in the power of such third person to do the wrong should bear the injury. This position seems almost impregnable, and appeals strongly to our sense of justice, and we should hold with them, and thus uproot in this jurisdiction what we consider a pernicious system of secret titles concealed in the pockets of the owner, and calculated to entrap the unwary, were we not impelled by an overwhelming weight of authority to the contrary.

Before proceeding to the examination of the authorities holding the opposite view, it may be proper here to remark that the case of *Wait v. Green*, *supra*, has been overruled, and the cases cited and relied upon in that case carefully examined and distinguished in the later case of *Ballard v. Burgett*, 40 N. Y. 314.

The principle opposed to the rule held in the states mentioned, is an old one in the common law, and has been recognized from a very early period.

In Shep. Touch. it is said: "It is a general rule that, when a man hath a thing, he may condition with it as he will. A contract or sale of a chattel personal, as an ox or the like, may be upon condition, and the condition doth always attend and wait upon the estate or thing whereunto it is annexed; so that, although the same do pass through the hands of a hundred men, yet it is subject to the condition still." Touch. 118.

In *Coggill v. Railroad Co.*, 3 Gray, 545, A. sold and delivered to B. certain wool, which was to be paid for by note at six months. B. sold the wool to C., and delivered it to the railroad, for shipment to C., whereupon A. took it from the railroad by writ of replevin. The note was never given, and B. failed and stopped business. The railroad company defended on the ground that it was the bailee of a purchaser for value from the original vendee, to whom A. had given the possession and all *indicia* of ownership. BIGELOW, J., after stating that it had long been settled in that state that a sale and delivery of goods on condition that the title should not vest until the price was paid or secured did not pass the title to the property until the condition was performed, and if the condition should not be fulfilled the vendor might recover it from the vendee or his creditors, says: "The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to denying the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

In a note to this case, there is a statement by the reporter that, in an action of replevin for a piano delivered under a contract very much like the one made by plaintiff and Morse, and which piano the vendee sold before payment, at Suffolk, March term, 1856, judgment was given for the vendor.

The first case seems to have settled the doctrine in Massachusetts. *Sargent v. Metcalf*, 5 Gray, 305; *Blanchard v. Child*, 7 Gray, 155; *Benner v. Puffer*, 114 Mass. 376. The same rule prevails in New Hampshire. *Porter v. Pettengill*, 12 N. H. 299; *Luey v. Bundy*, 9 N. H. 298; *Davis v. Emery*, 11 N. H. 230; *Holt v. Holt*, 58 N. H. 276. And in Maine. *Sawyer v. Fisher*, 32 Me. 28; *Everett v. Hall*, 67 Me. 497.

The case of *Ballard v. Burgett, supra*, was one in which it appeared that Ballard sold to France a yoke of oxen, with the agreement that the oxen were to remain the property of Ballard until they were paid for. This was in October, 1865. The oxen were delivered to France, who kept them, without paying for them, until April, 1866, when he sold them to Burgett, who bought without any notice whatever of Ballard's claim. Ballard sought to recover the oxen from Burgett. GROVER, J., in delivering judgment, said: "But it is claimed that France, although he had no title himself, but only the right to acquire title by paying the money, nevertheless, by selling to a *bona fide* purchaser, such purchaser acquired from him a valid title against the plaintiff. If this be so, this class of cases constitute an exception to the general rule that a purchaser of personal property other than commercial paper acquires no better title than that of his vendor. I can conceive no substantial principle upon which such an exception can be sustained. The possession of the contemplated purchaser gives him no better opportunity to impose upon purchasers than that of an ordinary bailee. In the latter case it has never been claimed that any title would be acquired by a purchaser from such bailee. Possession by a vendor, without title, has never been held sufficient to confer a title upon a purchaser from him." The learned judge then discusses the case of *Wait v. Green*, and the authorities cited by Judge BOCKES in his opinion, and concludes that the rule announced in that case is not sustained, and declines to follow it. Judge LOTT concurred in a separate opinion, critically examining the *Wait Case*, and the cases cited in it. JAMES and MURRY, JJ., dissented. The same doctrine is recognized in *Bean v. Edge*, 84 N. Y. 510; *Cole v. Mann*, 62 N. Y. 1.

A very interesting case is found in 28 Ohio St. 630,¹ the facts in which are more nearly like the facts here than any case which has fallen under our notice. There an instrument in writing was executed, reciting that K. & M. had given into the custody of P. a mirror and three pictures, which P. agreed to hold as the exclusive property of K. & M. until he (P.) should have paid them the sum of \$135 in weekly installments; that, upon P.'s failing to perform any of the conditions for two weeks, he should deliver to K. & M. the mirror and pictures in as good condition as when received, and forfeit all money paid thereon as an equivalent for the use of the same while in his custody. K. & M. agreed in the same paper that, upon the performance of all the conditions as to payments, etc., they would transfer the property and its title to P. P. then took the property, and used it as a part of his household furniture. He paid \$40 of the amount due, \$5 of which was from the earnings of his wife's labor. P. abandoned his family, and left them entirely destitute. One month after P. left, his wife sold the mirror to obtain sustenance for her family. Defendant bought the mirror, paying full value for it, and at the time had no knowledge of the arrangement under which P. held it. K. & M. commenced their action against the defendant to recover this mirror. The questions arising upon this state of facts, affecting conditional sales of chattels, were elaborately considered by the court, and all the American cases examined and discussed, among them the cases from Illinois and Kentucky, and the conclusion reached is in harmony with the views held in Massachusetts and elsewhere, and which are so quaintly and tersely stated by Shepherd.

Since the above was written, we have been handed a decision by the supreme court of the United States, (*Harkness v. Russell*, 7 Sup. Ct. Rep. 51,) appealed from Utah. Justice BRADLEY, in a lengthy opinion, collates all the authorities, English and American, touching conditional sales, and agrees that in such transactions the vendor may pursue his property even into the hands of an innocent purchaser for value and without notice. This point was not necessary to the decision of that case, because it was shown that the pur-

¹*Sanders v. Keber.*

chaser had notice of the vendor's claim, but the court considered it, and the discussion of it in that case, and the conclusion reached, throws into the scale of the majority the weight of the opinion of that august court.

It is believed that an examination of the reports of adjudged cases will show that in almost every state in the Union, except those quoted in the first part of this opinion, the principles here adopted have been recognized as the law of the land. In many states, however, the hardships that have resulted from the enforcement of this rule in favor of designing and wicked persons having been seen, laws have been passed invalidating all such contracts, and we venture to hope that the legislature will adopt some such salutary law here.

While the court below may not have been strictly accurate in saying to the jury that the contract was a lease,—it should have called it a conditional sale,—yet this inaccuracy could not have affected the result; for, whether it be considered a lease or contract of conditional sale, the defendant had no rights which he could assert against it.

Finding no error in the action of the court, the judgment should be affirmed; and it is so ordered.

LONG, C. J., and HENDERSON, J., concur.

NOTE.

A CONDITIONAL SALE reserving the title to the property in the seller until the payment of the purchase price, or the performance of some other condition, is valid, not only between the parties, but also as against third persons, *Harkness v. Russell & Co.*, 7 Sup. Ct. Rep. 51; *Arkansas*, *McIntosh v. Hill*, 1 S. W. Rep. 680; *Blackwell v. Walker*, 5 Fed. Rep. 419; *Connecticut*, *Cooley v. Gillan*, 6 Atl. Rep. 180; *Florida*, *Campbell Printing-press & Manufg Co. v. Walker*, 1 South. Rep. 59; *Indiana*, *Baals v. Stewart*, 9 N. E. Rep. 403; *Iowa*, *Thorpe v. Fowler*, 11 N. W. Rep. 3; *Warner v. Jameson*, 2 N. W. Rep. 951; *Kentucky*, *Hart v. Barney & Smith Manufg Co.*, 7 Fed. Rep. 543; *Michigan*, *Marquette Manufg Co. v. Jeffery*, 13 N. W. Rep. 592; *Smith v. Lozo*, 3 N. W. Rep. 227; *Montana*, *Silver Bow M. & M. Co. v. Lowry*, 12 Pac. Rep. 652; *Heinbockel v. Zugbaum*, 5 Pac. Rep. 897; *New Jersey*, *Marvin Safe Co. v. Norton*, 7 Atl. Rep. 418; *The Marina*, 19 Fed. Rep. 700; *Vermont*, *Dixon v. Blondin*, 5 Atl. Rep. 514.

Such sales do not come within the provisions of the laws for registration of chattel mortgages in *Arkansas*, *Blackwell v. Walker*, 5 Fed. Rep. 419; *Florida*, *Campbell Printing-press & Manufg Co. v. Walker*, 1 South. Rep. 59; *Montana*, *Heinbockel v. Zugbaum*, 5 Pac. Rep. 897; but they do in *Iowa*, *Warner v. Johnson*, 21 N. W. Rep. 483; *Warner v. Jameson*, 2 N. W. Rep. 951; *Kentucky*, *Hart v. Barney & Smith Manufg Co.*, 7 Fed. Rep. 543; *Iowa*, *Budlong v. Cottrell*, 20 N. W. Rep. 167; *Minnesota*, *Dyer v. Thorstad*, 29 N. W. Rep. 345; *Pennsylvania*, *Rafferty v. McKinnan*, 1 Atl. Rep. 546. And see *Marvin Safe Co. v. Norton*, (N. J.) 7 Atl. Rep. 418.

In Mississippi such sales are valid, without writing or record, unless the separation of title and possession continues three years, and except that property so sold to a *trader* is liable to his creditors, unless a sign be displayed showing its true ownership. *Paine v. Hall's Safe & Lock Co.*, (Miss.) 1 South. Rep. 56.

(4 N. M. [Gild.] 83)

TERRITORY *ex rel.* WADE *v.* ASHENFELTER.

(*Supreme Court of New Mexico*. January 21, 1887.)

1. QUO WARRANTO—JURISDICTION OF NEW MEXICO DISTRICT COURTS.

In New Mexico, a proceeding by information in the nature of a writ of *quo warranto* to oust a usurper from office is within the jurisdiction of, and is properly commenced in, the district court.

2. SAME—ORIGINAL WRIT—PROCEEDING BY INFORMATION.

The original writ of *quo warranto* is obsolete, and the proper remedy for the purpose of ousting a usurper from office is now by information in the nature of *quo warranto*.

3. SAME—RETURN OF PROCESS—COMP. LAWS N. M. § 1903.

Comp. Laws N. M. § 1903, requiring all original process in any suit to be returned on the first day of the term next after its issuance, applies only to ordinary actions commenced by petition, and not to the extraordinary remedies of *habeas corpus*, *quo warranto*, *mandamus*, etc., and process issued upon an information in the nature of *quo warranto* may be made returnable at the same term when the information is filed.

4. DISTRICT AND PROSECUTING ATTORNEYS—NEW MEXICO ACT FEBRUARY 28, 1862, § 19—CONSTRUCTION OF.

Section 19 of the New Mexico act of February 28, 1862, entitled "An act * * * to authorize the governor to appoint a district attorney for the Third district," provides "that the governor * * * shall appoint some person learned in law as *attorney general* for the Third judicial district." Held that, as a literal construction of the section would render the act nugatory, recourse must be had to the title and context, and that it was apparent that the section intended to provide for the appointment of a *district attorney*, who should hold for a fixed term of two years.

5. STATES AND STATE OFFICERS—GOVERNOR—POWER OF DISMISSAL.

The governor of the territory of New Mexico has no power, either inherent in the office of governor, or under the organic act of the territory, to remove a judicial officer holding office for a fixed term, before the expiration of such term.

Appeal from district court, Sierra county.

Quo warranto to try title to the office of district attorney for the Third judicial district. Judgment against the defendant, who appeals.

G. G. Posey, Idrus L. Felder, and W. T. Thornton, for appellant. *Wm. Breeden, Atty. Gen.,* for appellee.

LONG, C. J. This is a proceeding brought by the territory of New Mexico, on the relation of Edward C. Wade, against Singleton M. Ashenfelter, who is appellant. On the tenth day of November, A. D. 1885, the relator, Edward C. Wade, filed in the office of the clerk of the district court of the Third judicial district, sitting in the county of Sierra, an affidavit of which the following is a copy:

Territory of New Mexico, County of Sierra. Edward C. Wade, of lawful age, being duly sworn, upon his oath states that heretofore, to-wit, in the month of March, A. D. 1884, he was, by the governor of the territory of New Mexico, in due form of law, nominated for the office of district attorney for the Third judicial district of said territory; that such nomination was transmitted and submitted to the legislative council of said territory, and by said council confirmed, advised, and consented to, and that thereafter, on the eleventh day of March, A. D. 1884, the said governor, by and with the advice and consent of said legislative council, then in session at the capitol of said territory, said advice and consent being given upon said nomination as aforesaid, appointed and commissioned him as such district attorney of said Third judicial district in due form of law; that he thereupon and thereafter took the oath of office, and entered upon his duties as such district attorney, and was legally possessed of and performed the duties of said office, and exercised the powers and received the emoluments thereof, from the time of his said appointment to and induction into said office, as aforesaid, until the ninth day of November, A. D. 1885; that from and after his induction into said office, as aforesaid, he never resigned, abandoned, or forfeited the same, nor was he ever removed or displaced from said office by the judgment of any court, nor has the said office, since his appointment thereto, been abolished, or its tenure in anywise changed or altered, nor has his term expired; that, by virtue of his said appointment, he was (as he is advised and believes) legally entitled to hold said office, perform the duties and receive the emoluments thereof, for the full term of two years, and thereafter until his successor to said office should be lawfully appointed and qualified. He further states that on the ninth day of November, A. D. 1885, one Singleton M. Ashenfelter, illegally claiming said office under color of an unauthorized, illegal, and void appointment, (as affiant is advised and believes,) made long after the date of affiant's appointment, by the governor of the territory of New Mexico, without the advice and consent of the legislative council of said territory, and at a time when said council was not in session, usurped, intruded into, and unlawfully (as affiant is advised and believes) held said office of district attorney for the said Third judicial district of the territory of New Mexico, and still does unlawfully (as affiant is advised and believes) hold said office, perform

and execute the powers and duties thereof, and claim the emoluments of the same; and that since the said ninth day of November, A. D. 1885, the said Singleton M. Ashenfelter unlawfully (as affiant is advised and believes) excluded, and still excludes, this affiant from said office, and has refused, and still refuses, to allow this affiant to hold and execute the said office or to receive the emoluments thereof. Affiant further says that he is desirous that the title of this affiant and of said Ashenfelter to said office, and the right to exercise its functions, and receive its emoluments, should be judicially inquired into and determined, and that to that end a rule may be made upon the facts herein stated, upon motion of the attorney general of the territory of New Mexico, for said territory, upon the said Singleton M. Ashenfelter to show cause, if any he hath, why leave should not be given to file an information in the nature of a *quo warranto* in behalf of said territory, upon the relation of this affiant, the said Edward C. Wade, against the said Singleton M. Ashenfelter for usurping, intruding into, and unlawfully holding and exercising said office as aforesaid.

[Signed]

"EDWARD C. WADE.

"Subscribed and sworn to before me this tenth day of November, A. D. 1885.

"GEORGE R. BOWMAN, Clerk."

And thereupon William Breeden, attorney general, appeared in open court, and moved for a rule upon Singleton M. Ashenfelter, predicated on said affidavit, to show cause, if any he had, why the said attorney general should not have leave to file an information in the nature of a *quo warranto* in said court on behalf of the territory of New Mexico, on relation of said Wade, and against said Ashenfelter, for having illegally usurped and intruded into the office of district attorney for the Third judicial district of said territory. On the same day the court granted said rule, requiring the respondent to so appear in said court on the 12th. On that day, Ashenfelter being in court in person, and it having been shown that the rule to appear had been served upon him as ordered, and no cause being shown, on motion of the attorney general leave was given to file such information, and the same was then and there in open court on such leave filed. On the thirteenth day of November the attorney general appeared in open court, and moved for an order directing process to issue upon said information, which process was on the seventeenth day of said month ordered by the court, and which thereupon issued in the following words:

The Territory of New Mexico to Singleton M. Ashenfelter, Greeting:
Whereas, Wm. Breeden, attorney general for the territory of New Mexico, on the relation of Edward C. Wade, hath filed in the district court for the Third judicial district of the territory of New Mexico, sitting within and for the county of Sierra, by leave of the court, an information in the nature of a *quo warranto* alleging and charging that you, the said Singleton M. Ashenfelter, have unlawfully usurped, intruded into, and held the office of district attorney for the Third judicial district of the territory of New Mexico, and unlawfully exercised the powers and functions thereof, and that you, the said Singleton M. Ashenfelter, still unlawfully hold said office, and exercise the powers and functions thereof, without any authority of law, and to the exclusion of the said Edward C. Wade, who, it is alleged, is the legally appointed district attorney for said district, and lawfully entitled to the possession of said office, and to hold and enjoy and to exercise the powers and functions thereof, therefore you, the said Singleton M. Ashenfelter, are hereby commanded that, laying all other matters and things aside, you do appear, at 10 o'clock A. M., on Wednesday, November 18, 1885, before the said district court, now sitting in said county of Sierra, at the court-house of said county, then and there to answer unto said information concerning the matters therein

alleged and charged against you, and observe what the said court shall direct in this behalf. And this you do under penalty of the law, and on pain of such judgment and other process as said court shall award.

"Witness the Hon. Wm. F. HENDERSON, associate justice of the supreme court of the territory of New Mexico, and judge of the Third judicial district court thereof, and the seal of said court, this seventeenth day of November, A. D. 1885.

[Seal]

"GEORGE R. BOWMAN, Clerk."

On which said writ the sheriff of Sierra county, New Mexico, on the seventeenth day of November, 1885, made the following return, and filed said writ, with said return, with the clerk:

"I certify that I served the within writ upon the within-named Singleton M. Ashenfelter at the county of Sierra, this, the seventeenth, day of November, A. D. 1885, at 10 o'clock A. M.

"THOMAS MURPHY, Sheriff of Sierra County."

This process was served on the day it issued, and the next day, the 18th, the following stipulation was filed in court:

"THE TERRITORY OF NEW MEXICO, COUNTY OF SIERRA, ss.—IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT. November Term, 1885.

"*The Territory of New Mexico, on the Relation of Edward C. Wade, vs. Singleton M. Ashenfelter.*

"In order to expedite and obtain a speedy determination of this cause, and to save the defendant all of the rights that he may have touching the jurisdiction of the court over his person herein, and that none of them may be waived, it is hereby agreed that the plea to jurisdiction and the answer may be filed and considered at the same time, without the general appearance, which may be entered for the purpose of such answer, being considered as giving jurisdiction over the person of the defendant, but that the question as to whether the court acquired jurisdiction over the person of the defendant by reason of a process of summons issued by the court during the present term of this court, and made returnable to the present term of this court, may be considered the same as if no general answer had been made, but only a special appearance for that purpose entered.

"November 18, 1885.

W.M. BREEDEN,
"Attorney General.

"G. G. POSEY,
"IDUS L. FELDER,
"W. T. THORNTON,
"Attorneys for Defendant."

The respondent appeared specially in the district court, and moved the court to quash the process, and dismiss the information, and stated his reasons as follows:

First. Because the court has no jurisdiction over the subject-matter, and no power to proceed by information, and can only proceed to try the right of office by the original writ of *quo warranto*, and not by an information in the nature of a *quo warranto*.

Second. The process issued in this cause is an original writ issuing out of this court, and could only be made returnable at the next succeeding term after the same was issued; whereas, the writ issued in this case was made returnable the same term at which it was issued.

"*Third.* Because the court, as appears upon the face of the information and the writ, has no jurisdiction either of the subject-matter in controversy, or of the person of the defendant.

[Signed]

"SINGLETON M. ASHENFELTER."

The motion as overruled, and the respondent excepted. Answer was then filed, and the case submitted on the information and answer. At a later day of the same term the court adjudged, and so entered of record, that Ashenfelter is not entitled to the possession of the office of district attorney for the Third judicial district, and that he unlawfully holds the same, but that Edward C. Wade is such district attorney, and lawfully entitled to the possession of such office; and it is further adjudged that Ashenfelter surrender said office to the said Wade. From this judgment Ashenfelter appeals.

The questions presented by the record for determination here, therefore, are: *First.* Did the court below err in overruling the motion to quash, and in taking jurisdiction over the person and subject-matter, and in proceeding to hear and determine the case? *Second.* Did the court err in its final judgment?

Upon the first alleged error, appellant contends: *First*, that, if any tribunal in this territory has jurisdiction, it is the supreme and not the district court; *second*, if any remedy exists to redress the wrong complained of, it is not on information, but by the original writ of *quo warranto*; *third*, that in any event the respondent should not have been required to appear at the term when the information was filed, but at a subsequent one.

As to the first question, sections 2006 and 2014, Comp. Laws, are recited. The first of these sections gives power to the supreme court to issue writs of prohibition; the other one confers authority on any judge of the supreme court to issue writs of *habeas corpus*. It does not, therefore, follow, that exclusive jurisdiction is in the supreme court over such a proceeding as this one, especially in the light of section 666, Comp. Laws, as follows: "The district court shall have original jurisdiction in all cases, civil and criminal, in which jurisdiction is not specially delegated to some other court." No statute has been cited which does "specially delegate" to the supreme court jurisdiction in this class of cases; and, in the absence of it, the foregoing section, by its express terms, settles the question of jurisdiction to be in the district court, but does not determine the character of the proceeding. One provision of the organic act provides: "The district courts shall possess chancery as well as common-law jurisdiction." Section 1823 of the Compiled Laws, which section came in force in 1876, reads: "In all courts in this territory the common law, as recognized in the United States of America, shall be the rule of practice and decision."

This court, in the case of *Browning v. Estate of Browning*, 9 Pac. Rep. 677, (decided at last January term,) considered these provisions, and also made a review of the cases decided in the territory referring thereto. It was there held, (page 684:) "The legislature intended by the language used in that section to adopt the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country."

If section 1823, *supra*, and the section of the organic act above referred to, are applicable to this proceeding, our inquiry must be whether the common law, at the time of that separation, was such as to warrant the action of the court below.

In *Lettensdorfer v. Webb*, 1 N. M. 34, it is said: "By the tenth section of the organic law it is provided that the supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction. Jurisdi-

tion is properly the power to hear and determine causes. The common law, then, at least so far as to control and regulate the proceedings of the district court *in the hearing and determining of causes*, has been extended over this territory by act of congress, and that court, when it proceeds to hear and determine, must observe the course of proceeding prescribed by the common law." It may be this point was not exactly before the court in that case for determination, but the opinion is an elaborate and very able one, and the language quoted above was no doubt carefully considered, and evidently the deliberate judgment of the court on the point stated.

In *Arellano v. Chacon*, 1 N. M. 269, a case twice argued in the supreme court, and therefore presumably very carefully considered, the same section of the organic act herein quoted was before the court, and it was held: "The district courts of this territory may try issues of fact by juries, set aside verdicts for established legal causes, and grant new trials. To exert these high powers, the law has expressly conferred the authority. It is a parcel of that common-law jurisdiction of which they are made the depositories by the organic act."

When the observations made in the foregoing opinions are supplemented by the considerations stated in *Browning v. Estate of Browning, supra*, and the provisions of section 1823 of the Compiled Laws, it seems reasonably clear that the rule at common law as the same existed at the time of our separation from England, except so far as modified by statute, must determine the practice in the court below. If the territorial statute provides a rule of practice, it must govern; but, in its absence, the course of proceeding at common law must be ascertained and followed. Recourse must therefore be had to the common law to ascertain whether the remedy is by the original writ of *quo warranto* as claimed by appellant.

"*Quo warranto*, a writ which lies against any person or corporation that usurps any franchise or liberty against the king without good title; and is brought against the usurpers to show by what right and title *they* hold or claim such franchise or liberty. It is in the nature of a writ of right for the king against him who holds, claims, or usurps an office, * * * to inquire by what authority he supports his claim, in order to determine the right. * * * The judgment on a writ of *quo warranto* (being in the nature of a writ of right,) is *final and conclusive even against the crown*. This, together with the length of its process, probably occasioned that disuse into which it is now fallen, and introduced a more modern method of prosecution, by information filed in the court of king's bench by the attorney general, in the nature of a *writ of quo warranto*; wherein the process is *speedier*, and the judgment not quite so decisive. * * * This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or to seize it from the crown, but hath long been applied to the mere purpose of trying the civil right, seizing the franchises, or ousting the wrongful possessor; the fine being nominal. * * * This proceeding is now applied by virtue of St. 9 Anne, c. 20, which permits an information in the nature of a *quo warranto* to be brought, with the leave of the court, at the relation of any person desiring to prosecute the same, against any person intruding into, or unlawfully holding, any franchise or office in any city, borough, or town corporate,—provides for its speedy determination." 5 Jac. Law Dict. page 373, and authorities there cited; 5 Toml. Law Dict. 280; 3 Wend. Bl. 262.

"The writ of *quo warranto* has long been superseded in practice by the proceeding by information in the nature of a *quo warranto*, which is the usual proceeding also in American practice." Bouv. 373.

"There is one species of information still further regulated by St. 9 Anne, c. 20, viz., those in the nature of a writ of *quo warranto*, which was shown in the preceding volume to be a remedy given to the crown against such as

had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ." 4 Wend. Bl. 812.

"An information in the nature of a *quo warranto*, though a proper proceeding to try a right in respect to which, in strictness in words, it may not come, yet, being a remedial law, it shall receive as large a construction as the words will bear." 1 Salk. 376, S. C.

Upon a motion for leave to file an information in the nature of a *quo warranto*, in *State v. Burnett*, 2 Ala. 142, it is said: "The convenience of this mode of proceeding has rendered the old writs for ascertaining a right to an office or franchise entirely obsolete, and it may be questioned whether they would now be effectual."

In *Donnelly v. People*, 11 Ill. 553, it is held: "That proceeding [by information] is a substitute for the ancient writ of *quo warranto*."

"The precise period when this ancient writ fell into disuse in England, and its place was usurped by the more modern remedy of an information in the nature of a *quo warranto*, cannot be definitely ascertained. It is certain, however that the information, itself a common-law remedy, was of very early date, and it is probable that it began to supersede the more ancient remedy upon the abolition of the king's justices in eyre, and the substitution of the justices of assize." High, Extr. Rem. 467.

It is established by the authorities cited, and their number could be increased, that the ancient original writ was long ago superseded, and cannot be the proper remedy in this case. This view of that question disposes of the second point pressed upon the attention of this court.

The next matter, in its proper order for consideration, is whether the court erred in requiring process to issue returnable at the same term when the information was filed. Appellant, to support his contention that process should have issued returnable at the next term, *instead of at the same term*, cites section 1903, Comp. Laws, as follows: "All original process in any suits shall be returned on the first day of the term next after its issuance. By this statute the first day of the term next after it issues is the return-day of process authorized by the provisions of the section. The important inquiry is whether the section is applicable to extraordinary proceedings like the one here. Did the legislative assembly intend the section quoted to apply to remedies of an extraordinary kind, such as *mandamus*, prohibition, *quo warranto*, and the like, or was it the intention to apply it only to ordinary remedies as distinguished from extraordinary ones?"

In Rap. & L. Law Dict. 1017, process is thus defined: "A form of proceeding taken in a court of justice for the purpose of giving compulsory effect to its jurisdiction. The process of various courts of record consists of writs, summonses, warrants, etc., and hence the terms 'process' and 'writs' are often used synonymously."

In this manner the term "original process" is used in that section, and it is necessary to consider whether the process proper to issue when leave is granted to file an information in the nature of a writ of *quo warranto* was intended by section 1903.

Sir William Blackstone, (volume 3, p. 131,) in speaking of *habeas corpus*, uses this language: "In the king's bench and common pleas it is necessary to apply for it [the writ of *habeas corpus*] by motion to the court, as in case of all other prerogative writs,—*certiorari*, prohibition, *mandamus*, etc.—which do not issue as of mere course, without showing probable cause why the extraordinary power of the crown is called in to the party's assistance."

"Prerogative writs" are "remedies of an *extraordinary kind* granted by the courts in certain cases, but never as a matter of right; they being a direct intervention of the government with the liberty or property of the subject. The principal writs of this nature are (1) the writ of *procedendo*; (2)

the writ of *mandamus*; (3) the writ of prohibition; (4) the writ of *quo warranto*; (5) the writ of *habeas corpus*; (6) the writ of *certiorari*." 2 Rap. & L. Law Dict. 697. "The prerogative writ of *quo warranto* has, however, fallen into disuse." Id. 1057.

These various writs are generally referred to as high prerogative writs, issuing, as they do, in a class of special remedies of extraordinary character. "Originally the writ of *mandamus* was purely a prerogative writ. It was so called because it proceeded from the king himself, in his court of king's bench, superintending the police and preserving the peace of the realm." High, Extr. Rem. § 3. So it was with the original writ in *quo warranto*, prohibition, and in other extraordinary proceedings. As distinguished from what may, for the purpose of distinction, be designated as ordinary proceedings,—those in usual use for the redress of grievances continually arising,—they were regarded as extraordinary, and were instituted, as Blackstone states, *supra*, "by motion to the court, as in case of all prerogative writs," and were not granted as a matter of course, but on leave only.

Was it the intention of the legislative assembly to apply section 1903, *supra*, to these extraordinary remedies, instituted, before the passage of that section, only on leave of the court, or to provide a uniform rule as to ordinary actions? This section was a part of the act of July 12, 1851. See page 190, Comp. Laws 1865. Resort to the context is proper in determining construction, and, on examination of the act, the purpose of this section will become more apparent. That act undertook to provide a code of practice in ordinary cases.

Section 20 of that act reads: "All civil suits shall be commenced and conducted by petition and answer, replication and rejoinder, rebutter and surrebuter, and in this order until the issue is formed." Section 211: "When any person who may think he has a cause of action shall wish to bring suit against his adversary, he shall file in the office of the clerk a petition." The section then names what shall be set out in the petition. Section 37 is identical with section 1903 of the Compiled Laws of 1884, and reads: "All original process in any suit shall be returned on the first day of the term next after its issuance."

It was in this connection that the section under consideration was made a part of the act of 1851. The system of practice thus instituted had its foundation in a petition as the cause of action. This petition was intended to take the place of the common-law declaration, and the bill of complaint in equity, and to combine the two systems of pleading and practice into one in the nature of a Code, as is manifest from section 6: "The names and distinctions between different actions as known to the common law of England and the United States shall not be deemed material by the courts of this territory, and all matters of complaint or defense of a like nature may be joined, respectively, in the petition and answer."

It was in suits of this kind, brought by the petition provided for, to which the section now numbered 1903 in the Compiled Laws of 1884 was to apply, and the return-day of the process for which was fixed at the next term. It must be apparent this attempt to provide a new practice did not extend to the extraordinary remedies of *habeas corpus*, *quo warranto*, *mandamus*, and the like, which were all well recognized as a separate and distinct class of proceedings, in which speed was the very essence of the remedy, but was only intended to apply to those ordinary suits in which the process issued as a matter of course. It was actions founded on petition, and not those based on information to which the section applied. The one class was originally instituted only on leave of the court to obtain a "prerogative writ," and the practice as to them is thus defined:

"Prerogative writ. In practice a writ issued upon some extraordinary occasion, and for which it is necessary to apply by motion to the court." "A

writ not issuing as of course, without showing some probable cause why it should be granted. The writs of *habeas corpus*, *procedendo*, *mandamus*, prohibition, *quo warranto*, belong to this class." 2 Burrill, 822; 3 Bl. Comm. 132; 3 Steph. Comm. 681.

To hold that this statute determines the character and return-day of the process in these special proceedings would be to utterly ignore the well-known distinctions at common law between cases originating under the high prerogative writs, by leave, on motion, usually designated extraordinary remedies, and that other equally well-defined large class of cases where process is not a question of leave, but is issued as a matter of right, and introduce confusion and delay in place of certainty and speed.

Can it be reasonably contended the assembly meant, by the act of 1851, that one believing himself aggrieved could file with the clerk his petition, not verified, and thereupon, without leave, as a matter of course, a writ of *habeas corpus*, *mandamus*, or *quo warranto* should issue returnable at the next term? The statement of the inquiry carries its own answer.

The following case is in point: "*Quo warranto* is the legal writ to try the right to hold office and for ousting a usurper. This court sits but once a year. The writ does not issue except upon motion, and after rule and cause shown; and if, when issued, it must go to the common rules for pleading, * * * the remedy will prove wholly ineffectual; for the office usurped would expire before the complaint would be got ready for trial, and the judgment of ouster, if rendered, would operate on a person no longer in the possession of the office. We must so exercise jurisdiction as to give effect to the administration of the law, and not take a course certain to render it nugatory. The defendant will be ruled to plead to-morrow morning." *State v. Buchanan*, Wright, (Ohio,) 239.

In Vermont the statute provided: "Power is given to the supreme court to issue and determine all writs of error, *certiorari*, *mandamus*, prohibition, and *quo warranto*;" but the mode of procedure was not prescribed. The supreme court, in *State v. Smith*, 48 Vt. 281, adopted the practice in England. Judge REDFIELD, a very able jurist and law writer, in that case makes the ruling in the following terms: "It is not denied that at the time our statute was enacted, and down to the present time, the practice was settled and uniform in the courts of England that, after leave was granted and the information filed, the respondents had time and opportunity to plead to the information. *The nature of the application is summary, and requires speed; and the court will see to it that there is no delay.* * * * The statute gives merely jurisdiction to this court of these prerogative writs. * * * We think, when an information is allowed to be filed, it is the duty of the court to fix some time, ordinarily *during the same term*, for the respondent to appear and plead."

Lindsey v. Attorney General, 33 Miss. 523, is a very instructive case. The practice adopted by the trial court in the case now here evidently followed that one. The practice in the two cases is identical. If the rule followed in that case is correct, there is no error in the mode of proceeding adopted in the Third district in this one. It is observed in the Mississippi case: "The very nature of the right asserted requires a speedy remedy. It is not only the right of the party having the legal title to the office to be placed at once in possession and enjoyment of it, but it is also the policy of the law that he alone who has been intrusted with the public confidence, in the mode pointed out by law, should perform the duties of the office. The remedy, to be valuable, should be speedy. It was so under the practice as regulated by the rules of the common law, * * * and we find nothing in the policy of the law, or the theory of our government, requiring us to make the remedy less efficient than it is under the English practice."

The same reason applies with even greater weight in this territory.

The statute of Anne, to which reference is made, became a law in A. D. 1710; and, so far as applicable to this cause, is as follows, (see High, 647; Statute of Anne, 9 Anne, c. 20:)

"An act for rendering the proceedings upon writs of *mandamus* and informations in the nature of a *quo warranto* more speedy and effectual, and for the more easy trying and determining the rights of offices and franchises in corporations and boroughs.

"(1) Whereas, divers persons have of late illegally intruded themselves into, and have taken upon themselves to execute, the offices of mayors, bailiffs, portreeves, and other offices, within cities, towns corporate, boroughs, and places within that part of Great Britain called England and Wales; and, where such offices were annual offices, it hath been found very difficult, if not impracticable, by the laws now in being, to bring to a trial and determination the right of such persons to the said offices within the compass of the year; and, where such offices were not annual offices, it hath been found difficult to try and determine the right of such persons to such offices before they have done divers acts in their said offices prejudicial to the peace, order, and good government within such cities, towns corporate, boroughs, and places wherein they have respectively acted; and whereas, divers persons who had a right to such offices, or to be burgesses or freemen of such cities, towns corporate, boroughs, or places, have either been illegally turned out of the same, or have been refused to be admitted thereto, having in many of the said cases no other remedy to procure themselves to be respectively admitted or restored to their said offices or franchises of being burgesses or freemen than by writs of *mandamus*, the proceedings on which are very dilatory and expensive, whereby great mischiefs have already ensued, and more are likely to ensue, if not timely prevented,—for remedy whereof be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of Trinity term, in the year of our Lord one thousand seven hundred and eleven, where any writ of *mandamus* shall issue out of the court of queen's bench, the courts of sessions of counties palatine, or out of any of the courts of grand sessions in Wales, in any of the cases aforesaid, such person or persons who by the laws of this realm are required to make a return to such writ of *mandamus* shall make his or their return to the first writ of *mandamus*."

"(4) And be it further enacted by the authority aforesaid, that from and after the said first day of Trinity term, in case any person or persons shall usurp, intrude into, or unlawfully hold and execute any of the said offices or franchises, it shall and may be lawful to and for the proper officer in each of the said respective courts, with the leave of the said court, respectively, to exhibit one or more information or informations in the nature of a *quo warranto*, at the relation of any person or persons desiring to sue or prosecute the same, and who shall be mentioned in such information or informations to be the relator or relators, against such person or persons so usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises, and to proceed therein in such manner as is usual in cases of information in the nature of a *quo warranto*; and, if it shall appear to the said respective courts that the several rights of divers persons to the said offices or franchises may properly be determined on one information, it shall and may be lawful for the said respective courts to give leave to exhibit one such information against several persons, in order to try their respective rights to such offices or franchises; and such person or persons against whom such information or informations in the nature of a *quo warranto* shall be sued or prosecuted shall appear and plead as of the same term or sessions in which the said information or informations shall be filed, unless the court where

such information shall be filed, shall give further time to such person or persons against whom such information shall be exhibited, to plead; and such person or persons who shall sue or prosecute such information or informations in the nature of a *quo warranto* shall proceed thereupon with the most convenient speed that may be, any law or usage to the contrary thereof in anywise notwithstanding.

"(5) And be it further enacted and declared by the authority aforesaid, that from and after the said first day of Trinity term, in case any person or persons against whom any information or informations in the nature of a *quo warranto* shall, in any of the said cases, be exhibited in any of the said courts, shall be found or adjudged guilty of a usurpation or intrusion into, or unlawfully holding and executing any of the said offices or franchises, it shall and may be lawful to and for the said courts, respectively, as well to give judgment of ouster against such person or persons of and from any of the said offices or franchises as to fine such person or persons, respectively, for his or their usurping, intruding into, or unlawfully holding and executing any of the said offices or franchises; and also it shall and may be lawful to and for the said courts, respectively, to give judgment that the relator or relators in such information named shall recover his or their costs of such prosecution; and, if judgment shall be given for the defendant or defendants in such information, he or they for whom such judgment shall be given shall recover his or their costs therein expended against such relator or relators, such costs to be levied in manner aforesaid.

"(6) And be it further enacted and declared by the authority aforesaid, that it shall and may be lawful to and for the said courts, respectively, to allow to such person or persons, respectively, to whom any writ of *mandamus* shall be directed, or against whom any information in the nature of a *quo warranto* in any of the cases aforesaid shall be sued or prosecuted, or to the person or persons who shall sue or prosecute the same, such convenient time, respectively, to make a return, plead, reply, rejoin, or demur, as to the said courts, respectively, shall seem just and reasonable, anything herein contained to the contrary thereof in anywise notwithstanding."

It is apparent from the tenor of the act that it was intended to furnish speedy relief against the wrongs mentioned in it. While the act in terms was limited to the "rights of offices and franchises in corporations and boroughs," yet its terms were extended in practice to include other rights and offices so that it gradually became the means for determining the title to office.

Here was an act in full force, furnishing a most speedy and convenient mode for ousting one who wrongfully intruded himself into office. In this country, where most offices are elective, and where terms are not long, and questions of title often occurring, we are asked to hold that the legislative assembly of this territory intended to adopt a system less effective than the English one, and which would create delay, and enable the holder to occupy for the full term before the final judgment of the law could oust him. If the possessor must be summoned to appear at an ensuing term, and the delay occurs incident to ordinary proceedings, it is too plain for doubt that the remedy is wholly without efficacy. We are not willing to believe, under our institutions, that any such legislative intent was present when section 1903, *supra*, was passed; but, on the contrary, are inclined to adopt that construction most in harmony with our institutions, and best calculated to insure a speedy determination of title to office,—a question under our political system of vital importance. By holding that that section was intended to apply only to ordinary proceedings, where process issues as a matter of course, and not to those special proceedings where speed is the essence of the remedy, a distinction in the mode of proceeding which formerly prevailed, and which now almost everywhere obtains, is preserved, and a system of procedure recognized which will best subserve the ends of justice, and accord with what we believe to have been the legislative intent. The conclusion is that it was cor-

rect practice in the court below to cause process to be issued and served returnable during the term; and in doing so the court committed no error, and therefore properly overruled the motion to quash the process.

Having thus disposed of the question of practice interposed, the inquiry next arising for determination is as to the final judgment of the court on the merits. The following are the facts established by the record upon which the judgment of the court below was predicated: March 11, A. D. 1884, Edward C. Wade, the relator, was duly and legally appointed by the governor of the territory of New Mexico, by and with the advice and consent of the legislative council thereof, to the office of district attorney for the Third judicial district. Said Wade took the oath of office as such district attorney, as required by law, and entered upon the duties thereof, and was lawfully possessed of the same. He performed its duties, and received its emoluments, continuously, openly, and notoriously, until the ninth day of November, A. D. 1885. He never resigned said office, abandoned the same, nor was he removed therefrom. On said last-named day, over the objection, protest, and opposition of said Wade, the appellant, Singleton M. Ashenfelter, took possession thereof, claiming to be lawfully entitled thereto.

The appellant predicates his right to the office in question on the following facts: On the twenty-eighth day of October, A. D. 1885, Hon. Edmond G. Ross was governor of said territory, and as such made, executed, and delivered to said Ashenfelter a commission, whereby, so far as he legally could, he appointed the said Ashenfelter to the said office. The said appointee accepted said commission, and duly and in legal form took the oath of office, and on the said ninth day of November, as before stated, took possession and began to discharge the duties of the same. From the date of the said commission so held by Ashenfelter, to the time of bringing this proceeding, the legislative council had not at any time been in session, and never advised or consented to said appointment in any form whatsoever; or took any action repealing the same.

The question, under these facts, is, which party was entitled to hold the said office at the institution of this case? As bearing upon the point, it is important to inquire if, at the date of Ashenfelter's commission, there was any vacancy in the office to which he was appointed. If there was such vacancy, then it becomes necessary to determine whether the governor had the legal power alone, in the recess of the legislature, to fill it. If there was no such vacancy otherwise occurring, then the question arises, did the governor have the power to create a vacancy by the mere act of appointment and delivery of the commission to Ashenfelter, and by the same act both create and fill the vacancy?

There is no pretense that there was any effort to remove the relator, unless the appointment of Ashenfelter and his commission so operated. It is important to determine whether the office of district attorney for the Third district is one with a certain tenure. To settle that inquiry the legislation of the territory must be examined; for upon its construction must rest the determination of the question whether or not the office of district attorney for the Third district has a fixed tenure. There can be no intelligent comprehension of the question without a consideration of the several acts of the assembly relating to the subject, and therefore said enactments are here set out as follows:

First.

"An act to create the office of attorney general."

"Sec. 7. That the governor, by and with the consent of the legislative council, shall appoint an attorney general for said territory, who shall reside and keep his office at the seat of government, and he shall hold his office for two years, and until his successor shall be appointed and qualified.

"Sec. 8. When required, he shall give his opinion in writing to the gover-

nor, auditor, and treasurer, upon any question of law relating to their respective duties and offices.

"Sec. 9. The attorney general shall commence and prosecute all criminal and civil actions in the district courts of the several counties of this territory, in which the territory or any county may be concerned; and in like manner he shall defend all suits which may be brought against the territory, or any county of the same; he shall prosecute forfeited recognizances, and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the territory, or to any county thereof.

"Sec. 10. If the attorney general shall be interested or shall have been concerned in any cause, or shall be absent at the trial of any cause, in which the territory or any county is concerned, the district judge may appoint some other person to prosecute or defend the cause, and the person thus appointed shall have the same power, and receive the same fees, as the attorney general would if he was present.

"Sec. 11. In addition to the fees of office, the attorney general shall receive a salary of fifteen hundred dollars per annum: provided, that in no case shall there be taxed any fees against the territory for prosecuting or defending.

"Sec. 15. This act shall take effect and be in force from and after its passage.

"Approved, February 2, 1859."

Second.

"An act to amend the law relative to the attorney general, and to authorize the governor to appoint a district attorney for the Third district of this territory."

"Sec. 16. That the law authorizing the appointment of an attorney general for this territory be, and the same is, so amended as to require the attorney general to perform the duties therein designated in the supreme court, and district courts of the First and Second judicial districts only.

"Sec. 17. The salary of the attorney general shall be reduced to six hundred dollars, instead of fifteen hundred, as now provided by law.

"Sec. 18. That all the duties required of the attorney general by law now in force shall remain in full force as it concerns him.

"Sec. 19. That the governor, by and with the advice of the legislative council, shall appoint some person learned in law as attorney general for the Third judicial district of this territory, who shall reside and keep his office in the said Third district, and shall continue in office for the term of two years, and until his successor shall be appointed and qualified.

"Sec. 20. The district attorney for the Third district shall be required to perform the same duties, in the several counties of his district, as designated as the duties of the attorney general, and shall receive the same fees for his services, and no more.

"Sec. 21. The said district attorney shall receive a salary of four hundred dollars annually, to be paid out of the territorial treasury, in addition to his fees of office: provided, that in no case shall any fees be charged against the territory.

"Sec. 22. That all laws applicable to the attorney general shall be applicable to the said district attorney for the said Third district.

"Sec. 23. Be it further enacted, that if, from any cause, the attorney general shall fail to attend any term of the district court, in such case the presiding judge of said court is authorized to appoint some person of his confidence to represent the attorney general during the term of the district court, and the person so appointed by said judge shall receive five dollars per day for his services for all the time the said court may continue in session, and, further, shall be entitled to all the fees allowed by law to the attorney general, and the sum paid to the person thus appointed shall be deducted from the salary

allowed to the attorney general; and the auditor of public accounts, in such case, is required to draw on the territorial treasury for the pay of the person so appointed by said judge on his services being certified by a certificate of the said judge.

"Sec. 24. That this act shall take effect from and after its passage.

"Approved February 28, 1862."

Third.

"An act designating the districts of the attorney general and district attorneys."

"Sec. 25. That hereafter it shall be the duty of the attorney general to attend and prosecute in the supreme court of the territory, and in the district courts of the counties of Santa Fe, San Miguel, Mora, Taos, and Rio Arriba, and he shall receive the salary and fees as at present prescribed by law.

"Sec. 26. There shall be a district attorney appointed by the governor, by and with the advice and consent of the legislative council, for the counties of Santa Ana, Bernalillo, Valencia, and Socorro; and another appointed in the same manner for the counties which may now or hereafter be created in this territory south of the Jornada del Muerto, who shall perform the duties and receive the fees and salaries now established by law.

"Sec. 27. That this act shall take effect from and after its passage.

"Approved January 28, 1863."

Fourth. ASSIGNMENT OF JUDGES.

"An act in relation to the judicial districts.

"Section 1. That from and after the passage of this act the territory of New Mexico shall be divided into three judicial districts, as follows, to-wit: The counties of Santa Fe, San Miguel, Mora, Taos, Rio Arriba, shall constitute the First judicial district; and the counties of Santa Ana, Bernalillo, Valencia, and Socorro, shall constitute the Second judicial district; and all that part of the territory embraced in the county of Dona Ana shall constitute the Third judicial district: provided, that the times and places of holding the courts remain in force as now provided by law.

"Sec. 2. That the Honorable KIRBY BENEDICT, chief justice, be, and is hereby, assigned, as now provided by law, to the First judicial district; that the Honorable SIDNEY A. HUBBELL, associate justice, be, and he is hereby, assigned to the Second judicial district; and the Honorable JOSEPH G. KNAPP, associate justice, be, and is hereby, assigned to the Third judicial district."

The act first herein set out is, as shown by the title, "An act to create the office of attorney general." It also determines the tenure thereof, and the salary connected with the same. This was in February, A. D. 1859. Three years later, February 28, 1862, the second act set out above was approved. Its construction is the one about which there is most contention. It is the only act found in which the term of office for district attorney for the Third district is claimed to be fixed, and this contention cannot prevail unless the words "attorney general," used in the nineteenth section of the act, was intended to be "district attorney." In the act of 1859 the duties of the attorney general were co-extensive with the territory, but by the act of 1862 his duties were expressly limited "to the supreme court, and the district courts of the First and Second districts," and his salary was reduced to \$600. In the act of January 28, 1863, section 25, as above set out, the territorial limits within which the attorney general was to exercise his duties was again reduced and restricted to what now constitutes the First judicial district. These acts also establish a legislative intent, not only to restrict the limits within which the attorney general should discharge the duties of a prosecuting officer in the

actual trial of causes, but also in intent to create prosecuting officers within the several districts. By section 19 of the act of 1862 a prosecuting officer was provided for in the territory in which, by the former act, the attorney general had been prosecutor, while assigning the attorney general to like duties in the other district. In the act of January, 1863, the attorney general is assigned to duty as a prosecutor; a district attorney is provided for Santa Ana, Bernalillo, Valencia, and Socorro; and a district attorney for the county south of the Jornada del Muerto was provided. While this last region is not named as the Third district, it was so in fact. In this act no tenure is fixed. It provides an additional district attorney. The intent to provide a separate prosecuting officer within each district by some designation is thus clearly apparent. Was it the purpose, by the act of 1862, to provide for two attorney generals, one for the First and Second districts, and one for the third district? or was the purpose of the act to provide a district attorney for the Third district, and assign the attorney general to the other two?

It is a well-settled rule of construction that resort may be had, not only to the words of a statute, but as well to its title and context. "If a doubt arise as to the proper construction to be given to a particular clause of a statute, resort must be had to the entire section or statute upon the subject of which the clause in question forms a point." Sedg. 237; *Williams v. Thomas*, 9 Pac. Rep. 356, (decided last term.)

The title of this law and the context are radiant with light to aid construction. It is designated by the legislature, "An act * * * to authorize the governor to appoint a *district attorney* for the Third district." It is not an act to provide for an additional attorney general for such district, but, by name, for a district attorney. In the very beginning it purports to legislate respecting two officers by different names, performing duties of the same general character, but within different territorial limits. It is true the words "attorney general" are used in the nineteenth section. Is such use a clerical inaccuracy? There can be no doubt it was intended by the act to provide a prosecuting officer for the Third district. If the purpose was to designate him attorney general, it is difficult to understand why, in sections 20 and 21, immediately following section 19, such officer should be designated as a *district attorney*. In section 20 the prosecuting officer is designated "the district attorney for the Third district." In section 21, "the said district attorney." In section 22, "the said district attorney."

The word "said," in these two sections, in ascertaining the legislative intent, is full of significance. To what do they refer? What is meant when it is stated in section 20, "The *district attorney* for the Third district shall be required to perform" certain duties therein named? The term "said district attorney" either refers back to the officer mentioned in the nineteenth section as attorney general, or it is absolutely meaningless. If such term does not refer back to that section, to what is reference made? No satisfactory answer can be made to this inquiry.

Unless section 19 provides for a "district attorney," then, at the time of the passage of the act, there was no such officer, and the reference in the sections 20, 21, and 22 are to officers having no existence, for whom no provision had been made. Such an interpretation would declare the assembly and the legislature of 1862 guilty of the absurdity of providing duties, fixing a term and salary for an office not in existence, nor called by that body into being. If, however, it is held that the words "attorney general" were inserted in the act by clerical mistake, when the words "district attorney" were intended, and the section read in that way, then the whole act is consistent with its title, each section with every other, and the act becomes at once intelligible and effective.

The preamble and the said several sections are here placed in juxtaposition, that their true interpretation and meaning may be the more apparent:

"An act to amend the law relative to the attorney general, and to authorize the governor to appoint a district attorney for the Third district of this territory."

"Sec. 19. That the governor, by and with the advice of the legislative council, shall appoint some person learned in law as attorney general for the Third judicial district of this territory, who shall reside and keep his office in the said district, and shall continue in office for the term of two years, and until his successor shall be appointed and qualified.

"Sec. 20. The district attorney for the Third district shall be required to perform the same duties, in the several counties of his district, as designated as the duties of the attorney general, and shall receive the same fees for his services, and no more.

"Sec. 21. The said district attorney shall receive a salary of four hundred dollars annually, to be paid out of the territorial treasury, in addition to his fees of office: provided, that in no case shall any fees be charged against the territory.

"Sec. 22. That all laws applicable to the attorney general shall be applicable to the said district attorney for the said Third district."

Read literally, the whole act, so far as it undertakes to provide a prosecuting officer for the Third district, is wholly nugatory, as no duties are prescribed for an attorney general for the Third district, nor fees, nor salary. Read according to its spirit and evident intent, it is a harmonious and effective act, creating, as the title says it intends to do, a district attorney, fixing his fees and salary, prescribing duties and tenure. That section 19 should be read according to its evident intent, and not literally, is very clear. Where two constructions may reasonably be adopted, one of which will render an act wholly nugatory, and the other will make it effectual, the latter should be adopted.

The act of 1863 amounts to a legislative construction of the former act. It provides for the appointment of a district attorney in the territory south of the Jornada del Muerta, who shall receive the fees and salary now established by law. Unless the act of 1862 prescribed duties and provided fees for such an officer, none existed. The act of 1862 assumes that such an office was in existence, as the title clearly implies. It is plain that section 19 of the said act of 1862 should be construed to create and fix the tenure of office of the district attorney for the Third district, and that under said act the governor, by the advice and with the consent of the legislative council, appoints such officer, who holds his place for two years, and until his successor is appointed and qualified. He holds, then, by a fixed tenure. This is the law applicable to the office in controversy.

It is not contended that Mr. Wade's time had expired when Mr. Ashenfelter received his commission. So the conclusions reached compel a consideration of the last inquiry, as to the power of the executive, at his own will, to remove this officer holding a term fixed by law; and that question will now be considered.

Under our governmental system all power is inherent in the people, and the executive has the express and incidental powers conferred by law, and no more. For the right asserted by appellant he must affirmatively show legal authority. Even in England, where parliament is supreme, and where acts of parliament can seldom be questioned, the power of the crown is always open to question, and no one can give or be deprived of rights by prerogative interference, except in strict accordance with the law of the land. No executive authority exists outside of its legal boundaries. 12 Coke, 76; 1 Inst. 36, 63, 496.

Various statutes of this territory are cited by appellant to establish that the executive was clothed with the power of removal at the date when Ashenfelter received his commission. These will now be considered.

It is claimed by the appellant that section 1740, Comp. Laws, gave to the executive power to make an appointment to the office of district attorney during the recess of the legislative assembly. That section is in the following terms: "In all cases wherein the governor is or may be authorized by law to make appointments by and with the advice and consent of the council, he is hereby authorized to make temporary appointments during the recess of the assembly, to continue until the meeting of the same."

It is contended that as the governor is empowered, during a session of the legislative assembly, to appoint a district attorney by and with the advice and consent of the council, that in the recess, by virtue of the foregoing section, he may alone appoint, until the meeting of the council. Such a contention assumes that, if the legislative assembly had been in session at the date of Ashenfelter's commission, the governor would in that event have been clothed with power, acting with the council, to appoint him. While the executive might so appoint during a session of the assembly to fill a vacancy, it does not necessarily follow that he could do so where no vacancy existed. The whole question resolves itself into the power of the governor to remove. If he did not have the power to remove, no vacancy occurred, as Wade held by a fixed tenure, which had not expired at the date of the attempted removal. The foregoing section means only that, *where a vacancy occurs* during the recess, the governor may appoint in the interim, and not that during such recess he may fill an office already full with an existing incumbent. Unless the executive had the power to create a vacancy by removal, there was no vacancy to fill during the recess, so the section cannot aid the appellant until it be first determined that there was, at the time of his appointment, a vacancy, and that depends on the extent of the executive power.

Section 1841, Rev. St. U. S., is also referred to as giving authority to the executive to make this appointment. So much of this section as is pertinent to this discussion reads as follows: "The executive power of each territory shall be vested in a governor, who * * * shall take care that the laws be faithfully executed."

A similar provision was under consideration in *Field v. People*, 2 Scam. 91. As the case will be referred to upon another point, it is worthy of observation that the supreme court, at the time that case was decided, contained among its members such able judges as BREESE, SCATES, and TREAT, of national fame for learning and ability. It is there said of a like provision: "This clause is merely declaratory and directory. It confers no specific powers, nor does it enjoin any specific duty. This power of general supervision, says an able commentator on American law, (2 Walk. Amer. Law, 103,) is a duty enjoined on the federal and state executives. It would be dangerous, however, to treat this clause as conferring any specific power which they would not otherwise possess. It is to be regarded as a comprehensive description of the duty of the executive to watch with all vigilance over the public interests. The governor is not to execute the laws himself, but see them executed. This duty is performed by lending the aid and power of the executive arm to overcome resistance to law. The history of the federal and state governments afford practical exposition of this clause of the constitution, in conformity with this construction. The executive is to see the laws executed as they may be expounded by those to whom that duty is intrusted. If this clause confers the power of supervision and dismissal as to one officer, it also gives the same authority over every other one in the government * * * upon whom the performance of a duty may be enjoined. The injunction to see the laws executed is general, and sufficiently comprehensive to embrace every law and officer. If, under this clause, the governor may dismiss the secretary, it cannot be seen why he may not dismiss every other one, without regard to their manner of appointment or the tenure of office, and thus, by the construction of one clause, bring all the officers, and the operation of all the

laws of the state, under executive control. This would counteract the whole scope and design of the constitution, by substituting the changing and capricious will of one man for the fixed and known rules of the law. From this consequence there is no escape if the rule be as contended for."

This quotation from a learned court constitutes such an able statement of reasons why the construction contended for by appellant as to the power contained in section 1841 should not prevail that it leaves but little more to be said. The section is in its very terms declaratory, and it must be apparent that it was not intended by this act to give to the executive the power to remove at will. The several departments of government, the executive, legislative, and judicial, under our system, are separate and distinct in the performance of different functions closely related to each other, yet independent. To construe this section so as, by reason of its terms alone, to give power to the executive to remove at will, would enable such department, by exercise of the mere power of removal, to override and control the judicial. If the personal or official action of a prosecuting officer should be displeasing, the executive could arbitrarily remove at will, and thereby, by virtue of the power of removal, could control the whole judicial machinery, so far as it relates to the criminal law; and the executive, as an incident to this power, would be able to control the course of proceedings in a co-ordinate and distinct department of the government, and to make the judicial prosecuting officers wholly subservient to executive direction. Such a result under a system where independent action in the several departments of government is everywhere recognized, was surely not intended in the section invoked by appellant. It is not believed any such power is conferred by that section.

A very able argument is made by appellant's counsel, drawn from the power of removal exercised by the president, and therefrom it is sought to be deduced by analogy that a similar authority exists in state and territorial executives. To extend the argument thus made to its legitimate end, if it is one proper to be adopted, the right of removal would thereby be carried to every executive of the several states, except when express limitation prevailed, in as full and ample a manner as that authority heretofore existed in the chief executive of the United States. If such a view were correct, the exercise of that right by state executives would have been so frequent, that the record of adjudication, now very numerous, would be a mine of information and authority establishing such a continuous exercise of the power by judicial sanction that the right of state executives would be as clearly ascertainable as that conceded in the president. No precedent has been referred to, in the presentation of this case, where the power of removal by a state executive, against one holding office by a certain tenure, has been sanctioned by the courts of last resort. This is, of itself, strong and persuasive against the right, and greatly weakens the argument upon the analogy sought to be maintained between the powers of the general and territorial governments.

The reasoning of the court in *Field v. People, supra*, is here quoted as a sufficient answer to the contention on that point:

"The marked disparity between the powers and responsibility of the general government and that of this state naturally and necessarily results from the different character of the respective governments, their powers, duties, and the object of their creation. The government of the United States is the national government of the Union. To that is delegated the attributes of national sovereignty. The duties of the executive of the national government are therefore widely extended and greatly diversified; embracing all the ordinary and extraordinary arrangements of peace and war, of diplomacy and navigation, of finance, of naval and military operations, and of the execution of the laws throughout almost infinite ramifications of details, and in places at vast distances from each other. His views are not bounded even by the circuit of the whole Union, but must extend to the most remote regions to

which commerce or navigation has extended or connected our interest. So multifarious and diversified, therefore, are the functions of his office, that the limited abilities of no one man are equal to their discharge. Hence the necessity of organizing various departments, and the employment of numerous ambassadors and other public ministers, all of whom constitute so many aids and helps in the performance of the executive duties of the president. And as many of the duties of these officers cannot be regulated by law, because they cannot be anticipated, but arise out of the changing exigencies of time and circumstances, large discretion must, from necessity, be vested somewhere; and it has been vested in the president as the chief executive officer of the government. From his interest in and control over all the business of the executive department, and his political responsibility for its administration, arises his right to supervise, control, and dismiss those executive officers who are his political and confidential aids in the discharge of his executive duties.

"But the state governments are widely different in their objects, powers, and duties. Compared with the general government, they may be denominated domestic governments. They act exclusively upon the domestic relations of life. Their regulations and sphere of action are limited to their territorial boundaries. The powers and duties of the chief executive magistrate, therefore, are proportionably limited, and such as from their nature are capable of being specifically prescribed and regulated by law; and, unlike those of the president, they may all be performed in person. He neither has, nor does he require, the aid of others in the performance of any of his duties. The duties, likewise, of all the executive officers of the state, are capable of being regulated by law; and by our constitution they are required to be so regulated. No discretionary authority or control over them is delegated to the governor by the constitution, nor does it contemplate the delegation of such power by law. From the discretionary powers with which the president is clothed, there is a necessity for his possessing the power of removal, which does not exist in the case of the governor. The heads of the departments and public ministers being the political and confidential officers of the president to execute his will, and act in cases in which he possesses a legal discretion, all their acts in this character are only politically examinable. The duties which are not enjoined by law cannot be enforced by its process. But, as the law has expressly given to the president the right to prescribe the duties of those officers, it also gives, by necessary implication, the power of removal, as a means of rendering available the authority expressly granted."

We are thus brought to the last point of the appellant's contention, to-wit: "That the power to remove is a necessary legal adjunct and incident of the power of appointment." Fortunately, authority entitled to much consideration exists, making the question reasonably clear.

The subject is discussed in two classes of cases. In one class where the office is held without any fixed term; in the other, where the law has attached to it a time during which the occupant may hold. In the first class, where the office is held only at the will of the appointing power, the right to remove does exist as an incident of the power to appoint. *Ex parte Hennen*, 13 Pet. 256; *Keenan v. Perry*, 24 Tex. 253. In the other class of cases, however, the ruling is different. In the case of *People v. Bissell*, 49 Cal. 412, it is said: "The word 'tenure,' as used in this section, is, in my opinion, to be construed as meaning 'term,' the effect of which is to continue the incumbent in office for the period of four years from the time of his appointment. Under that construction, *his term not having expired, the governor had no power to appoint.*"

The case for determination by this court comes within the second class, those where the tenure is fixed by law, as it is hereinbefore held, upon a construction of the territorial statutes, that Wade held his office for a fixed period, which had not expired when the relator received his commission.

In Texas there is this provision: "The governor shall appoint one county treasurer, who shall hold his office until the next general election in this state, or until otherwise provided by law." The supreme court of that state made its ruling under such a statute from which we quote: "The county treasurer, when once appointed in the mode prescribed by law, has a vested right to his office, and cannot be removed except for cause amounting to a forfeiture of his office. He can only be removed on conviction, by a jury after an indictment, for malfeasance, misfeasance, or nonfeasance in office. The principle that the *power of removal is incident to the power of appointment* is applicable only in those cases where the office is held at the pleasure of the appointing power, and the *tenure is not fixed by law.*" *Collins v. Tracy*, 36 Tex. 547.

In *People v. Jewett*, 6 Cal. 292, Chief Justice TERRY states the point decided this way: "The case under consideration presents the single question whether the governor of this state can remove from office a notary appointed under the provisions of this act, *before his full term has expired.*" It was held by the court, the office being for a fixed term, the governor could not, during the continuance of the term, remove the incumbent.

"All offices must be created in accordance with law. Unless they are held during the pleasure of the executive, or subject to removal at his will, an office is as much a species of property as anything which is capable of being held or owned." *Wammack v. Holloway*, 2 Ala. 33.

In the Texas case, *supra*, it is said: "The holder of an office has a vested right therein;" in the Alabama case, that the right to hold such office, where the term is fixed, is a species of property, so an arbitrary removal without notice, or opportunity to be heard or deny charges, would be taking away property without process of law.

The supreme court of Michigan, in *Dullam v. Willson*, 53 Mich. 392, 51 Amer. Rep. 128, and 19 N. W. Rep. 112, delivered an elaborate and exhaustive opinion, reviewing the authorities on this subject, with Judge COOLEY as a member of the bench. In that case, Wilson, the respondent, was in possession of the office of trustee of the Michigan Institution for the Advancement of the Deaf, Dumb, and Blind. His term expired by law, February, A. D. 1887. He held his appointment from the executive. On the second of July, 1888, Gov. Begole, without preferring charges against Wilson, or giving him opportunity to answer, deny, or explain charges of official misconduct, attempted to remove him by an executive order which read as follows:

"EXECUTIVE OFFICE, LANSING, July 2, 1888.

To James C. Wilson, Esq.—DEAR SIR: I have this day, for your official misconduct and habitual neglect of duty, removed you from the office of trustee of the Michigan Institution for the Deaf and Dumb. The reasons for such removal I shall lay before the legislature at its next session.

"Yours respectfully,

JOSIAH W. BEGOLE.

On the same day the governor appointed, in due form of law, the relator, Dullam, to the place, and Wilson, refusing to retire, was brought into court by proceeding in *quo warranto*. The governor of Michigan was supported by an authority which does not exist in this territory, making that case a much stronger one in favor of the power of removal than the present one. A constitutional provision there in force read as follows: "The governor shall have power, and it shall be his duty, except at such time as the legislature may be in session, to * * * remove from office for gross neglect of duty, or for corrupt conduct in office, or any other misfeasance or malfeasance, either of the following state officers," (among them the trustee named in the governor's order.) Under such circumstances, upon a very careful consideration, the learned court held that the governor must first notify the officer of the intention to remove, with statement of the causes, and give him an op-

portunity to be heard; and also denied the executive right to make the change by the mere act of removing the incumbent and appointing his successor.

In the opinion delivered by Judge CHAMPLIN, in the case, he makes the following very clear and forcible observations: "I do not think the people, when they adopted this amendment, intended or supposed that they were placing such unlimited power in the hands of any man. If it exists, it places in the power of the governor, at his mere will or caprice, to remove all the state officers, except legislative and judicial, and to fill their places with his own partisans, thus revolutionizing the whole administration of the state, and defeating the express will of the people. It is no argument to say that it may never be done. It is sufficient to know that it could be done."

These reasons apply with greater weight when the officer sought to be removed is one in no way connected with the executive duties, but is in a separate department, performing duties as an officer of the court.

In the state of Kentucky the statute required the secretary to reside and perform his duties at the seat of government. Benjamin Hardin, secretary, declined to do so, and the governor attempted to remove him, and made an executive order to that end in these words:

"SEPTEMBER 1, 1846.

"Whereas, Benjamin Hardin, by his failure, willful neglect, and refusal to reside at the seat of government, and perform the duties of secretary, has abandoned said office, and said office, in the judgment of the governor, has become vacant for the cause aforesaid, it is therefore declared by the governor, and ordered to be entered upon the executive journal, that the office of secretary has become and is vacant; wherefore, to fill the vacancy, the governor this day commissioned George B. Kinkead, Esq., to be secretary till the end of the next general assembly of Kentucky."

The governor of Kentucky had the express power by statute to remove, but it was held the removal could not be made without the incumbent was first given the opportunity to be heard. Chief Justice TOM MARSHALL delivered the opinion of the supreme court, and said: "The secretary being removable for breach of good behavior only, the ascertainment of the breach *must precede the removal*; in other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and *may, moreover, be seriously affected in his good fame and standing*, implies a charge and trial and judgment with opportunity for defense and proof." *Page v. Hardin*, 8 B. Mon. 672. The court further held in that case, as no other power existed to hear complaints, the secretary must first be charged in a judicial tribunal, and denied the power of the governor to arbitrarily remove before such hearing.

A very able discussion of executive power is to be found in *State v. Pritchard*, 36 N. J. Law, 114. In that case it was the duty of the governor to fill vacancies. Certain police commissioners were convicted of a crime to cheat and defraud, and sentenced to pay a fine of \$100 each. The attorney general officially advised the governor that thereby their offices became vacant, and recommended the appointment of successors, which was done. The incumbents denied that the offices were vacant, and resisted the right of the governor's appointees, and upon a proceeding in *quo warranto* the case came before the supreme court. The power of the governor was denied, and it was held there must first be judicial determination of the fact of vacancy before the governor could appoint.

The case is one worthy of careful study, and quotation is made at some length: "It is obvious, therefore, that the governor of this state is not possessed of a particle of judicial capacity. I cannot see that a single one of the powers conferred upon this high office even borders upon such authority. It is true that he is empowered to fill certain vacancies, and in doing such acts

he must decide whether or not such vacancies exist. But such decision is in no sense a judicial act. It is a mere assumption of the existence of a certain state of facts on which to base executive action. Such assumptions or determinations by the chief executive, when they relate to or affect private interests, have no binding force. If the executive should fill an office on the conviction that the incumbent was dead, it is presumed that in the mind of lawyers there would prevail no doubt that, if the fact of death had not occurred, the executive action would be void. An estoppel of private right by executive decision is not likely to be pleaded by any well-skilled counsel. I think there is no reasonable ground on which to base a claim for the existence of any right of judicature in the governor of the state. And there can be as little doubt that the act of declaring that the offices involved in this case had been forfeited was a judicial decision. It had all the essential elements of such an adjudication. It was a determination of the fact as well as the law, and comprised at once the functions of the jury and the judge, and it related to a right of property. The questions to be settled were whether the officer had misbehaved,—and that was an issue of fact,—and whether such misbehavior amounted to a forfeiture of office,—and that was an issue of law. The point of fact required the introduction of evidence, and for this purpose the governor had before him the record of the conviction of these defendants in a criminal court. Whether such record would be competent for the purposes for which it was used, is open, as a question of pure law, to considerable uncertainty; the usual and inveterate rule being that a criminal record is not admissible in any suit or proceeding relating to property or the civil rights of persons. But it is enough to denote that here was presented a rule of evidence to be passed upon. In all its parts the proceeding was one of ordinary judicature. And then, too, after the ascertainment of the fact, it became necessary to apply the rule of law. The result was an announcement that the forfeiture had been incurred. And this, clearly, was an act of judicial discretion. Than the judgment of the judge, there is no other legal test of the effect a certain act of misconduct has upon the right to office. What malfeasance will work a forfeiture is no part of the *lex scripta*. There is no statute upon the subject. It is obvious that it may well be that some convictions in a criminal court may not produce such a result. The point is not met by the suggestion that in this case the crime committed was one *malum in se*, and made highly penal, because, if the jurisdiction is vested in the executive on this occasion, it belongs to him in all cases of official misdemeanor. It is not too much to say that of all the cases where there is room for the use of a graduated standard for judicial judgment the class of cases which comprises the one now considered is the most prominent. What jurist or judge has ever attempted to define that category of offenses which in law are operative to deprive the wrong-doer of a public office? And yet such was the question upon which the executive was called upon to pronounce. These acts were judicial in the most rigorous sense of the term."

It will be observed, from the authorities cited, that in California and Texas there is a direct denial, in cases where the office is held by a fixed tenure, of the power of removal as an incident of the power of appointment; while an overwhelming weight of authority elsewhere is to the effect that, even when the power of removal for cause is expressly granted, such authority cannot be exercised without the incumbent has first had in some form an opportunity to be heard in his own self-defense.

This principle was recognized in *Ex parte Garland*, 4 Wall. 378, by the supreme court of the United States, where it is said, speaking of attorneys as officers of the court: "They hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court after opportunity to be heard has been afforded;" citing *Ex parte Heyfron*, 7 How. (Miss.) 127; *Fletcher v. Daingerfield*, 20 Cal. 439.

The removal from office not only deprives the possessor of a valuable private right, and affects public interests, but it also implies wrong-doing and injures

the good name of the incumbent. It would seem a first principle of justice that one should not be tarnished without opportunity to be heard in his own behalf. If the executive may at will direct the official to stand aside, and enforce the demand, it operates as a trial without notice, and a judgment without evidence, with no power for rehearing or appeal. Such eminent jurists as TREAT, MARSHALL, COOLEY, and others equally learned, have denied the existence of such executive power. The courts of last resort, some directly and others in effect, in Texas, California, Michigan, Kentucky, Rhode Island, and New Jersey have also refused their sanction to executive acts predicated on such an assumption. The whole theory of the state government is in favor of a division of powers, and against concentration in the hands of a single person or department. Fixed terms, certain tenures, rights divested only after notice, evidence, and trial, tend to stability, and the regular and orderly exercise of the functions of government by the different departments; whereas, office held only at the will of a single person, exercising authority above inquiry, and whose conclusions are final and beyond the power of any other tribunal to review, tends to arbitrary action, and is not in harmony with the liberal spirit upon which our institutions are founded.

Judge CAMPBELL, in *Dullam v. Willson, supra*, said: "It is not satisfactorily shown that any different doctrine has ever prevailed in the United States, except in some isolated cases; and it would require a unanimity of decision amounting to an entire removal of old landmarks to justify the recasting of constitutional principles which underlie our whole system," and authorize us to give judicial sanction to the creation of a vacancy by executive fiat in an office with a fixed tenure, and thereby declare the forfeiture of a vested right without day in court, trial, judgment, or opportunity for appeal or review.

In the language of the learned supreme court of the state of Michigan in the case last cited, it is proper to add that, "in what has been said upon the law of this case, there has been no wish or purpose to cast the least imputation on the motives of the executive. The same presumption of good faith and honest desire to act within legal and constitutional limits are accorded to him as to either of the co-ordinate branches of the government, and his motives are not the subject of criticism. No doubt, he acted upon the impression that he was entirely within the line of his duty, as well as of law, and that he believed the removal of the respondent was demanded by the best interests of the public service."

It is a very delicate task for one department of the government to pass upon the acts of either of the others. It is, however, unavoidable, as the law has imposed upon the judiciary duties it cannot and should not seek to escape, but rather to discharge them with the highest respect for the other departments, with the single purpose to maintain only those principles of law firmly established by the weight of authority, well founded in justice, proper for the protection of human rights, and the maintenance of that system which prevails, that every one, however humble, shall be heard before he is condemned or his right denied.

It is held that this proceeding was properly commenced in the court below by information in the nature of a writ of *quo warranto*; that the process properly issued, on motion, by order of the court; that it was rightfully made returnable at a day during the same term; that the court had jurisdiction to hear and determine the cause; and that Edward C. Wade was, at the commencement of the proceeding, and that Singleton M. Ashenfelter was not, the lawful and rightful district attorney for the Third judicial district, and that there is no error in the record. The judgment of the court below is affirmed, and costs taxed against the appellant.

BRINKER, J., concurs.

(2 Idaho [Hasb.] 260)

STEVENSON v. MOODY, as Territorial Comptroller.

(Supreme Court of Idaho. January 24, 1887.)

1. TERRITORIES—LEGISLATURE—OFFICERS AND ATTACHES.

The number of officers and *attachés* of a territorial legislative assembly is determined by the laws of the United States, and cannot be increased by any act of the legislative assembly itself.

2. SAME—EXPENSES.

A territorial legislative assembly is limited in its expenses to the amount provided by congress, and cannot appropriate money from the territorial treasury to pay *attachés* not authorized by act of congress.

BUCK, J. This controversy comes into this tribunal, as a court of original jurisdiction, upon an agreed statement of facts, under sections 20 and 780 of our Code of Civil Procedure. The statement of facts agreed upon by the parties, and submitted to the court, are—*First*. That on the thirteenth day of December, A. D. 1886, the legislative council of Idaho territory proceeded to elect such *attachés* as have formerly been elected; that the plaintiff was elected to a position designated by said council as “assistant chief clerk of the council,” and that, as such clerk, he has rendered services for 39 days. *Second*. That assistant chief clerks of the council, so called, have been elected by former assemblies of this territory. *Third*. That the duties devolving upon the chief clerk of said council are onerous in the extreme, and that public business is expedited by the employment of an assistant, and such assistance is necessary for the proper transacting of the business of the council. *Fourth*. That the plaintiff made the demand of the defendant, as comptroller of Idaho territory, for a warrant upon the general fund of the territory for the sum of \$195, claimed by him to be due him for said services, at the rate of \$5 per day, as said assistant chief clerk, and the defendant refuses to execute or deliver said warrant to plaintiff for the alleged reasons: (1) That there is no law of the United States creating or recognizing such subordinate officer of either branch of the legislative assembly of the territory; (2) that the laws of the United States forbid the payment of moneys belonging to this territory to any subordinate officers of the legislative assembly, for services rendered such assembly; (3) that the laws of the United States forbid the creation of such subordinate office by a legislative assembly; and (4) because there is no law authorizing the comptroller to draw a warrant in payment for services rendered said assembly by persons not officers of said territory.

The following sections of the United States Statutes determine the powers and authority of our territorial assembly.

“Sec. 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. * * *

“Sec. 1855. No law of any territorial legislature shall be made or enforced by which the governor or secretary of a territory, or the members or officers of any territorial legislature, are paid any compensation other than that provided by the laws of the United States.”

“Sec. 1888. No legislative assembly of a territory shall, in any instance, or under any pretext, exceed the amount appropriated by congress for its annual expenses.”

In the case of *National Bank v. County of Yankton*, 101 U. S. 129, Mr. Chief Justice WAITE, in announcing the decision of the court, says: “All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of congress. * * * The relation of the territories to the general government is much the same as that which counties bear to their respective states, and congress may legislate for them as a state does for its municipal corporation. The organic law of a territory takes the place of a constitution, as the fundamental law of the local

government. It is obligatory, and binds the territorial authorities. Congress has full and complete legislative authority over the people of the territories, and all the departments of the territorial government."

It is clear from the inspection of the organic act of the territory, and from the decision of the supreme court of the United States, that the legislative assembly can be composed of such persons only as is provided by congressional enactment, and that the number of its officers and *attaches* is determined by the same power. A legislative assembly of the territory cannot increase the number of its members or officers or *attaches*, or the amount of their compensation, by any enactment of its own. If the length of time allowed for its session, or the number of its officers, is not sufficient, the relief must come from congress. Section 1855 of the United States Revised Statutes limits the compensation of the members of the legislative assembly to a specified amount. Section 1888, in still more explicit terms, provides that the annual expenses of a legislative assembly shall not exceed, in any instance, or under any pretext, the amount appropriated by congress. Section 1855 enacts that the amount of such compensation for any member or officer of a territorial assembly shall not be increased over the amount provided by congress, and prohibits, in express terms, the making of a law for that purpose by such assembly.

In January, 1873, as appears by section 1861 of the Revised Statutes of the United States, assistant chief clerks of each branch of the legislative assembly of territories were expressly provided for. In 1878, however, by act of congress passed June 19th, (20 St. U. S. 193,) said section was repealed, and it was provided that the subordinate officers of each branch of the territorial legislature shall consist of a chief clerk, enrolling and engrossing clerk, sergeant-at-arms, and door-keeper, messenger, and watchman, and chaplain. The office of assistant chief clerk was not included within this new enumeration of *attaches* to the legislative assembly. We must presume that this omission was intentional.

From an inspection of the several sections of the United States Statutes, and the decisions of the supreme court of the United States, it seems clear that the election of an assistant chief clerk of the council was not authorized by law; that the joint resolution of the legislative assembly, providing for the payment of such officer out of the territorial treasury, was contrary to the laws of the United States, and void; and that the territorial comptroller is not authorized by law to draw a warrant upon the territorial treasurer for the payment of plaintiff as said assistant clerk.

Upon the above conclusions of law, and the stipulation of parties herein, this controversy is dismissed.

HAYS, C. J., and BRODERICK, J., concurring.

(2 Idaho [Hab.] 268)

HEILNER and others v. BROWN.

(Supreme Court of Idaho. February 7, 1887.)

1. NEW TRIAL—APPEAL—OBJECTION TO AFFIDAVIT.

Where an affidavit was produced and read in the district court, without objection, on motion for a new trial on the ground of newly-discovered evidence, and an objection is made in the supreme court of Idaho that the same is insufficient and void for want of a sufficient jurat, that court will not consider the objection.

2. SAME—NEWLY-DISCOVERED EVIDENCE—DISCRETION.

An order for a new trial, on the ground of newly-discovered evidence, being largely discretionary with the trial judge, the supreme court will not disturb the same, unless appellant shows an abuse of such discretion.

Appeal from district court. Washington county.

Brumback & Lamb and G. W. Adams, for defendants and appellants. Huston & Gray, for plaintiff and respondent.

HAYS, C. J. This is an appeal from an order granting a new trial. The grounds of the motion for a new trial were irregularity in the proceedings of the court, newly-discovered evidence, insufficiency of the evidence, and errors in law. The appellants contend that the affidavit of J. Durkheimer, produced and read in the court below on the motion for a new trial on the ground of newly-discovered evidence, was insufficient and void on account of not having a proper jurat thereon. It was read and treated as an affidavit in the court below without objection, and counsel cannot be heard to raise such an objection for the first time in this court. If it was defective, they should have objected to it in the court below, and, if overruled, they could have excepted, and been heard here. While courts look with disfavor on motions for new trial, on the ground of newly-discovered evidence, yet the court below must be clothed with large discretionary powers in such cases, and, if there is no abuse of that discretion, the appellate court will not interfere. We find no abuse of that discretion in this case, but think the order a very proper one. This being decisive of the question, other points discussed will not be considered.

The order is affirmed.

BUCK and BRODERICK, JJ., concurring.

(*Idaho [Hasb.] 265*)

ROSENTHAL and others v. IVES and others.

LANSDALE and others v. SAME.

(*Supreme Court of Idaho. February 7, 1887.*)

1. MINES AND MINING—ADVERSE CLAIMS.

In an action brought under section 2328, Rev. St. U. S., and the act of 1881 amendatory thereof, in support of an adverse mining claim, it is not enough that one claimant should show a superior right or title, as against the other, but one must show a clear right, as against the government, to a patent from the United States to the claim in dispute, or some part thereof, before either party can prevail in the action.

2. SAME—LOCATION—ALIENS.

Under the acts of congress, only citizens of the United States, and persons who have declared their intentions to become such, can acquire rights by location upon mineral lands of the public domain.

3. SAME—FINDINGS.

In an action between claimants to determine the right of possession to a mining claim, the plaintiffs must allege and show all the qualifications necessary to entitle them to purchase, among which must be included an allegation that the plaintiffs are citizens, or have declared their intention to become such; and, when the action is tried to the court alone, all these facts must be found, whether admitted by the pleadings or not.

4. SAME—CITIZENSHIP.

As there was an omission to find in these cases that plaintiffs were citizens, or had declared their intention to become such, *held*, that the judgment should be reversed, and the causes remanded, with directions to the court below to find on this question, from the evidence taken at the trial, if sufficient, and, if not, upon such evidence as may be adduced, and proceed to render judgment accordingly.

Appeal from district court, Shoshone county.

Chas. W. O'Neal, for Ives and others, appellants. *Wm. H. Clagett*, for Rosenthal and others, respondents.

BRODERICK, J. These actions were commenced in support of the adverse claims made by the plaintiffs against the issuance of patents to Ives and Silverthorn to the Idaho Bar claim, in Shoshone county, Idaho. The two cases were, by consent of the parties, consolidated, and tried by the court without a jury. The court found and adjudged that Ives and Silverthorn were, as against the plaintiffs in each of said cases, the owners of, and entitled to the

possession of, a certain portion of the claim, which was described in the judgment; that the plaintiffs in the *Lansdale Case* were the owners of, and entitled to the possession, as against the defendants, of that portion of the Idaho Bar claim more than 80 rods distant from the west line thereof, which conflicted with the lower half of the Murray location; that the plaintiffs in the *Rosenthal Case* were the owners of, and entitled to the possession, as against the defendants, of all the area in conflict with the upper half of the Murray location; that Ives and Silverthorn be enjoined and restrained from asserting or claiming any right, title, interest, or estate in any of the two parcels herein adjudged to be the property of the plaintiffs in the consolidated cases, respectively, and from prosecuting their application for a United States patent to any portion of said parcels of land.

From this judgment Ives and Silverthorn appeal to this court, and assign as error: *First*. That the consolidation and trial of the two cases as one was unauthorized by law, and improper, even with the consent of the parties. *Second*. That the findings do not show that Murray (one of the original locators) was a citizen of the United States, or had declared his intention to become such, nor that the plaintiffs in either of said cases were citizens of the United States, or had declared their intention to become such. *Third*. That the findings fail to show that the plaintiffs in either of said cases, or their predecessors in interest, ever complied with the requirements of section 2324 of the Revised Statutes, and the several acts amendatory thereof, as to performing the annual labor required by those acts, during A.D. 1884. *Fourth*. The finding that there was a mining custom in force, at the date of the Ives location, limiting all placer claims in that locality to 80 rods in length to each locator; that no exceptions to this custom were allowed by the custom itself; that the Ives location was made in violation of this custom, and was void as to the excess in length beyond 80 rods from its beginning point.

We will notice these questions in their order.

The consolidation of the cases below for the purposes of the trial, by the consent of the parties, is certainly no ground for reversal. The defendants were the same in both cases, and the questions involved the same. The consolidation and trial as one case saved costs to all the parties, and, if the order was error, it was without prejudice. At least, there has been no claim here that any prejudice resulted therefrom. In such case a party should not be heard to complain here of that to which he assented in the court below.

The second question, as to the omission to find that Murray or the plaintiffs in either of the cases were citizens, or had declared their intention to become such, is more difficult. It appears from the record that in the *Rosenthal Case* the citizenship of Murray and plaintiffs is alleged, and not denied. In the *Lansdale Case* the citizenship of plaintiffs is alleged, denied by the defendants, and hence put in issue. It further appears that on October 13, 1885, after the rendition of the judgment, appellants stipulated in open court that the *Lansdale Case* should "abide and be controlled by all orders, decisions, and judgments in the *Rosenthal Case*."

It is contended, on behalf of the respondents, that the judgment in the *Rosenthal Case* should be affirmed, (so far as this point is concerned,) because the citizenship of Murray and the plaintiffs is admitted, or not denied; and also that the judgment in the *Lansdale Case* should be affirmed, because under the stipulation it was to abide and be controlled by the decision and judgment here in the *Rosenthal Case*. In ordinary cases, this point made by counsel would have to be sustained, as it is a general rule, well recognized, that what is admitted by the pleadings is taken as proven, and that which is alleged in the complaint, and not denied by the answer, is considered admitted, as between the parties. But these are statutory actions, brought under an act of congress, and must be controlled by its provisions. It is true that it is a contest between parties to settle the right of possession to mining ground,

but the act provides that, after a judgment is rendered, the party entitled to the possession of the claim, or any part thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land-office, together with the certificate of the surveyor general, etc., and make the payments required; "whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land-office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess." The amendatory act of 1881 provides that if, upon the trial, neither party appears to be entitled to the claim in dispute, nor any part thereof, this fact must be found, and judgment rendered accordingly.

From a consideration of these provisions, it is clear that the object and purpose of the action is not only to settle the controversy as between the claimants, but for the information of the officers of the land department of the general government. It is not enough that one party should show the better or superior title, as against the other claimant, but one party must show clearly, as against the government, the right to a patent for the disputed ground, or some part thereof, before either claimant can prevail in the action. *Jackson v. Roby*, 109 U. S. 441, 3 Sup. Ct. Rep. 301; *Lee Doon v. Tesh*, 8 Pac. Rep. 625; *McGinnis v. Egbert*, 5 Pac. Rep. 653, 660.

The citizenship of Murray and the plaintiffs was pleaded, and we think there should have been a finding upon this allegation of the complaint, notwithstanding the admissions of the defendants. We must not be understood as deciding that in all actions the trial court must find upon allegations which are admitted by the parties, but we limit our conclusions in this regard to this particular class of cases. *North Noonday Min. Co. v. Orient Min. Co.*, 9 Mor. 529, 1 Fed. Rep. 522.

As to the third assignment of error, we think the findings show a sufficient compliance on the part of the plaintiffs with the requirements of law as to performing the necessary labor upon the claim.

This brings us to the fourth and last question to be considered. Was it error to find the existence of a mining custom at the date of the Ives location, limiting all placer claims in that locality to 80 rods in length, and will this finding support the conclusion of law based thereon? Rules and customs of miners, reasonable in themselves, and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decisions. That such rules may still be adopted and enforced as a part of the law of this country is too well settled to admit of argument. We cannot see that the custom in question in any way conflicts either with the acts of congress, or the laws of the territory, but, on the contrary, think the custom a reasonable one, and entirely in harmony with the spirit of the laws. *Irev. St. U. S. § 2319*; *Code Civil Proc. Idaho, § 486*; *Smelting Co. v. Kemp*, 104 U. S. 652; *Erhardt v. Boaro*, 113 U. S. 535, 5 Sup. Ct. Rep. 560; *North Noonday Min. Co. v. Orient Min. Co.*, 9 Mor. 529, 1 Fed. Rep. 522.

We find no error in the record, except the omission to find on the question of citizenship; and, to have this omission supplied, the judgment is reversed, and the causes remanded to the court below, with directions to find upon this question on the evidence taken at the trial, if sufficient, and, if not, upon such evidence as may be adduced, and render judgment accordingly.

HAYS, C. J., and BUCK, J., concurring.

(9 Colo. 476)

BARNES and another v. BEIGHLY.

(Supreme Court of Colorado. January 24, 1887.)

1. EQUITY—CREDITORS' BILL—DISCOVERY—JUDGMENT NOT MADE A LIEN.

A bill will not lie by a judgment creditor for discovery, and to have land in another county than that in which the judgment was rendered, alleged to be held in

trust for the judgment debtor, who is residing on such land, made subject to the judgment, where the judgment has not been made a lien upon the land claimed to be subjected by filing a transcript of the judgment with recorder of the county in which the land is situated.

2. SAME—SPECIFIC DENIALS BY DEFENDANTS—GENERAL REPLICATION.

On a creditors' bill seeking to have property alleged to have been purchased with the money of a judgment debtor, and to be held in trust for him, made subject to a judgment, where the defendants charged with collusion answer on oath denying the charges, and such denials are not contested by the plaintiff by any evidence contradictory of the statements therein, but by a general denial, it is error to enter judgment in favor of the plaintiff.

3. SAME—GENERAL VERDICT FOR AMOUNT OF JUDGMENT.

In a suit by a judgment creditor for discovery, and in aid of a judgment previously recovered by the same plaintiff, in which defendant alleges that the original judgment is still in force and unsatisfied, and charges collusion with defendant's wife, made co-defendant, in transferring his property to her name, it is error for the court to give a general judgment against both defendants for the amount of the defendant's debt.

4. SAME—ERRONEOUS JUDGMENT.

In a suit for discovery, and in aid of a judgment, in the nature of a creditors' bill by a judgment creditor, it is error to enter judgment against the debtor, and a co-defendant charged with collusion, for the amount of the former's debt.

Appeal from county court, Clear Creek county.

The plaintiff, Beighly, brought suit in the county court of Clear Creek county, to the November term, 1882, against the defendants, Orpheus I. Barnes, L. H. Barnes, and S. A. Gilbert, for discovery, and in aid of a judgment previously recovered in the said court by the same plaintiff against the said Orpheus I. Barnes. The original cause of action was a balance due on account for goods and chattels sold and delivered by the plaintiff to the defendant, the amount of the recovery being \$673.65. The present action was not instituted in pursuance of the Code remedy, by proceedings supplementary to execution, but is a proceeding in equity in the nature of a creditors' bill. The bill alleges, among other things, that the original judgment is still in full force and effect, and remains wholly unsatisfied; that the judgment debtor, O. I. Barnes, after the rendition of said judgment, removed to Leadville, Lake county, and engaged in business there in the name of the said L. H. Barnes, his wife, with the intent and purpose of placing and keeping his money and property beyond the reach of any execution that might be issued on the plaintiff's judgment. It further alleges that the co-defendants, L. H. Barnes and S. A. Gilbert, colluded with said judgment debtor to obstruct the collection of said judgment; that said O. I. Barnes purchased real estate and personal property with his own funds, and caused the title thereof to be transferred to his co-defendants, for the purpose of cheating and defrauding the plaintiff in the collection of his judgment. The bill specifies certain real and personal property alleged to be so acquired and held by the co-defendants, charging that no consideration moved from them to the vendors, but that the property is fraudulently held in trust for the use and benefit of said O. I. Barnes. Charges of the same character are made in relation to property alleged to have been owned by said judgment debtor in Gilpin county, during the business transactions which formed the basis of the original judgment, and the proceeds of the sale thereof, it is alleged, were fraudulently transferred to his wife, the said L. H. Barnes. Discovery is sought concerning all these transactions and alleged fraudulent and collusive conduct, with full disclosure as to all property owned by said O. I. Barnes, or in which he is in any manner beneficially interested. Judgment is prayed that the defendants, or some of them, be decreed to pay the plaintiff the amount of said judgment, with interest and costs, and that defendants, or some of them, be adjudged to apply for that purpose any money, property, or choses in action belonging to said O. I. Barnes, or held in trust for him, or in which he is in any way interested. Summons was served on O. I. Barnes and L. H. Barnes, and

they were the only defendants who appeared to the action. Said defendants answered the bill, denying all the fraudulent conduct charged, and responding to all inquiries concerning the ownership of property, and how the same was derived. The plaintiff filed a replication traversing the truth of the statements made by the defendants, but offered little testimony contradictory thereof. Upon the hearing, no findings of fact appear to have been made, but the court rendered a general judgment in favor of the plaintiff against said defendants, O. I. Barnes and L. H. Barnes, for the sum of \$1,046.53, and costs.

W. P. Wade, for appellants. *L. C. Rockwell*, for appellee.

BECK, C. J. This is a record of proceedings had in the court below, upon a bill filed therein by the appellee in the nature of a creditors' bill. It is earnestly contended on part of the appellants that such a proceeding could not be legally entertained under the laws of this state, on the facts and circumstances set out in the bill. This objection was not raised in the county court, either by demurrer or answer, nor is it here directly presented by any of the assignments of error. We are therefore not called upon to decide this question. But the sufficiency of the bill itself, and of the evidence to support relief in such a proceeding, and the regularity and validity of the judgment rendered, are questions properly before us for adjudication.

We do not hesitate to say that the bill is defective. It sets out, among other things, that the judgment sought to be enforced was rendered by the county court of Clear Creek county; that the judgment debtor and his co-defendants are residents of Lake county; and that the judgment debtor purchased real estate and personal property in the latter county with his own funds, taking the title in the names of his co-defendants, "for the purpose of cheating, hindering, and defrauding the plaintiff in the collection of his said judgment. Real estate and personal property is described which is alleged to be so held. The bill avers the issue of execution to Lake county, and its return *nulla bona*, but it does not aver that any steps have been taken to make the judgment of the county court of Clear Creek county a lien upon the property of the judgment debtor in Lake county.

If the allegations of the bill are true, the property mentioned is in fact held in the name of other persons for the use of the judgment debtor. This would constitute a resulting trust therein in his favor, if the transaction had been *bona fide*. But the transfers having been made for a fraudulent purpose, participated in by the grantees as well as the debtor, the only trust capable of enforcement results in favor of the creditors of the latter party.

Under our statutes all equitable interests in property are subject to levy and sale on execution. Gen. St. §§ 1835, 1883. For the purpose of acquiring a lien on any real estate owned by a judgment debtor, or which he may acquire after judgment, situate in a different county from that in which the judgment is entered, it is provided by section 1839 that the creditor may file a transcript of his judgment with the recorder of such county. This does not appear to have been done in the present case. The doctrine established by the authorities is that the judgment must be a lien on the real estate sought to be subjected to sale on execution through the aid of a creditors' bill. *Newman v. Willetts*, 52 Ill. 99; *Cornell v. Radway*, 22 Wis. 260; *Evans v. Hill*, 18 Hun, 464; 2 Wait, Act. & Def. 414, § 3.

In respect to the evidence, we are of opinion that it was insufficient to support a judgment against the defendants. The plaintiff in his bill called upon them to answer as to the interest of the judgment debtor in all the property described, or in any manner referred to, in the bill, including all trusts and equitable interests held by or in the names of said co-defendants for the benefit or use of the judgment debtor, or in which he was interested directly or indirectly. Full discovery was prayed as to said matters, and the defendants

were called upon to state and set forth, as to the property described, the particulars of sales and purchases, the consideration actually paid, who paid the same, and who had the use and profits thereof since the purchase. The answers to these inquiries were necessarily made under oath. All acts of collusion, and all fraudulent efforts to conceal property or assets of the judgment debtor, or to hinder, delay, or defeat the collection of the plaintiff's judgment, were positively denied. It was also positively denied that the judgment debtor had any interest in the property mentioned, beneficial, in trust, or otherwise, or in any property held by said co-defendants. The answers filed were responsive to the discovery sought by the bill; the defendants stating, in some instances, as they had a right to do, the circumstances under which certain property was acquired. The truth of these answers was not contested by the plaintiff by any evidence that can be regarded as contradictory of the statements made therein. The replication of the plaintiff filed thereto neither operated to sustain the charges made in the bill, nor to require extrinsic proof in support of the denials thereto contained in the answers. The plaintiff was not concluded by these answers, and might have introduced evidence showing them to have been untrue; but, in the absence of evidence contradicting the statements of the defendants in relation to the matters whereof discovery was sought, it was error to render judgment in favor of the plaintiff.

We are also of opinion that the judgment rendered was irregular, and not warranted by law. It was a joint judgment against O. I. Barnes, the judgment debtor, and L. H. Barnes, the only co-defendant served with process. It gives no relief as to any of the property, real or personal, described in the bill, and alleged to have been fraudulently transferred and held so as to place the same beyond the reach of the plaintiff's execution, but is a general judgment against the defendants served with process, for a sum of money, to-wit, the sum of \$1,046.53. What items entered into the computation by which this result was reached the record does not disclose; and since the bill avers that the original judgment still remains in full force and effect, and as this action was not instituted to revive that judgment, there was no warrant of law for entering a second judgment for the same cause of action already merged in the first judgment.

Another fatal objection is that a general judgment for the same cause of action is foreign to the nature and purposes of a creditors' bill. Equitable jurisdiction cannot be invoked for relief of this character. *Miller v. Scammon*, 52 N. H. 609; 1 Pom. Eq. Jur. § 230; Story, Eq. Pl. § 473.

It was error, in any view of the case, to enter judgment against the defendant L. H. Barnes jointly with the judgment debtor, for the amount of the latter's debt, in an action ostensibly brought in aid of an existing judgment. If the defendant L. H. Barnes held title to property belonging to the judgment debtor, or in which he was beneficially interested, as averred in the bill, the province of the court, in a proper case, would be to decree that such property, or the debtor's interest therein, be subjected to the satisfaction of the plaintiff's judgment. The scope of this remedy is to cancel and remove fraudulent conveyances, to set aside fraudulent assignments, and to appropriate and apply to the satisfaction of the judgment equitable assets of the judgment debtor.

There may be other errors in the proceedings, but inasmuch as no sufficient abstract of the record was made and filed by the appellants, as required by our rules, and since counsel for the appellee has not seen fit to discuss the errors assigned, we are not disposed to consider all of the 16 errors assigned on the record.

For the reasons given, the judgment must be reversed.

(19 Nev. 396)

STATE ex rel. WRIGHT v. DOVEY. (No. 1,259.)

(Supreme Court of Nevada. February 5, 1887.)

SCHOOL FUND—APPORTIONMENT OF, AMONG COUNTIES, IN PROPORTION TO NUMBER OF CHILDREN—ORPHANS' HOME—CONST. NEV.—ART. 11, § 3.

Under section 3, art. 11, Const. Nev., providing that the interest on school moneys shall be apportioned among the several counties in proportion to the ascertained number of the persons between the ages of six and eighteen years in the different counties, and the statutes of the state providing for apportionment on that basis, the inmates of the Orphans' Home, at Carson City, are not to be counted as a part of the children of Ormsby county, in which it is situated, they not having the right to attend the public schools, and their education being provided for in the Home.

Application for mandamus.

T. Coffin and J. D. Torreyson, for relator. *The Attorney General*, for respondent.

LEONARD, C. J. There are 739 persons in Carson school district No. 1, between 6 and 18 years of age, of whom 50 are wards of the state in the Orphans' Home. In making his apportionment of the state school moneys to the county of Ormsby, respondent refused, and refuses, to include the said 50 wards among the persons entitled to be considered in the distribution of the public-school moneys, and made said apportionment upon the basis of 689 persons between 6 and 18 years of age in said district, instead of 739. Relator applies for a writ of *mandamus* to compel respondent to make his apportionment upon the basis of the latter number.

The constitution of the state provides that the interest on school moneys shall be apportioned among the several counties in proportion to the ascertained number of the persons between the ages of six and eighteen years in the different counties. Const. art. 11, § 3. Statutes have been passed, from time to time, providing for apportionment upon the same basis. It is the duty of the school census marshal to take annually, between the first and thirty-first days of May, inclusive, a census of all children under eighteen and over six years of age, who are residents of his district on the first day of May. He must include in his report all children of the district that are absent attending institutions of learning, and whose parents or guardians are residents of the district. He must not include non-resident children who are attending, in his district, institutions of learning, benevolent institutions, such as deaf, dumb, blind, and orphan asylums, nor any other children not actually residing in the district. Gen. St. §§ 1314, 1317, 1318.

In 1869 the legislature established, and caused to be erected, a State Orphans' Home, in Carson City, Ormsby county. St. 1869, 111. It is within Carson school-district No. 1. Its administration is under the control of a board, consisting of the superintendent of public instruction, surveyor general, and state treasurer. The board has power, among other things, to appoint a superintendent and matron, who shall be man and wife, and a teacher, *who shall reside at the Home, and have charge of the educational department*; said teacher to be duly qualified according to the provisions of the state school law. The board has power, also, to employ all other suitable persons necessary to conduct the affairs of the Home. All children admitted to the State Orphans' Home must, under the direction of the board of directors, be taught the usual branches of an English education, and the male orphans must be taught useful trades and occupations, and engaged in useful employments, as the board of directors shall order. The female orphans must be taught the useful occupations of housewifery, and such other useful occupations as the board of directors may provide. All orphans duly admitted to the Home thereby become the wards of the state, and are entitled, under the provisions of the statute, to the care, protection, and guardianship of the state. For such care, protection, and guardianship, the state is entitled to the

services of its wards, and has the right to train and educate them for useful places in society, and such rights of the state are superior to the claims of any and all relations or persons, resident or non-resident. Gen. St. §§ 1465, 1466, 1469, 1471.

Under the law as it now stands, the legislative intent to educate the orphans at the Home, and not in the public schools, is plain. By the method of education adopted and prescribed by the legislature, these wards are as thoroughly withdrawn from the public schools as they would be if they were to be sent to another state to be educated. They are not to be sent to the common schools, there to pursue the studies prescribed by the state board of education, but they are to be taught the usual branches of an English education at the Home, under the direction of the board of directors. Under the statute, it is as much the duty of the board of directors to educate the orphans under their charge, both before and after they are six years of age, as it is to clothe or feed them; and to that end to appoint a teacher, who must reside at the Home, and have charge of the educational department, as it is to appoint a superintendent and matron. The specific mention of the method of education to be pursued, excludes the idea that the board are at liberty to adopt any other.

Upon this question our conclusion is that, under the law now existing, these wards must be taught at the Home by a teacher who resides there, and that they are not entitled to attend the public schools of Carson City, or any others, so long as they remain inmates of the Home.

Having arrived at the conclusion just stated, is it the duty of respondent to include or exclude the wards in question in making his apportionment? We freely admit that the language of the constitution and statute is broad enough to sustain relator's claim that they should be included; but it does not necessarily follow from that fact that persons in their situation were intended to be included, either by the framers of the constitution or the legislature. In construing constitutions and statutes, the first and last duty of courts is to ascertain the intention of the convention and legislature; and in doing this they must be governed by well-settled rules, applicable alike to the construction of constitutions and statutes. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over the letter." *U. S. v. Kirby*, 7 Wall. 482. And see *State v. McKenney*, 18 Nev. 189. 2 Pac. Rep. 171; *State v. Kruttschnitt*, 4 Nev. 178.

It was the intention of the framers of the constitution, and of the legislature, to make as equitable and equal division of the public-school moneys as possible, and the method of division adopted was not an arbitrary one. It was based upon reason and justice. The controlling thought was to give to each county an equal sum for each child in the county entitled to attend and enjoy the public schools; and the principal object in taking the census at the same time in all the districts is to ascertain the number of such children, in order that an equal division of a common fund may be made. If two counties have an equal number of children entitled to attend the public schools, reason and justice demand that they shall share equally in the public funds; but if one has not only the same number as another, who are so entitled, but 50 more also, who are prohibited from attending, no reason can be given for including the 50 in the apportionment. They are no tax upon the public-school fund. The school is not affected by them. It would be the same if they did not exist, or if they resided in a foreign country; and it would be as unjust and unreasonable to allow a district to receive money because of their residence therein as it would to permit an equal sum to be given by reason of

the same number of adults residing there. Tribal Indian children have not been returned by census marshals, or considered by superintendents of public instruction in making their apportionments, for the reason, doubtless, that they have not been considered entitled to enjoy the privileges of public schools; because, in all other respects, they are within the constitution and statutes. Now, if the reason stated is the true one,—if they are not entitled to attend the public schools,—then it would be just as reasonable, and as much within the letter and spirit of the constitution and statutes, to allow Ormsby, or any other county, to draw public-school moneys on account of the numerous Indian children within its limits, at least without previous legislative action, as it would be to permit the same to be done in case of the orphan children at the Home, who are likewise prohibited by existing laws from attending the public schools. If we stick to the letter of the constitution and statutes, instead of to the reason of each, then census marshals must return Indians like other children, and superintendents of public instruction must consider them in making their apportionments. On the other hand, if we adhere to the reason of the law, then, if Indian children are not entitled to public-school privileges, superintendents should not include them in making their apportionments.

Our opinion is that neither the framers of the constitution nor the legislature intended to allow public-school moneys to any county for persons not entitled to attend the public schools therein, and that, under existing laws, the children of the Orphans' Home are not so entitled. *Mandamus* denied.

(5 Utah, 100)

ALLEN v. BARNES, Adm'r, etc.

(*Supreme Court of Utah. February 2, 1887.*)

1. POWERS—WILL—PROVISIONS IN DISCRETION OF EXECUTORS—“PROCEEDS.”

A clause in a will declaring that “it is my further desire that out of the proceeds of my estate, leaving the same to the best judgment and discretion of said executors hereinafter mentioned, to pay” certain sums per month to the testator's mother and aunt, gives to the executors, or an administrator with the will annexed, in case of their refusal to serve, authority to determine how much shall be paid such beneficiaries; but the word “proceeds” in said clause does not mean “income,” and the executor or administrator is not confined to the income of the estate in making such payments, but he cannot sell property for that purpose without first obtaining authority from the proper court.

2. COURTS—PROBATE COURTS OF UTAH—DISTRICT COURTS CONSTRUING AND EXECUTING WILL—COMP. LAWS UTAH, 53.

The probate courts of Utah are vested with exclusive original jurisdiction of all matters pertaining to the settlement of estates, (Comp. Laws Utah, 53;) and therefore, although the district courts of the territory, under their general equity powers, may entertain a suit for the construction of a will, it cannot execute it, and the supreme court, on an appeal from the decree of the district court in such a suit, will not direct the execution of the will.

Williams & White, for appellant. *M. M. Kaighn*, for respondent.

HENDERSON, J. The complaint avers that Joseph M. Allen died December 23, 1880, leaving the following as his last will: “In the name of God, amen. I, Joseph Moroni Allen, of the city of Salt Lake, territory of Utah, being weak in body, but of sound and disposing mind, and not under restraint or the influence or representation of any person, do make, publish, and declare this last will and testament: *First.* I hereby revoke all former wills and testaments heretofore made by me, and do solemnly declare that this alone is my last will and testament. *Secondly.* I direct my executors, hereinafter mentioned, as soon as they have sufficient funds in their hands, to pay all my debts, of whatsoever kind and character. *Third.* I leave and devise to my beloved wife, Julia H. Allen, one-fourth of all my real estate, and devise and give the same to her during her life, and after her death the same shall go to

my children, hereinafter mentioned, and to be divided in equal proportions among them, share and share alike; and, if there be but one of said children surviving at the time of her death, then all of said property shall go to said surviving child. And I further give and bequeath to the said Julia H. Allen a one-fourth interest in all personal property belonging to me at the time of my death. *Fourth.* I devise and bequeath to my mother, Disy Allen, and my aunt, Rachel Allen, jointly, and during the life of the survivor, the house they now live in and occupy as a home; and at their death, or at the death of the survivor, then said house, or the proceeds thereof, however arising, to be divided among my said children hereinafter mentioned, in equal proportions, share and share alike. And it is my further desire that out of the proceeds of said estate, leaving the same to the best judgment and discretion of said executors hereinafter mentioned, to pay unto my said mother, Disy Allen, the sum of twenty (\$20) dollars during each and every month of her life, as an income and support for her, and the sum of fifteen (\$15) dollars to be paid in like manner, each and every month, to my said aunt, Rachel Allen, during her life, as an income and support. *Fifth.* To my three children, Joseph Milton Allen, May Lisle Allen, and Gertrude Disy Allen, I give and devise all the rest, residue, and remainder of my real estate, of every name and nature whatsoever, owned by me at the time of my death; and I further give and bequeath the remainder of my personal property, owned by me at the time of my death, to my said three children, and that all of said property, both real and personal, or the proceeds thereof, be divided in equal proportions among them, share and share alike; and, should any of said children die during their minority, then his or her or their share shall go to the survivor or survivors, to be divided among them in equal proportions, share and share alike; and, should there be but one surviving child, then the share of the children shall go to the surviving child as if there had been no other children. Lastly, I hereby appoint my wife, the said Julia H. Allen, and George Sims, both of the city of Salt Lake and territory of Utah, executors of this, my last will and testament."

The complaint further avers that plaintiff is the mother of said deceased, and the person named in the fourth paragraph of said will; that the Rachel Allen also named with her in said will has assigned all her interest and rights under said will to plaintiff; that said will was admitted to probate, and John S. Barnes appointed administrator by the probate court, the executors in said will having refused to accept the trust; that said Barnes accepted said trust, and is administering said estate. The complaint further avers, in relation to the fourth paragraph of said will, that said administrator claims that by said will he has the discretion to determine the amount said estate ought to pay and can pay without a sale of real estate, and therefore refuses, and has failed to pay said legacies, while the plaintiff, and her sister, Rachel Allen, demands that said legacies should be paid in full, and denies that said administrator has any discretion whatever as to the amounts of said legacies while there are assets in his hands sufficient and liable to pay the said legacies; that said administrator now has, and has all the time since he became administrator had, ample assets of said estate in his hands to pay said legacies, and all demands required to be paid before said legacies.

The answer denies the construction of the will claimed by the plaintiff, and alleges, as to defendant's construction, "that while said testator did bequeath a certain contingent sum to said two beneficiaries, which in no event should exceed twenty dollars per month to said plaintiff, and fifteen dollars per month to said Rachel Allen, that the same was payable only out of the net proceeds or income of said estate after all expenses, costs, and debts, and prior bequests and charges, had been fully paid and satisfied, and that the amount was then dependent upon the best judgment and discretion of the executors named, or of such other persons or person as should be charged with

the execution of the will of said testator." The answer further alleges that the discretion vested by said will in the administrator has been properly exercised, and payments made out of the income of said estate, and that said plaintiff has for four years acquiesced in defendant's construction of said will, and that no complaint has been made to the probate court in relation thereto. The answer admits the other allegations of the complaint.

The cause was tried in the district court, when the following findings of fact and conclusions of law thereon were found:

"(1) That Joseph M. Allen died on December 23, 1880, in and a resident of Salt Lake county, Utah territory, leaving a will bearing date February 27, 1880, which will was duly admitted to probate by the proper court, to-wit, the probate court in and for said Salt Lake county, on February 15, 1881.

"(2) That the executors named in said will failed to qualify, and that defendant herein was, on February 15, 1881, duly appointed administrator with the will annexed of the estate of said decedent; that he duly qualified, and ever since has acted as such administrator.

"(3) That by said will testator, among other things, made a bequest in favor of plaintiff and one Rachel Allen, in the following words, to-wit: 'And it is my further desire that out of the proceeds of said estate, leaving same to the best judgment and discretion of said executors hereinafter named, to pay unto my said mother, Disy Allen, the sum of twenty dollars during each and every month of her life, as an income and support to her, and the sum of fifteen dollars to be paid in like manner, each and every month, to my said aunt, Rachel Allen, during her life, as an income and support.'

"(4) That defendant, said administrator, claimed the right under said clause of said will to exercise his judgment and discretion as to the amount to be paid under said bequest, and up to and including the month of July, 1883, paid each and every month to said Disy Allen the sum of fourteen 29-100 dollars, and to said Rachel Allen the sum of ten 66-100 dollars; that thereafter, each and every month, he paid to said Disy Allen the sum of seventeen and 14-100 dollars, and said Rachel Allen the sum of twelve and 86-100 dollars, up to April 1, 1884, and has made no payments thereafter.

"(5) That on the allowance so paid to them, and by assistance extended to them from other relatives, said beneficiaries Disy and Rachel Allen have been able to live comfortably, after their usual manner of life.

"(6) That the estate of decedent amounted to about \$25,000, on which was indebtedness to the amount of about \$3,000; that the income of the estate, after the indebtedness was paid, amounted per month, over and above taxes, insurance, and repairs, and other expenses, to from \$100 to \$120 per month; that the family of decedent, consisting of the widow and three minor children, were dependent upon it for support; and that said beneficiaries, neither of them, had, at the time of making the will, or has had since then, any estate, property, or income other than that provided in the will.

"(7) That all the several allegations of the complaint, except as to the misconduct of the defendant and purport or construction of the will, are true."

"CONCLUSIONS OF LAW.

"(1) That the word 'proceeds,' in that portion of said will hereinbefore quoted, should be construed to mean 'income;' that defendant, as administrator with will annexed, was clothed with a reasonable discretion as to the amounts to be paid under the will to said beneficiaries Rachel and Disy Allen, and that the disputed portion of the will should be and is construed accordingly.

"(2) That defendant has exercised his discretion in a reasonable manner, so far as payments were by him made.

"(3) That defendant is entitled to judgment as prayed in his answer, and for his costs."

Judgment was entered pursuant to the findings, and from that judgment the plaintiff appeals to this court.

We can only consider this as an equitable action to construe the terms of the will; the administration of the estate under the will must be left to the probate court. We were urged on the argument to not only construe the contested provisions of the will, but to execute and direct payment. Section 3 of the act of congress of June 23, 1874, (Comp. Laws Utah, 53,) gives exclusive original jurisdiction to the probate courts of all matters pertaining to the settlement of estates. The district courts, under the general equity powers conferred upon them, may take cognizance of equitable suits for the construction of doubtful provisions of a will, it being a well-known subject of equitable jurisdiction, (3 Pom. Eq. Jur. c. 3, §§ 3, 4; 1 Redf. Wills, 492;) but, when the will is so construed, it only becomes the settled and adjudicated terms of the will, which is left to the probate court to execute, where the entire matters pertaining to the estate are pending, and where it can be executed with reference to the situation and condition of the entire estate.

The question, then, before us is whether, by the will in question, the testator intended that his mother and aunt should be paid monthly, during their lives, the sums of \$20 and \$15, respectively, out of any property of which he should die seized, and without restriction or supervision by his executors; or whether the amounts to be paid to them were left to the discretion of his executors, not exceeding the sums above stated, and only out of the income of his estate. It is plain that the testator intended to commit to his executors some discretion in relation to the payments, and it is difficult to see wherein their discretion is to be exercised, except as to the sums to be paid. In the paragraph of his will under consideration, he first makes an absolute bequest to his mother and aunt of the use of a house for a home during the life of the survivor of them. He then changes his language from that of absolute gift to the expression of a desire, leaving the same to the best judgment and discretion of his executors. It can hardly be presumed that the testator did not clearly understand the difference between such expressions. 2 Story, Eq. Jur. § 1069. The testator's intention is further made plain by stating the purpose and object of this provision of his will to be for the support of the beneficiaries. We think it is plain that he intended to commit the whole matter to the discretion and judgment of his executors, but he fixes the standard by which the discretion is to be exercised. It is but fair to presume, from these provisions of the will, that the testator meant to recognize his moral obligation to provide maintenance for his mother and aunt out of his estate, and to leave it to an intelligent discretion to provide such means as was necessary to that end, having in view their needs, their means of support from other sources, the contributions of others who might be under the same obligation as he, and to fix a limit to the amount which should be so paid, and which he probably deemed sufficient. The discretion thus left to the executors is not wholly arbitrary. If it is abused, no doubt any person interested would make application to the proper court, and correct and control it.

In view of our opinion as to the discretion vested in the executors, we do not deem the construction of the word "proceeds" as very material, but we can hardly think that it was the intention of the testator to absolutely restrict the payments to the annual income. No doubt the executors in exercising their discretion should have reference to the condition of the estate, and the income from it, and should not go beyond the income, unless in their judgment, in order to carry out the objects intended to be provided for by the testator, there should be imperative necessity for it. We think that a decree should be entered in this court that the disputed portion of the will is construed to mean that the defendant, as administratrix with the will annexed, is clothed with a reasonable discretion as to the amounts to be paid under said will to Disy Allen and Rachel Allen, and in his discretion may be paid out of a: y

part of said estate in his hands. We do not mean to say that the executors can transfer or sell real estate belonging to the estate, for the purpose of paying the beneficiaries, without application to and authority from the proper court.

The clause of the will under consideration was of somewhat doubtful meaning, and we cannot say that this suit for its construction was unnecessary, and, in view of the circumstances, we think that the costs should be divided between the estate and the plaintiff; and this cannot be more equitably done than by leaving each party to pay their own costs in both courts. The judgment should therefore be without costs to either party.

ZANE, C. J., and BOREMAN, J., concur.

(6 Mont. 416)

MONTANA CENT. RY. CO. v. HELENA & R. M. R. CO.

(*Supreme Court of Montana. January 21, 1887.*)

1. RAILROAD COMPANIES—RIGHT OF WAY OF ANOTHER COMPANY LOCATED THROUGH A CANYON—INJUNCTION—REV. ST. MONT. DIV. 5, ART. 3, CH. 15, § 309.

Where one railroad company, duly authorized, has built its road-bed, and obtained its right of way and grounds for station buildings, machine-shops, side tracks, etc., through defile or canyon, the court will grant an injunction in its favor, restraining another railroad corporation, authorized to build to the same point, from going upon or interfering with the track or right of way of the corporation first in possession until an adjustment of rights can be made by the court under the general railroad law. Rev. St. Mont. p. 464, div. 5, art. 3, c. 15, § 309.

2. SAME—RIGHT TO TAKE RIGHT OF WAY OF ANOTHER RAILROAD—NECESSITY.

One railroad corporation is not empowered, under the general railroad act, (Rev. St. Mont. div. 5, art. 3, c. 15,) to be the judge of the necessity of the taking or using the road-bed or right of way, built or secured by another railroad company through a canyon or defile, but the necessity is a question for decision in the district court of the county in which the canyon is located.

Appeal from district court, Lewis and Clarke county.

Sanders, Cullen & Sanders, for appellant. *Chumosero & McCutcheon, E. W. & J. K. Toole*, and *Wm. Wallace, Jr.*, for respondent.

GALBRAITH, J. This is an appeal from an order of injunction made by the judge at chambers. The order, in substance, prohibited the appellant from entering upon, or in any manner interfering with, the free and unobstructed use and enjoyment, by the respondent, of the tracts of land, right of way, or station grounds described in the complaint, and from using or occupying the same for the construction of its road-bed, and from committing any waste or nuisances thereon, until the further order of the court. This order was made upon the complaint and answer, and affidavits presented in support of the answer. The facts, as shown by these, were substantially as follows:

That both the respondent and appellant are organized under the general act of the general assembly of the territory of Montana in relation to railroad corporations,—the former being authorized to construct "a branch extending from a point at or near Helena, in a south-westerly direction, along Ten-mile creek, so called, to Red mountain, at or near Rimini;" the latter, with authority to construct "a railroad from said city of Helena to and near said town of Rimini;" that the respondent had taken the necessary steps "whereby it became and is entitled to one hundred feet on each side of the central line of its said railroad where the same is located and constructed through and over the public domain, and fifty feet on each side of said line where it is located and constructed on other property, as its right of way;" that, in connection with such right of way, it had procured, and was entitled to the possession, use, and enjoyment of, certain ground adjacent thereto, for station buildings, depots, machine-shops, side tracks, turnouts, and water stations, which, with

said right of way, were obtained prior to the alleged commission, by the appellant, of the acts complained of; that the appellant has entered upon, and is now constructing its road-bed at certain points upon, the respondent's said right of way and depot grounds, and at one point has located a crossing of the respondent's track.

The answer avers that it is necessary so to construct appellant's road, and that both roads are constructed through canyons, passes, or defiles of Ten-mile creek: that no damage will be done to respondent's road, by the construction of the appellant's road, except by said necessary crossing; and that the respondent refuses to make any equitable terms, whereby both roads may each occupy said canyons, or parts thereof.

The principal question for our determination is as to what authority shall determine the terms and conditions upon which one railroad corporation may occupy the track, road-bed, or right of way of another located through a canyon, pass, or defile. It is contended by the appellant that this power exists in the corporation so occupying another's track, road-bed, or right of way, while it is claimed by the respondent that such jurisdiction belongs to the district court of the judicial district wherein the canyon, pass, or defile is situate. Our conclusion as to this question must be deduced from a correct construction of our statutes in relation to the subject of eminent domain.

The decision of this court has already been made, sustaining the action of the judge in making the above preliminary order of injunction, but, no opinion having been there rendered, our purpose now is to present our reasons for such determination. The legislation of this territory, in relation to the right, power, and method of taking property for the use of railroads, is wholly comprised in title 15 on the subject of eminent domain. Rev. St. div. 1, p. 147, and article 3, c. 15, div. 5, Rev. St. p. 464, entitled "Railroad Corporations," commonly known as the "General Railroad Law." The former of these expressly refers to the taking of property for the uses of railroads, and confers the power of exercising the right of eminent domain, for this as well as all other public uses therein named, upon the district court. Section 585 of this title provides as follows: "All proceedings under this title must be brought in the district court for the county in which the property is situated. They must be commenced by filing a complaint, and issuing a summons thereon. Section 586 designates, among other things which the complaint must contain, the following: * * * *Third*, a statement of the right of the plaintiff." This evidently refers to section 583 of the same title, which provides that, "before property can be taken, it must appear (1) that the use to which it is to be applied is a use authorized by law: (2) that the taking is necessary to such use; (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use."

Therefore, unless taken away by conflicting legislation, either directly or by implication, the district court of the county where the property is situate has original jurisdiction in proceedings for the condemnation of property for the use of railroads, or for the other purposes mentioned in the foregoing act. In so far, however, as this jurisdiction is concerned, the general railroad law conflicts. Section 302 of this law provides that railroad corporations "shall be authorized to locate, construct, maintain, and operate their roads between any points they may select, within the counties named in the certificate of *termini* of such road." By section 306 the right of way is granted through the public lands to the extent of 100 feet in width on each side of the center of the railroad, except as against the United States. Section 307 provides "that, for the purpose of securing private lands and premises along the line of its road, necessary and proper for the construction thereof, such corporation be, and is hereby, empowered to enter upon, purchase, take, and hold any lands and premises that may be necessary for the construction and workings of said road, not exceeding in width one hundred feet on each side of its center line."

This section also provides the method by which such property may be appropriated. Section 308 provides how, in case of necessity, any road, street, alley, or public way or ground of any kind, or any part thereof, owned or in charge of municipal corporations, public officers, or public authorities, (evidently referring to streets and public grounds in towns and cities, and to highways,) may be occupied and appropriated by such companies, and expressly makes their directors the judges of the necessity for such appropriation. The above sections, 302 and 307 by implication, and section 308 directly, make the railroad corporations judges of the necessity for the appropriation; that is, they are, by implication, constituted the judges of the necessity for the appropriation of private lands, and directly of the necessity for the appropriation of streets, alleys, public grounds, and highways, when there is an inability to agree with the "corporation or public officer, or public authorities owning or having charge thereof."

But, except as to these instances, the jurisdiction of the district court relating to the condemnation of property for the use of railroads being principally, if not alone, that of one railroad corporation seeking to appropriate the right of way and other property occupied by and already appropriated by another, remains as provided for by title 15 on the subject of eminent domain, unless taken away by section 309 of the general railroad law in the case for which it specially provides, viz., a railroad's track or right of way in a canyon, pass, or defile. This section is as follows: "That any such corporation whose right of way or whose track extends through any canyon, pass, or defile shall not exclude any other such corporation from a passage through the same, upon equitable terms; and, in case of disagreement, upon application of either of the parties, with notice to the other, the same shall be adjusted by a court of competent jurisdiction; and if the passage of any such railroad through any canyon, pass, or defile causes the disuse or change of location of any public wagon road that may traverse the same, damages shall be awarded therefor as provided by section 307 of this article; and, if it shall become necessary for any other railroad company passing through the territory to cross or pass any other railroad track or defile already constructed or surveyed, the same may be so done without compensation therefor, except the actual damage done by so doing; and when two or more companies desire to pass through the same canyon, pass, or defile, neither shall exclude the other from passing through the same, and neither shall have any compensation therefor, except the actual damage done by so doing; and should it be necessary that the said companies should use the same track or bed in passing through such canyon, pass, or defile, the same may be done without any compensation therefor from one to the other, except the actual damage done by so doing."

This section provides for four kinds of cases; but the matter under consideration is referable to the first of these, viz., where one road has established its right of way or constructed its track upon such right of way, through a canyon, pass, or defile, and another road attempts to pass through upon such right of way. It is a case where a railroad attempts to take for its own use property already appropriated for another public use. By the law of eminent domain, (*title 15, supra,*) in order to do this, it would be necessary to make it appear to the court that it was for a more necessary public use. To what extent does the above provision of the general railroad law change this method of proceeding provided by *title 15*? If so, how are they to be reconciled, and what construction is to be placed upon them? It will be observed that, with the exception of a public wagon road passing through a canyon, pass, or defile, the method of proceeding to condemn which is changed from that provided by section 308 to that by section 307, being the same as in the case of private lands, this section relates to a different kind of property than that named in any other portion of the article, viz., property already appropriated by a railroad. But while it provides for a method to appropriate a public wagon road,

the only tribunal mentioned in connection with railroad property is "a court of competent jurisdiction," proceeding in the usual manner in a "case of disagreement, upon application of either of the parties with notice to the other;" and an adjustment upon equitable terms. Would not the making by the law, as we have seen, of the railroad the judge of the necessity of the taking of the other property mentioned therein, and the mention in the same section of the method of proceeding to condemn a public wagon road, and the failure to make the railroad occupying another's property the judge of the necessity for so doing, and the express mention of a court of competent jurisdiction proceeding regularly to adjust a dispute, plainly indicate that it was the intention of the legislature to constitute the district court of the county wherein the canyon, pass, or defile is situate the tribunal to determine the terms and conditions upon which one railroad shall occupy the property of another therein? This would seem to be the plain import, looking only to the language of this section, which contains all that this article provides relating to the property of a railroad in a canyon, pass, or defile. Why this silence in relation to the railroad being the judge of the necessity in such a case, unless it was intended or deemed to have been provided for by this section relegating the whole matter, where there was a disagreement as to the terms and conditions of passage, to a court of competent jurisdiction? Unless this is meant, we do not understand why the legislature should make such a provision. The nature of the case requires that this should be done before the passage by the second road through the canyon, pass, or defile, and doubtless this was the intention of the legislature when it made this provision. What could the legislature mean by providing for the adjustment of the terms of passage, if the road seeking to go upon another's right of way in a canyon could locate its track or road-bed anywhere it pleased thereon? This would be to allow the road attempting to occupy the other's right of way to be judge of its own equitable terms; for we think that the terms in this connection do not refer to damages or compensation alone, but also to the manner of locating and constructing the road with relation to the first right of way or track.

Some of these have been well suggested by the judge in his decision: "In what places, if any, is the canyon wide enough for the second track? Might the second track be built on the opposite side of the canyon? Should it be built on or over the first track? These questions, and many others, involving science, skill, and engineering, would have to be solved before the court could adjudicate upon the question."

To say that a road seeking to occupy another's right of way or track should be the judge of the equitable terms of such occupancy, and of the construction of its road, would place it in the power of the former to injure, or even destroy and render useless, the road of the latter, without redress. It would confer the power of confiscation without a remedy. The object of the law was doubtless to prevent a single road in this mountain region, where there are so few convenient or even accessible or available passages for railroads, from obtaining the control of any of these to the exclusion of other roads. It is intended to meet a case where there is not room for more than one road to establish a right of way or track through a canyon, pass, or defile. These words, as used in the law, signify, as noted by the learned judge in his decision below, a way or passage between steep hills or mountains, or precipitous bluffs of earth or rock, where there is only room for one right of way, or for the construction of but one track. This provision of the statute was made to promote the general interest. It would manifestly be detrimental to the interests of the territory that a single railroad should monopolize any one canyon, pass, or defile, through the otherwise almost impassable barriers of these mountains. It seems plain that the construction of the law contended for by the appellant would defeat its object. It would result in the very condition of things against which the legislature seeks to provide. By title 15, one

railroad could only appropriate the property of another in all cases where it was made to appear to the court that it was for a more necessary public use. But it is plain that when property is used for one railroad it cannot, unless in exceptional instances, be said to be taken for a more necessary public use when appropriated by another railroad. Therefore, when the legislature contemplated the appropriation of the property of a railroad in a canyon by another, being a case of necessity, it provided that the court could do so, not by requiring that it must appear to be for a more necessary use, but upon equitable terms.

If the construction contended for by the appellant is correct, the intention of the legislature to make the second railroad the judge of the terms and conditions should appear in plain and express terms, or by necessary implication. Mills, in his work on Eminent Domain, referring to numerous authorities, (page 46,) says: "To take property already appropriated to another public use, the act of the legislature must show the intent so to do by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting the intent." "A general authority to lay out a railroad does not authorize a location over land already devoted to another railroad or public use." So far as the general railroad law is concerned, no provision is made for the taking by one railroad of the property of another, except in a canyon, pass, or defile. There is nothing in this law which indicates an intention to authorize one railroad to take the property of another, except a general authority to lay out a railroad. This, alone, is not sufficient. If such authority would be probable to appear anywhere, it would be in the section containing the provision under consideration; but there is nothing in this which indicates such plain and clear intention, but, on the other hand, rather an intention to confer this jurisdiction upon the district court. "One public corporation cannot take the lands or franchises of another public corporation in active use by it, unless expressly authorized to do so by the legislature; but the lands of such corporation not in actual use may be taken by another corporation authorized to take lands for its use *in invitum*, whenever the lands of an individual may be so taken subject to the qualification that there is a necessity therefor." "The question as to whether such necessity exists or not is one of fact for the jury."

The legislature recognized in the case of the passage of railroads through a canyon, pass, or defile a case of necessity, viz., that it was necessary for the public interest that they should pass through without excluding each other, and in such a case as the one at bar, that the second may use the property of the first; but provided that, before this could be done, it must be upon the just and equitable terms and conditions adjusted by the district court.

Railway Co. v. Alling, 99 U. S. 463, is a case directly in point. In this case the supreme court of the United States, Mr. Justice HARLAN delivering the opinion, after deciding that the Denver Company (*i. e.*, the railway company) had the first right of way through the Grand canyon of the Arkansas, subject to the act of congress of 1875, relating to railroads passing through a canyon, pass, or defile, and which in its main features resembles the provision of our statute, says: "Where the Grand canyon is broad enough to enable both companies to proceed without interference with each other in the construction of their respective roads, they should be allowed to do so. But in the narrow portions of the defile, where this course is impracticable, the court, by proper order, should recognize the prior right of the Denver & Rio Grande Railway Company to construct its road. Further, if in any portion of the Grand canyon it is impracticable or impossible to lay down more than one road-bed or track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should by proper order, and upon such terms as may be just and equitable, establish and secure the right of the Canon City Company, conferred by the act of March 31, 1875,

to use the same road-bed and track, after completion, in common with the Denver Company."

In interpreting the same act of congress, Judge HALLETT, of the circuit court of the United States, in the case of *Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. Co.*, 17 Fed. Rep. 867, which is also a case in point, says: "It is not said in the act of congress that the entire right of way which may be appropriated by one company is subject to be used by another, but only that the first appropriation shall not prevent any other company from the use of the same canyon, pass, or defile; and it must be clear from the language used that it is only in cases of necessity that one company can go upon the right of way of another for the purpose of building its road." "Now, whenever a controversy arises between two companies in respect to the existence of such necessity, the fact that the canyon, pass, or defile is such that it is impracticable for the second company to pass through it without going upon the territory of the road first located, will enter into the controversy, and it must be settled by the courts." "It is perfectly plain that the first company has the right to object to the intrusion upon the right of way by the second company until that question is settled. If it were true that this act would subject the way to the use of any other company, in such a manner that the latter might go in against the objection of the first, it would also be true that the second company could demand of the first the use of its track absolutely, without adjudication of the facts in any court; but it seems to me as clear as anything can be that the first company to locate its road, through any such place as is described in this act of congress, may in the first instance, and without showing any cause whatever, object to admitting any other company into its way until the facts are shown making it necessary for the second company to come on the right of way to build its road. * * * Questions that arise in a controversy of this kind, or that may arise, are as difficult of determination, and as substantial in their character, as any which can be brought into a court of justice. I think they are questions which are subject to adjudication in the ordinary sense. They are questions to be settled by a final decree of court. The matter is to be settled upon evidence, and not upon a preliminary motion. * * * It would be manifestly unjust to the defendant itself to countenance the building of the road now, when it may be that the court will afterwards require the road to be removed, and built somewhere else. What would be said if we should now, and here, give the defendant permission to go on and build its road as it shall choose, and in six months from this time, on final hearing, declare all of it to be wrong,—a mistake from the first,—and that it would be the duty of the defendant to take up its track, and put it somewhere else? I do not think any court can go on in that way. This is a matter for final decision and determination, and, as such, these are questions which can only be considered on final hearing. * * * What was said by counsel about the hardships that rest upon the defendant may be entirely correct,—I suppose it is; but I think it is not a matter for which the court can give relief by preliminary order. The plaintiff in this action has secured this right of way by going upon it, and building its road, under the act of congress, and I think it has a right to defend that right of way, against all who may seek to convert it to their own use, until the conditions of things mentioned in this act of congress is shown to exist, and no court has power to direct any other road to go upon such way until the facts are ascertained. They are to be ascertained according to the usual methods of proceeding in courts of equity."

These principles appear to us to be so applicable, so correct and just that it would almost seem as if the provision of our statute under consideration was drawn to conform to the above act of congress, and the foregoing interpretation of it by these decisions. These decisions demonstrate conclusively that, under the provision of our statute for such cases, the respondent has the right of way through the canyons; that it may object to any encroachment

upon its right of way or track until it appears to the court that there is a necessity therefor; that until it so appears any encroachment by the appellant upon such track or right of way would be a trespass; and that when such necessity does appear, and there is a failure to agree upon the terms of occupancy, the matters in dispute shall be adjusted by the district court of the county where canyon, pass, or defile is situate, upon equitable terms.

It seems to us plain, for the foregoing reasons, that the former decision of this court—sustaining the action of the judge at chambers in issuing the foregoing order of injunction was correct.

(*6 Mont. 442*)

BASS and another v. BUKER and others.

(*Supreme Court of Montana. January 24, 1887.*)

1. PUBLIC LANDS—PRE-EMPTION—MORTGAGE BEFORE “FINAL RECEIPT”—Rev. St. U. S.

§ 2262.

“Mortgage” is included within the words “grant or conveyance,” as used in Rev. St. U. S. § 2262, providing that any grant or conveyance made by a settler of lands pre-empted before “final receipt, shall be null and void, except in the hands of a *bona fide* purchaser for value.”

2. MORTGAGE—FORECLOSURE—APPURTENANT WATER-DITCH.

The question whether a water-ditch upon certain premises is appurtenant thereto cannot be considered in an action for the foreclosure of a mortgage on the land, when the ditch is not mentioned in the mortgage, nor in any of the pleadings except the replication.

3. APPEAL—INSUFFICIENT EVIDENCE—WANT OF PARTICULARITY—CODE CIVIL PROC. MONT. § 287, SUBD. 3.

When the ground upon which a motion for new trial in a civil action is based is the insufficiency of the evidence to justify the judgment of the trial court, and the statement does not specify the particulars in which the evidence is alleged to be insufficient, that question will not be considered on appeal.

4. SAME—EXCEPTION NOT RESERVED.

When the statement, on appeal in a civil case, contains no exceptions, and there is no bill of exceptions in the transcript, alleged errors in the admission of evidence cannot be considered.

Appeal from district court, Missoula county.

Proceedings to foreclose a mortgage.

Stevens & Bickford, for appellants. *Woody & Marshall*, for respondents.

BACH, J. This is an appeal from a judgment, and from an order denying a motion for a new trial. The grounds upon which the motion for a new trial was based are (1) insufficiency of the evidence to justify the decision and judgment of the court; (2) that said decision and judgment are against the law.

The statement on the motion for a new trial does not specify the particulars in which the evidence is alleged to be insufficient, therefore we cannot consider that question. See subdivision 3, § 287, Code Civil Proc.; *Taylor v. Holter*, 2 Mont. 477.

Second, that the decision and judgment are against the law. The judge presiding at the time held, as conclusion of law, that the mortgage sought to be foreclosed was void. There being no question properly before us as to the sufficiency of the evidence to sustain the rulings of the court upon the facts at issue, we must presume, not only that the evidence justified all the findings of fact, but also that all the facts at issue necessary to sustain the decision were found by the court below. See *Beck v. Beck*, 6 Mont. —, 12 Pac. Rep. 646. Those facts are as follows: That the defendant Andrew Buker, on the tenth day of January, 1872, did settle upon and improve the premises described in the complaint and mortgage; that those premises were part of the surveyed lands of the United States, subject to entry under the pre-emption laws; that said Buker filed his pre-emption claim for said premises in the proper office, on the fifth day of March, 1874; that on the sixteenth day of

September, 1881, the said Buker had not completed his title to said lands as by law required; that the mortgage sought to be foreclosed was executed upon the sixteenth day of September, 1881; that the defendant and respondent Warner, by mesne conveyances, made subsequent to said mortgage, became seized and possessed of all the right and title of said Buker in and to said premises; that the plaintiff was not a *bona fide* purchaser for a valuable consideration; and, omitting the intermediate steps, that said Warner, after complying with the requirements of law, has received from the proper office the "final receipt" for said premises as a pre-emption claim.

The issue raised by the pleadings is that the mortgage referred to was void under section 2262 of the United States Statutes, and that was the decision of the court below.

Section 2262 of the Revised Statutes of the United States provides that, before a pre-emption shall be allowed, the claimant shall make oath that "he has not, directly or indirectly, made any agreement or contract, in any manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself;" and the same section further provides that "any grant or conveyance which he may have made, except in the hands of a *bona fide* purchaser, for valuable consideration, shall be null and void."

It is claimed by the appellants that the words "grant or conveyance" do not include a mortgage; that a mortgage, by our laws, does not pass the title to the land, but is a mere security or lien for the note. The authorities are at variance upon this question.

The supreme court of California has held that such a mortgage was absolutely void, as against the mortgagor and his assigns, excepting a *bona fide* purchaser. See *Bull v. Shaw*, 48 Cal. 455.

The supreme court of Minnesota held mortgages to be within the terms "grant and conveyance," and that they were therefore void, except as provided in the statute, in several cases, among others in *McCue v. Smith*, 9 Minn. 259, (Gil. 237); *Woodbury v. Dorman*, 15 Minn. 338, (Gil. 272.) But the same court, in a later case, reversed that doctrine, and held that a mortgage was not included within the terms of the statute; and the court bases its decision upon the ground that a mortgage is a mere security, and does not act as a conveyance. See *Jones v. Tainter*, 15 Minn. 512, (Gil. 423.)

The supreme court of Kansas holds, with the California supreme court, that a mortgage does come within the terms of the statute. *Brewster v. Madden*, 15 Kan. 249.

In the case of *Owings v. Lichtenberger*, 9 Copp, Land-Owner, 197, in a letter dated November 17, 1882, the Hon. Henry M. Teller, then secretary of the interior, writes upon this question as follows: "It is claimed by plaintiff's counsel that the mortgage, given by plaintiff before his removal, was a disposition of his homestead. * * * I do not think this view of the case can be maintained. At common law the title passed to the mortgagée, but the rule of the common law has been changed by statute in most of the states, and in such states the legal title remains in the mortgagor. In Nebraska a mortgage of real estate is a mere pledge or collateral security."

We think the honorable secretary of the interior and the supreme court of Minnesota apply the wrong rule of interpretation to the section 2262, by not first ascertaining what the nature of a mortgage is in Nebraska and Minnesota. They, in effect, declare that a United States statute is to be interpreted through the medium of a statute of a state. Whatever may be the meaning of the words "grant or conveyance" in section 2262, it is certain that there cannot be two proper interpretations of the same statute. It is equally certain that the section contains one rule of law, and no more, on this subject, and that that rule applies to mortgages upon pre-emption lands, wherever

situated, with the same force and effect. If the true interpretation of that section is to be governed by the character of a mortgage in the different states and territories, there would be at least two distinct and contrary rules applying to mortgages and pre-emption claims; for some of the states hold that a mortgage passes the title, while others—by force of some statute, in most cases—hold that a mortgage is a mere security. We would, then, reach the conclusion that the validity of such a mortgage would depend upon the situation of the land. That, certainly, cannot be the law. A mortgage upon pre-emption lands, made before final entry, is either valid or void under that section. If valid in any state, it is valid everywhere; if void in one state, it is void in all states.

The true rule of interpretation is, "What did congress mean?" The purpose of congress undoubtedly was to furnish all and every encouragement to settlers upon the public lands, and to legislate so that, neither directly or indirectly, by virtue of the law, should those lands become the property of a few. And this section provides every possible safeguard against any alienation by the settler, up to the time of the final conveyance by the government. One portion of the section provides that the claimant shall make oath that "he has not, directly or indirectly, made any agreement or contract, in any manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself." These words show the evident purpose of the government, and, in the light of those words, the expression "grant or conveyance" is clearly meant to include a mortgage.

But there is still a further reason for such an interpretation. Section 2262 became a law in 1841. At that time the courts of the state of New York were the only courts that held that a mortgage was a security only. Even at this late date the following states: Alabama, Arkansas, Connecticut, Illinois, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and West Virginia,—hold the old common-law doctrine that the mortgagor has the legal title. In New York alone the courts, without the aid of a statute, hold a contrary doctrine. In the other states which hold a mortgage not to be a conveyance, the rule depends upon express statutes, passed long after 1841, when section 2262 was made law by act of congress. Then we must consider what a mortgage was considered to be in the year 1841. And, so considering, we are forced to the conclusion that a mortgage is included within the words "grant and conveyance" in section 2262, and that the mortgage sought to be foreclosed in this action was absolutely void.

The supreme court of the United States, as far as we can ascertain, has never ruled upon this question; but in the case of *Warren v. Van Brunt*, 19 Wall. 646, that court, speaking of the Minnesota cases, which held such mortgages void, said, (page 655:) "All contracts in violation of this important provision of the act are void, and are never enforced. It has been so decided many times by the supreme court of Minnesota. We are satisfied with these decisions." 19 Wall. 646.

The appeal from the judgment also brings up the question, does the answer state facts sufficient to constitute a defense? There is no question raised except as to whether or not the facts were sufficiently and properly alleged. The complaint itself shows the interest of the defendant Warner; so it is not necessary for us to consider whether or not the answer fully stated the facts that constituted the right of ownership in Warner. The answer fully sets forth all the facts necessary to show the invalidity of the mortgage. The statement contains no exception. There is no bill of exceptions in the transcript. We cannot consider in this court any alleged error in the admission of testimony, which error, as far as the transcript shows, is complained of for the first time in this court.

During the argument of this cause there was considerable time devoted to the question whether or not a certain water-ditch was appurtenant to the pre-emption lands included in the mortgage. The mortgage is referred to in and made a part of the complaint, to which it is annexed. There is no mention in the complaint or mortgage as to any water-ditch, which is only referred to in the replication. Certainly no issue was raised in this action upon that point by an allegation in the replication. Supposing there had been a decree in favor of the plaintiff, such decree could only provide for a sale of the premises as described in the mortgage. The purchaser at the sale would have bought whatever was included within that mortgage. The decree would not have determined that the ditch was or was not appurtenant. That question could only be decided in an action at law. It cannot arise in this controversy, and we are not called upon to consider it.

The judgment of the court below, and the order denying a motion for a new trial, are affirmed, with costs.

(14 Or. 328)

SHERIDAN v. CITY OF SALEM.

(Supreme Court of Oregon. December 21, 1886.)

1. MUNICIPAL CORPORATIONS—ACTION AGAINST FOR TORT—PRESENTATION OF CLAIM TO COUNCIL—NECESSITY OF.

A claim against a city for damages for an injury sustained by reason of a defective way, or other tort, is not required to be presented for allowance to the common council, although the charter gives to that body the exclusive power to make appropriations, and provides that "no claim against the city" shall be paid until it is audited and allowed by the common council.

2. SAME—LIABILITY—DEFECT IN WAY—STATUTE OF OREGON.

Under the Oregon statute, providing that an action may be maintained against a county, incorporated town, school-district, or other public corporation, either upon a contract made by it, within the scope of its authority, "or for an injury to the rights of the plaintiff arising from some act or omission" of such corporation, a city is liable for an injury caused by the neglect of its officers to keep in repair streets which it is their duty to maintain, unless some provision of the charter expressly exempts the city from liability.¹

3. SAME—REPAIR OF CROSS-WALK—EVIDENCE TO CHARGE CITY.

Evidence that a cross-walk on a common thoroughfare in a city was repaired by successive road supervisors is sufficient to charge the city with its maintenance.

4. APPEAL—PRESUMPTION AFTER VERDICT—BILL OF EXCEPTIONS—MUNICIPAL CORPORATIONS.

In an action against a city to enforce its liability for damages sustained by reason of the non-repair of a cross-walk, the fact of the streets at whose intersection the cross-walk is located being common thoroughfares, as bearing upon the question of the duty of the city to maintain the cross-walk, must be presumed after verdict, that fact being alleged in the complaint, although the bill of exceptions states other facts as being the only evidence upon the question.

5. CONSTITUTIONAL LAW—REVISION OR AMENDMENT OF STATUTE—SETTING FORTH ACT AT LENGTH—CONST. OR. ART. 4, § 22.

An act of the legislature, conferring upon a city important powers, additional to what it already has under its charter, is to be regarded as supplemental to the charter, and not as an amendment or revision of it, within Const. Or. art. 4, § 22, requiring that when an act is revised, or a section amended, the act or section so revised or amended shall be set forth at full length.

Appeal from circuit court, Marion county.

Geo. H. Burnett, for appellant. *N. B. Knight*, for respondent.

THAYER, J. This appeal is from a judgment in an action in favor of the respondent, against the appellant, for a personal injury alleged to have been sustained in consequence of a defective cross-walk across one of the appellant's streets. The respondent alleged in her complaint that the appellant was a municipal corporation, having exclusive power and authority to provide for

¹See *city of Boulder v. Niles*, (Colo.) 12 Pac. Rep. 632, and note.

the construction, cleaning, and repair of side and cross walks in said city; that it undertook to and did construct and maintain a cross-walk on the south side of Marion street, and across Winter street, therein, which streets were at the time and still are thoroughfares, used by the citizens of the city and others; but that it neglected to keep and maintain said cross-walk in good repair, and suffered it to become rotten and dangerous to persons passing along it, by reason of which the respondent, while traveling over it, on the eighth day of May, 1885, received a fall, caused by the giving away of a portion of the cross-walk, which occasioned the injury complained of. The appellant interposed a general demurrer to the complaint, which having been overruled by the court, answered over, denying the allegations of the complaint. The case was tried by jury, who returned a verdict against the appellant for \$900, upon which the judgment appealed from was entered.

A number of grounds of error are assigned in the notice of appeal, the first of which is that the complaint is defective, in not alleging that the respondent's claim was presented to the common council of the city before the action was brought. This the appellant's counsel maintains should have been done, in compliance with the city charter of said city, and he refers us to two of its provisions. The first one provides that the common council has exclusive power to appropriate for any item of city expenditure, and to provide for the payment of the debts and expenses of the city; the second provides that no claim against the city shall be paid until it is audited and allowed by the common council, and then the treasurer shall pay it upon a warrant drawn upon him by the recorder. We do not think that these provisions were intended to apply to a claim of this character. They were intended as a restriction upon the treasurer in paying out the money of the city, and are doubtless within the rule laid down in *Stackpole v. School-district*, 9 Or. 508. All claims arising out of the ordinary expenditures of the city are required to be presented to the common council for allowance before an action can be maintained thereon. But that arises out of a relation the claimant sustains to the city, created by an employment or contract of some character. Thus, a person who performs service, or does something for the city, at its request, for which compensation is to be made, tacitly agrees that he will present his claim to the common council for audit and allowance. That is the only mode by which the city can pay him. He so understands it when he engages to perform the service, and he could not claim that there had been a refusal to pay, or that there had been any breach of the contract or obligation, until the common council had refused to audit his demand. But in cases of tort the action is for damages, and the party injured is under no more obligation to present the claim to the corporation than he would be to a private person who had done him a wrong. The reason of the rule only applies to the former class of claims, and not to the latter,—has no application whatever to them.

Appellant's counsel lays great stress upon the comprehensiveness of the meaning of the word "claim," but that has nothing to do with the construction of the provisions of the charter referred to. It is not in consequence of that that the claim is required to be presented to be audited. It is the reason before indicated. The breach of payment in the action of *assumpsit* is a necessary allegation, but it does not figure at all in an action of trespass on the case. The city only agrees to pay a contracted indebtedness in case the claim is presented as mentioned, and the action is for a refusal to audit and allow it; but, if it commit a tort, the action matures at once. If the charter read that no claim should be sued upon until so presented, the rule might be different, and the meaning of the term "claim" be important; but, under the circumstances of the case, it is of no consequence whatever.

The next assignment of error is the question of the liability of a municipal corporation for damages occasioned to passengers along its streets and sidewalks in consequence of the neglect of its officers to keep them in repair. It

is the same old ugly question that has wearied the patience of courts and attorneys for many years. A great many recoveries of damages have been upheld by the courts in that class of cases; but they have required the expenditure of an immense amount of brain labor to discover any principle upon which to sustain them. The appellant's counsel contends that the power delegated by the legislature contained in the city charter of the appellant, in reference to the care of streets, sidewalks, and cross-walks, is conferred exclusively upon the mayor and aldermen, comprising the common council, and that they alone should be held liable for the consequence resulting from their own carelessness. That view seems reasonable, and, if it had been adopted in the outset, would have prevented the perplexity which the devious course pursued by the courts of many of the states has occasioned. I always thought it the correct one. I have never been able to discover any justice in allowing officials charged with a specific duty, relating to an affair in which the entire community is interested, to shirk the consequences of their own inattention, if not absolute heedlessness, upon the tax-payers of a particular district. It is universally conceded that municipal corporations are organized, in the main, for governmental purposes, and that the opening, improvement, and repair of public streets in a town are purely matters of public interest, and that the use and enjoyment of them belong to the public generally. Besides, the right to maintain an action for damages in such cases is the subject of great abuse. A person receiving an injury owing to the defectiveness of a street or sidewalk is very liable to intensify it, and juries are not unfrequently imposed upon shamefully in the matter. And, again, juries are not inclined to make that discrimination, when a public corporation is defendant, and an injured party, surrounded by circumstances usually calculated to excite sympathy, is plaintiff, they would if the responsibility were upon an individual. The policy always seemed to me to be a pernicious one, and entirely destitute of principle to stand upon. The Massachusetts decisions, and those of other states in the same line, indicate the only correct view upon the subject in my opinion. They recognize no common-law liability, as such, nor any liability at all, unless given expressly by statute. That seems to be the only rational solution of the question.

It has been determined by this court that the statute of the state, imposing liability upon public corporations, extends to such cases as the one under consideration. *McCalla v. County of Multnomah*, 3 Or. 424. That statute provides that an action may be maintained against a county, incorporated town, school-district, or other public corporation of like character in this state, either upon a contract made by such county or other public corporation in its public character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation. If this were an original question, I should very likely be of the opinion that "the act or omission" from which the injury arose, referred to in the statute, related to some act or omission of a strictly corporate character, and did not include the act or omissions of the officers of the county or public corporation in the discharge of duties they owed to the public, such as keeping public roads and streets in good repair; but the principle of that case has been followed in this state for more than 17 years, and I do not see any consistent way of getting rid of it without the aid of legislation. Many of the larger towns of the state have avoided its effects by provisions in their charters exempting the town from liability in such case, and imposing it upon the officers thereof, where they have been guilty of negligence that occasioned the injury; but without some such course, or a modification of the statute before referred to, the tax-payers of public corporations will have to continue to be insurers against the negligence of their officers.

The appellant's counsel seemed to think that the charter in this case was different in regard to vesting the power in the common council, instead of

the corporation itself, than in the cases where such corporations had been held liable for damages under similar circumstances. I have examined the charters of many of the corporations in the state, and find that they are substantially like the Salem charter in that particular. Besides, the case of *McCalla v. County of Multnomah, supra*, covers every conceivable question of that character. There the duty of keeping roads in repair was especially enjoined upon the road supervisor, and the county had nothing to do with the matter; but the court held that the county court, having the power to appoint and remove the supervisor, rendered the county liable. I do not think the case stands upon any correct principle, but, as before observed, it has been followed by numerous adjudications in the state respecting the liability of municipal corporations, and, in our judgment, if the rule is to be changed, the legislature had better make the change. Our decision upon the subject is controlled entirely by the rule of *stare decisis*.

Another assignment of error is that it does not appear that the cross-walk in question was maintained by the authority of the city council. The proof upon that point showed that a former and present supervisor of roads, an officer appointed by the common council under the charter of the city, who is required to collect and apply, under the direction of the council, the road tax within the city had repaired said cross-walk, and caused it to be repaired several times both before and after the injury, though it did not appear that the city council had especially directed it. This question arises upon the charge of the court to the jury that, by the charter, it was the duty of the city to keep in repair, and safe for travel, the cross-walks in the city, and that were maintained under its authority. The appellant's counsel saved an exception to this part of the charge, claiming that the evidence was insufficient to authorize the court to refer the matter to the jury. The bill of exceptions contains a statement that there was no other testimony than above indicated showing the fact. This must be taken, however, with the further fact that the two streets (Marion and Winter streets) were common thoroughfares within the city, used by the citizens thereof and others. This has to be presumed after verdict, as it was alleged in the complaint. Then, if those facts tended to prove that the common council had directed the improvement of the cross-walk, which I think we must conclude, there was evidence tending to show that it was maintained by the city, within the current of authorities bearing upon that point, and the court properly submitted the question to the jury.

The appellant's counsel has also submitted a question as to whether the city had any charter aside from the amendment of 1868. It appears that the legislative assembly of the state, at its session during that year, adopted an amendment to the existing charter of the city, conferring upon it important additional powers relating to the improvement of its public grounds, the establishment and opening of streets within its limits, and other matters, and prescribed the mode by which those powers were to be carried out. This amendment, said counsel suggests, constitutes the entire charter of the city. He deduces this conclusion from the fact that the constitution provides that when an act is revised, or a section amended, the act revised or section amended shall be set forth at full length; and assuming that the legislature did its duty, as he would claim, in publishing the act as revised, the amendment must embrace all there is of the charter. The difficulty, however, in the counsel's position, is that the act of 1868 was not a revision of the former act, or an amendment of any section thereof. It was only a supplement thereto. It amended the charter of the city by conferring on the common council powers that it did not theretofore possess, but did not, as I can see, change existing authority, or prescribe any different mode of procedure for exercising it. An amendment such as the constitution refers to in section 22 of article 4 is a change in some of the provisions of an act. Additional pro-

visions, not affecting existing ones, are not of the character of amendments intended by said section 22 of the constitution. To enlarge the jurisdiction of the city government so as to extend it to other and distinct subjects, is no such amendment as section 22 of the constitution provides in regard to. We substantially held that in the *Portland Water Case*, (*David v. City of Portland, ante*, 174,) decided at this term. The effect of the counsel's logic, as he admits, blots out the original charter of 1862, and leaves the city without any provision for boundaries, taxation, or any other requisite for ordinary municipal government. If that were the result, I think it would overtax his ingenuity to explain how it succeeded in retaining an attorney to present its defense herein, or how it could be brought into court even. The argument, it seems to me, if conceded, would have an unfortunate rebound.

The judgment appealed from will be affirmed.

(14 Or. 361)

JOY v. STUMP.

(*Supreme Court of Oregon. January 10, 1887.*)

1. EJECTMENT—TITLE—ADVERSE POSSESSION.

One who has held adverse possession of lands for the statutory period of limitations is vested with the legal title thereto, and may bring ejectment to recover such possession, when lost.¹

2. SAME—EVIDENCE—DEEDS SHOWING EXTENT OF CLAIM.

In an action of ejectment, where the plaintiff claims title by adverse possession, recorded deeds offered in evidence are admissible to show the extent of his claim; actual possession of a part of the premises described in the deed, under color of title to the whole, being constructive possession of the whole.

3. SAME—PROOF OF POSSESSION.

In such an action, where the plaintiff relies on naked possession to establish title, evidence tending to show such possession, and that it was hostile and adverse, is admissible.

Appeal from circuit court, Columbia county.

A. S. Bennett, for Joy, appellant. *Benton Killin*, for Stump, respondent.

STRAHAN, J. This is an action of ejectment, which, under the direction of the court, resulted in a verdict and judgment for the defendant, from which judgment this appeal is taken. The title upon which the plaintiff sought to recover was one founded entirely upon the statute of limitations, and to establish such title he sought to prove—*First*, that those under whom he claimed entered into the possession of the premises in controversy under a deed which described the same; *second*, sundry mesne conveyances purporting to convey title to the grantees respectively named therein, down to the plaintiff; and, *third*, evidence of possession accompanying each conveyance, and continuing without interruption for more than 20 years, and that such possession was, during all that time, hostile and adverse. But the court excluded all of this evidence, to which ruling of the court proper exceptions were taken.

By the pleadings each party claimed to be the owner in fee, and to be entitled to the possession, of the premises in controversy.

1. The first question for our consideration is this: Can a plaintiff recover in an action of ejectment founded upon adverse possession alone? Our Civil Code, § 318, provides: "Any person who has a *legal estate* in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action at law. * * *"

It is said in *Chapman v. Dougherty*, 87 Mo. 617: "In our statutory ejectment all the constituent elements of title are involved,—possession, right of possession, and right of property. Now, title may be defined, generally, to

¹See *Jaques v. Lester*, (Ill.) 8 N. E. Rep. 796, and note.

be the evidence of right which a person has to the possession of property. 2 Abb. Law Dict. 566. Title is when a man has lawful cause of entry into lands whereof another is seized; and it signifies, also, the means whereby a man comes to lands or tenements, as by feoffment, last will and testament, etc. Jac. Law Dict. 245. And it is elsewhere defined as the means whereby an owner possesses his property justly, or the evidence of ownership. Whart. Law Dict. 824. And, in an action which brings the title in question, something more is involved than the actual occupation or mere *pedis possessio*. It is one which involves the *justa causa possidendi*. *Gregory v. Kanouse*, 11 N. J. Law, 62."

The effect of an adverse possession for a sufficient length of time under the statute to bar an entry is not an open question in this court. It was adjudged in *Parker v. Metzger*, 12 Or. 407, 7 Pac. Rep. 518, after a careful examination of the authorities. It was there said by LORD, J.: "But the question here directly is whether our statute bars the right and vests the title in the party who brings himself within its provisions. If it does, then it is conceded that the suit may be maintained. This question has been very ably and thoroughly examined and answered by Mr. Justice SAWYER in *Arrington v. Liscom*, 34 Cal. 380. In that case the suit was, as here, to quiet title; and, after an elaborate review of the authorities, the result reached was that adverse possession for the full period limited by the statute confers title, and that it is such title as entitles the holder to all the remedies to quiet his possession that are incident to possession under written titles." The opinion continues, quoting from Angell, Lim.: "It is also unquestionable that where land has been held under a claim to the fee for the time prescribed by the statute, and an entry is made by the party who has the written title, such party may be dispossessed by an ejection brought by him who has so held and claimed. This was so held in *Jackson v. Oltz*, 8 Wend. 440. The lessor of the plaintiff had been in the possession for the period prescribed by the statute, claiming title under a patent. Defendants afterwards entered, and held under a title which had been judicially determined to be valid. The action was brought by the plaintiffs, relying on the title acquired by adverse possession, against defendants holding such paper title, and a recovery had. The court say: 'If the possession was adverse, and had been so for more than twenty years, as it had been in this case, then the possession ripened into a title, and the plaintiff must recover against the defendant, though the paper title to the fifty acres is, in reality, not in him.' The same principle is recognized in *Jackson v. Dieffendorf*, 3 Johns. 269; and in *Jackson v. Rightmyre*, 16 Johns. 314. Mr. Chancellor KENT says that showing a possession of thirty-eight years, under a claim of right, was showing an absolute right of possession sufficient to toll an entry." *Chiles v. Conley's Heirs*, 9 Dana, 385.

2. The deeds offered in evidence on the part of the plaintiff were clearly admissible. When a person goes into the possession of lands under color of title duly recorded, in which the boundaries of the lot or tract are defined, this operates as constructive notice to all the world of his claim, and also of its extent, so that a sufficient occupancy of a part of the lot carries with it, by construction, the possession of the entire premises described by his conveyance, when the boundaries are well defined. *Simpson v. Downing*, 23 Wend. 316; *Golson v. Hook*, 4 Strob. 23; *Janes v. Patterson*, 62 Ga. 527; *Munro v. Merchant*, 28 N. Y. 9; *Chiles v. Conley's Heirs*, *supra*; *Kile v. Tubbs*, 23 Cal. 432; *Hasbrouck v. Vermilyea*, 6 Cow. 678.

3. It is equally well settled that, when a person relies upon naked possession as the foundation for an adverse claim, there must be an actual occupancy, and the possession cannot be extended by construction beyond the limits of the actual occupation; and such possession must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate exclusive ownership in the occupant. *Wood*, Lim. Act. § 257;

Ferguson v. Peden, 38 Ark. 150; *Wells v. Jackson Iron Manuf'g Co.*, 48 N. H. 491; *Ege v. Medlar*, 82 Pa. St. 86.

The plaintiff, in harmony with the views above suggested, had the right to prove upon the trial, if he could, an adverse possession such as he offered to prove, and it was error in the court to refuse to permit him to do so. The court ought to have received the evidence offered, and then, under proper instructions to the jury, allowed them to determine whether an adverse possession was proven or not.

The judgment will therefore be reversed, and the cause remanded for a new trial.

(All concur.)

(36 Kan. 191)

CABLE v. COATES, Assignee, etc.

(*Supreme Court of Kansas. February 4, 1887*)

TAXATION—DEED—NOTICE OF REDEMPTION.

Where the date of a tax sale was September 4, 1878, and the redemption notice and list state the land must be redeemed on or before September 5, 1881, a tax deed issued on said September 5th, and filed for record at 2 o'clock p. m. of the same day, is prematurely issued, and the owner of the land has the right to avoid the tax deed, as he has three years from the day of sale, and any time before the execution of the deed, to redeem his land; and, in computing the three-years time, the day of sale is to be excluded. *English v. Williamson*, 34 Kan. 212; 8 C. 8 Pac. Rep. 214.

(*Syllabus by the Court.*)

Error to district court, Wyandotte county.

On January 29, 1884, Kersey Coates, as assignee of the Mastin Bank, brought his action against Rufus E. Cable, to recover the immediate possession of a parcel of land situate in Wyandotte city, and containing one-sixth of an acre. The defendant filed an answer, setting up, among other things, a tax deed issued to him on September 5, 1881. Trial was had December 27, 1884, before the court, a jury being waived. The court took the case under advisement, and on January 29, 1885, made the following findings of fact:

(1) That the plaintiff is the owner, has a legal estate in, of, and to the premises described and demanded in his petition, by and through divers conveyances from the government of the United States of America down to himself, as the assignee of the Mastin Bank, a banking corporation duly organized under the laws of the state of Missouri, and that such assignment was made to plaintiff pursuant to the laws of said state.

(2) That no tender was made by plaintiff to defendant, before the commencement of this action, for taxes paid by defendant on the premises in controversy.

(3) The defendant's sole claim of title to and right to possession of the demanded premises is predicated upon a tax deed issued to him for said premises by the county clerk of Wyandotte county, state of Kansas, bearing date September 5, 1881, which was recorded in the office of the register of deeds on the same day; and that said deed is based upon a sale of said premises made on the fourth day of September, 1878, for the delinquent taxes for the year 1877, and that the sale certificate upon which said tax deed is based is No. 627, and recites a sale of said premises, as therein stated, on the fourth day of September, 1878, and recites that a tax deed will be due thereon on the fourth day of September, 1881; that said deed is in the words and figures following, to-wit:

"Know all men by these presents, that whereas, the following described real property, viz., beginning fifty-three (53) poles east and thirty-eight poles south of north-west corner of the south-west quarter of the north-east quarter of section ten, (10,) town eleven, (11,) range twenty-five, (25;) thence south sixty feet; thence east to west line of Ferry street, extended in the city of Wyandotte, fifty-nine (59) feet; thence in a north-easterly direction to a

point due east of beginning; thence west to beginning; and containing 24-100 acres,—situated in the county of Wyandotte and state of Kansas, was subject to taxation for the year A. D. 1877; and whereas, the taxes assessed upon said real property for the year A. D. 1877, aforesaid, remained due and unpaid at the date of the sale hereinafter mentioned; and whereas, the treasurer of said county did, on the fourth day of September, 1878, by virtue of authority in him vested by law, at an adjourned sale of the sale begun and publicly held on the first Tuesday of September, 1878, expose to public sale at the county-seat of said county, in substantial conformity with all the requirements of the statute in such cases made and provided, the real property above described, for the payment of taxes, interest, and costs then due and unpaid upon said property; and whereas, at the time and place aforesaid, the real property above described could not be sold, for the amount of said taxes, penalty, and charges thereon, to any person or persons, in any parcel or parcels, at said public sale, or any adjournment sale thereof, the said lands above described were bid off by E. S. W. Drought, county treasurer of said Wyandotte county, state of Kansas, for the sum of twelve dollars and thirty-six cents, being the whole amount of taxes, interest, and costs then due and remaining unpaid on said real property, for said county of Wyandotte, in said state of Kansas; and whereas, the subsequent taxes of the year 1878-79, amounting to the sum of twenty-four dollars and forty-six cents, were duly charged up to said sale as provided by law; and whereas, D. R. Emmons, county clerk of Wyandotte county, state of Kansas, did, on the twenty-second day of February, 1881, in consideration of the sum of fifty-one dollars and twenty-five cents, taxes, interest, and costs due on said land for the years A. D. 1877, 1878, 1879, to William Albright, treasurer of said Wyandotte county, paid by Rufus E. Cable, of the county of Wyandotte and state of Kansas, duly assign the certificate of the sale of the property as aforesaid, and all the right, title, and interest of said Wyandotte county to said property, to said Rufus E. Cable; and whereas, the subsequent taxes of the year A. D. 1880, amounting to the sum of nine dollars and six cents, have been paid by the purchaser as provided by law; and whereas, three years have elapsed since the date of said sale, and the said property has not been redeemed therefrom as provided by law: Now, therefore, I, D. R. Emmons, county clerk of the county aforesaid, for and in consideration of the sum of sixty dollars and thirty-one cents, taxes, costs, and interest due on said lands for the years A. D. 1877, 1878, 1879, 1880, to the treasurer paid as aforesaid, and by virtue of the statute in such case made and provided, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Rufus E. Cable, his heirs and assigns, the real property last hereinbefore described, to have and to hold unto him, the said Rufus E. Cable, his heirs and assigns, forever; subject, however, to all rights of redemption provided by law.

"In witness whereof, I, D. R. Emmons, county clerk as aforesaid, by virtue of the authority aforesaid, have hereunto subscribed my name, and affixed the official seal of said county, on this fifth day of September, A. D. 1881.

[Seal.]

"D. R. EMMONS, County Clerk.

"_____,
"_____, Witnesses.

"State of Kansas, County of Wyandotte—ss.: I hereby certify that before me, F. B. Anderson, a notary public in and for said county, personally appeared the above-named D. R. Emmons, clerk of said county, personally known to me to be the clerk of said county at the date of the execution of the above conveyance, and to be the identical person whose name is affixed to and who executed the above conveyance as clerk of said county, and who acknowledged the execution of the same to be his voluntary act and deed as clerk of said county, for the purposes therein expressed."

"Witness my hand and notarial seal this fifth day of September, A. D. 1881.
My commission expires February 9, 1884.

[Seal.] "F. B. ANDERSON, Notary Public.

"TAX DEED FROM WYANDOTTE COUNTY TO RUFUS E. CABLE.

"*State of Kansas, Wyandotte County—ss.:* This instrument was filed for record on the fifth day of September, A. D. 1881, at 2 o'clock P. M., and duly recorded in Book 15, on pages 93, 94. Fee \$1.25-100; paid.

"J. S. CLARK, Register of Deeds.

"I hereby certify that the within deed was entered for transfer on my transfer record this fifth day of September, 1881.

"D. R. EMMONS, Co. Clerk."

(4) That defendant hath paid all taxes assessed against said premises since the date of said tax deed, amounting, in the aggregate, to the sum of \$157.57, including interest and penalty.

(5) That the notice and list of delinquent lands and town lots, including the premises in controversy, for sale in September, 1878, is for the taxes of the year 1877. The said notice and list of delinquent lands and town lots bear date July 25, 1878, and that said list and notice were published the requisite length of time before the day of sale, in a newspaper printed and of general circulation in Wyandotte county, Kansas, and that the sole proof of such publication is the affidavit of the publisher of such newspaper attached to a copy of said newspaper containing said notice of sale and list, now on file in the office of the county clerk of said county; and that no affidavit or other proof of the publication of said notice of sale and list, by the county treasurer of said county or any other person, was made, nor was any such ever filed, either in the county clerk's or treasurer's office, except that of the printer's so attached and referred to herein.

(6) That the redemption notice (and list) from such sale was published the requisite length of time in a newspaper printed, published, and generally circulated in said county, which notice declares the last day of redemption to be September 5, 1881, from said sale for delinquent taxes so made on September 4, 1878.

(7) That plaintiff, nor his grantors, nor any person in his or their behalf, ever made any effort to redeem said premises from such sale prior or subsequent to the execution and delivery of said tax deed to the defendant.

And thereon the court made the following conclusions of law: "As conclusions of law from the foregoing facts found, the court finds that the plaintiff is the owner and entitled to the immediate possession of the demanded premises against the said defendant; and that the defendant's said tax deed was and is void, and that no title was communicated by said tax deed to the said defendant to or for any portion of the premises in controversy; and that defendant is entitled to recover of and from the said plaintiff all taxes paid on said premises as prescribed by law in such cases, aggregating the sum of \$157 57-100, which is a lien on and against said premises until paid; and that said defendant is also entitled to recover of and from said plaintiff the value of any and all lasting and valuable improvements made by him on said premises prior to the commencement of this action; and that upon payment of said taxes, and upon payment of said improvements by the plaintiff to the defendant, the said defendant shall forthwith surrender actual possession of the demanded premises unto the said plaintiff; and that the plaintiff shall recover his costs, in this behalf expended, of and from the said defendant."

The defendant filed a motion for a new trial, which was overruled, and judgment rendered in favor of the plaintiff that he have and recover of and from the defendant the possession of the real estate described in the petition; the defendant to recover the taxes, interest, and penalties paid by him on the

premises, and also the value of all lasting and valuable improvements made by him upon the land prior to the bringing of the action. The defendant excepted, and brings the case here.

Hale & Miller, for plaintiff in error. *A. Smith Devenney and Alden & McGrew*, for defendant in error.

HORTON, C. J. The defendant below (plaintiff in error) claimed upon the trial the land in controversy under a tax deed issued to him September 5, 1881. The date of the tax sale was September 4, 1878. The redemption notice and list, which were published, stated the land was to be redeemed on or before September 5, 1881. It was decided in *English v. Williamson*, 34 Kan. 212, 8 Pac. Rep. 214, that, where real estate has been sold for taxes, the owner has, under any circumstances, at least three years' time from the day of sale, and any time before the execution of the tax deed, within which to redeem his land from the taxes; and it was further decided that the day on which the land is sold must be excluded from the computation of the three-years time. Therefore plaintiff below (defendant in error) had all of September 5, 1881, within which to redeem his land. No moment of time can be said to be after a given day until that day has expired. But the tax deed in this case was issued on September 5, 1881, and filed for record at 2 o'clock P. M. of that day. The deed, therefore, was prematurely issued. This action was commenced on January 29, 1884; so no question of limitation is involved. Section 141, c. 107, Comp. Laws 1879. The tax deed, having been prematurely issued, is clearly voidable, and was properly held by the trial court insufficient to vest in the grantee thereof an absolute estate in fee-simple to the land therein described. Before the plaintiff below can obtain possession, he must pay the taxes, interest, and penalties, that is, redeem the land.

The judgment of the district court will be affirmed.

(All the justices concurring.)

(36 Kan. 189)

SEIBERT v. BAXTER.

(*Supreme Court of Kansas. February 4, 1887.*)

STATUTE OF LIMITATIONS—ACTION FOR RENTS AND PROFITS.

A cause of action for rents and profits, although joined with one in the nature of ejectment, is founded on an implied contract, and therefore the three-years limitation provided in the second subdivision of section 18 of the Civil Code applies and controls. *Gatton v. Tolley*, 22 Kan. 678.

(*Syllabus by the Court.*)

Error to district court, Marion county.

Geo. R. Peck, A. A. Hurd, and Frank Doster, for plaintiff in error. *L. F. Keller*, for defendant in error.

JOHNSTON, J. Edson Baxter brought this action against Henry Seibert for the recovery of 40 acres of land in Marion county, and also for the rents and profits of the land while the possession was withheld. The court found that Baxter was seized in fee of the land, and was entitled to recover the same from the defendant, Seibert, and also that the plaintiff was entitled to recover for the rents and profits thereof for three years prior to the commencement of the action, and judgment was accordingly given. Seibert, as plaintiff in error, brings the case here for review, but complains only of the allowance made by the court for rents and profits. The rental value of the land was agreed to be \$90 per annum, and the only question in dispute here is, for what length of time before the commencement of the action can a recovery be had; it is conceded that an action for the recovery of the rents and profits of the land is not controlled by the statute of limitations applicable to the recovery of the land itself. Plaintiff in error contends that it falls within

the third subdivision of section 18 of the Code, and must be regarded either as a "trespass to real property," or an "injury to the rights of another not arising upon contract." The contention of the defendant in error is that he was entitled to recover as upon an implied contract, under the statute providing that an action upon contract not in writing, express or implied, can be brought within three years after the cause of action shall have accrued. Civil Code, § 18, subd. 2. We think the defendant has taken the correct view. The question was examined and decided in *Gatton v. Tolley*, 22 Kan. 678, where it was said that "the damages for withholding the premises, and for the rents and profits, can only be such as have accrued within the three years prior to the commencement of the action. While such cause of action may, under the Code, be united with an action for the recovery of real property, yet the three-years statute of limitations applies to such claims." The use and occupation of land not owned by Seibert created a legal obligation against him, and in favor of the owner, for the value thereof. It is true that the possession was held without the consent of the owner, and without any express promise of the occupant to pay the value of the same; but, Seibert having enjoyed the benefits accruing from the possession, the law implies a promise to pay what it was worth, and this implied promise or contract is the foundation of the cause of action. *National Oil Refining Co. v. Bush*, 88 Pa. St. 335; *Lary v. Hart*, 12 Ga. 422. The amount of the recovery in such cases is not the injury done to the land, but is the net value of the use and occupation of the premises, from which there is deducted, in certain cases, the value of lasting and valuable improvements. It is said that an action of ejectment is founded on a wrong, and that the action for the rents and profits is consequent upon the ejectment, and, being of the same nature, is joined with it. These causes of action are not united because they are founded on like grounds of recovery; but, one being in the nature of tort, and the other of contract, an arbitrary provision of statute was deemed necessary, and has been enacted, to authorize a joinder of the causes of action. Civil Code, § 83. We think the action for rents and profits must be treated as one based upon an implied contract, and, following *Gatton v. Tolley*, *supra*, we hold that the three-year statute of limitation applies.

The judgment of the district court will therefore be affirmed.

(All the justices concurring.)

(*26 Kan. 225*)

TARBOX v. SUGHRUE. CHERRINGTON v. JERNINGAN. GAEDE v. GALLA-
GHER. BEARD v. VAN TROMP.

(*Supreme Court of Kansas*. February 4, 1887.)

1. QUO WARRANTO—COUNTY OFFICE—ILLEGAL ELECTION.

A proceeding in the nature of *quo warranto* lies, to a great extent, within the discretion of the court, and, generally, *quo warranto* will not lie where there is another plain and adequate remedy; but as the Kansas statute making provision to contest the election of one declared elected to a county office does not authorize the removal from office of the contestee, and is inadequate for that purpose, *quo warranto* will lie at the suit of one who claims to have received the greatest number of votes for a county office, not only to try the title to the office, but to remove the defendant therefrom as well.

2. ELECTIONS—VALIDITY—VIOLENCE.

Where the election board honestly discharges its duty, and the mass of the voters are given a fair opportunity to cast their votes, a slight disturbance and casual fray at the polls is insufficient to vitiate an election, or to justify the voters in abandoning the polls; and, where the validity of the election is questioned on the ground that voters were deterred from voting by violence and intimidation, it should appear that the number deterred was sufficient to change the result, or that by reason thereof the true result could not be ascertained from the returns.

3. SAME—ILLEGAL VOTING.

As a general rule, the declared result of an election will not be disturbed by reason of the reception of illegal votes, unless the number be sufficient to vary the result.

4. SAME—PROCEEDINGS TO CONTEST—EVIDENCE.

The statements of witnesses of what others, not parties to the record, told them subsequent to an election, in regard to voting without right, is incompetent to establish the charge of illegal voting. *Gilleland v. Schuyler*, 9 Kan. 569.

5. SAME—ILLEGAL VOTING.

Testimony with regard to the registration and poll lists of previous and subsequent elections, as well as testimony by old residents that some of the persons whose names appear on the returns of a contested election were unknown to them, may be received in evidence for what it is worth, as tending to establish illegal voting; but such testimony is not very satisfactory nor reliable, and is of much less weight and force in a new country, where a large immigration is pouring in, and where there is a shifting and unsettled population, than in an older portion of the country which is more settled, and where the population is more stable.

6. SAME—INTIMIDATION—FRAUD.

A party challenging the validity of an election on the ground of violence, intimidation, and fraud must prove the same, and in this case the evidence is examined, and held to be insufficient to vitiate the election, or vary the declared result.

HORTON, C. J., dissenting from the conclusions of fact.

(*Syllabus by the Court.*)

Original proceedings in the nature of *quo warranto*.

Bowman & Bucher and *C. N. Sterry*, for plaintiff in error. *Whiteside & Hutchinson, J. W. Ady, Rossington, Smith & Dallas*, and *Finley & Milton*, for defendant in error.

JOHNSTON, J. This is an original proceeding in the nature of *quo warranto* to try the title of R. W. Tarbox and P. F. Sughrue to the office of sheriff of Ford county. Both of them were candidates, and both claimed to have been duly elected at the general election held in November, 1885. At that election there were three tickets in the field known as "People's," "Democratic," and "Independent." The plaintiff, Tarbox, was the candidate for sheriff on the Independent ticket, and the defendant, Sughrue, was the candidate on the People's ticket, while one T. J. Tate was the Democratic candidate. The result of the election, according to the canvass made by the county commissioners at the time appointed by law, was that Sughrue received 1,052 votes, Tarbox 926 votes, and Tate 189 votes. Sughrue was thereupon declared elected by a plurality of 126 votes, and a certificate of election was accordingly issued to him. The correctness of this result is challenged by the plaintiff, who claims to have received the greatest number of legal votes cast at that election. It is conceded that the election was held and conducted in a lawful manner throughout the county, except in Dodge precinct. In regard to that precinct, the plaintiff alleges and attempts to prove that a number of lawless persons, with the knowledge and consent of the candidates on the People's ticket, took possession of and surrounded the voting place on the morning of the election, and, by their threats and conduct, intimidated and kept away from the voting place legal voters who desired and intended to vote for the plaintiff; and that they fraudulently and illegally procured and had cast illegal votes by persons not electors of the precinct; and that repeating and illegal voting was carried on to such an extent that in the precinct, where there are not to exceed 600 legal votes, 1,000 were recorded as having been cast. It is alleged that the judges of the election of that precinct were knowing to and connived at the fraudulent and illegal voting, and that those who desired to prevent the illegal voting, and to challenge the voters and repeaters, were threatened and driven away from the voting place. It appears that prior proceedings of injunction and *mandamus* were begun with a view of inquiring into the validity of this election; but these have been passed over, and instead the present direct proceeding has been brought.

The defendant presents, as a preliminary question, an objection to the jurisdiction of this court. The objection is that a proceeding in the nature of *quo warranto* cannot be maintained where there is another plain and ade-

quate remedy. That principle has received the approval of this court. *State v. Wilson*, 30 Kan. 661, 2 Pac. Rep. 828. But is the remedy suggested by the defendant an adequate one? He contends that such a remedy is furnished in the statute providing that an election of a person who has been declared elected to a county office may be contested. Gen. St. c. 36, §§ 85-105, inclusive. It is true that under that act there may be a full inquiry into the validity of the election, and the rights of the claimant under the election may be adjudicated; but the ouster of the defendant from the office, which is a part of the remedy sought in this proceeding, cannot be obtained. The judgment rendered by the contest court under that statute is stated in section 101 as follows: "The court shall pronounce judgment whether the contestee or any other person was duly elected, and the person so declared elected shall be entitled to his certificate upon qualification. If the judgment be against the contestee, and he has received his certificate, the judgment annuls it. If the court finds that no person was duly elected, the judgment shall be that the election be set aside." Thus it will be seen that the judgment does not go to the extent of removing the incumbent of the office, but only settles the validity of the election,—who, if any one, is entitled to the office, and to the certificate of election, and may annul the certificate that has been granted to any successful contestee. It still remains to obtain the possession of the office; and, unless voluntarily surrendered by the incumbent, a direct proceeding like the present one would be required to effectuate that purpose. To oust the defendant the remedy proposed is inadequate; and therefore the present proceeding, which, to a great extent, is within the discretion of the court, will lie.

The case must therefore be examined on its merits, and the first matter we will consider is the claim that the voters were deterred from voting by violence, threats, and intimidation. More than 1,000 pages of closely written testimony have been taken in the case, a great portion of which was directed to this question, but we are of the opinion that it falls far short of supporting the charge. The poll was opened, and election board organized, without contention or disturbance. Zealous champions of the respective tickets were on the ground, advocating the claims of their candidates, and it is true that some loud talk and boisterous conduct were indulged in. The most serious disturbance referred to is the testimony of several that one Masterson, a challenger for the People's ticket, struck another, named Jones, who was challenging for the opposite party, a blow in the face. It appears that the blow was given by a backward movement of the arm, and that Masterson was not looking in the direction of the one who was struck, and the explanation of the circumstance given by Masterson is that he was pushed off his balance by persons who were crowding up to the window where the votes were received, and that the blow was wholly accidental. There was testimony of other slight disturbances and threatening talk during the day, but we think nothing occurred there which showed a preconceived purpose to intimidate the voters, or which materially affected the result or freedom of the election. If the election board continues to honestly discharge its duty, and a fair opportunity is given to vote, a slight disturbance and casual fray, such as frequently occurs at elections, will not vitiate an election, or justify voters in abandoning the polls. In respect to violence and intimidation, Judge McCRARY, in his work on Elections, § 416, says: "The violence and intimidation should be shown to have been sufficient either to change the result, or that, by reason of it, the true result cannot be ascertained with certainty from the returns. To vacate an election on this ground, if the election were not in fact arrested, it must clearly appear that there was such a display of force as ought to have intimidated men of ordinary firmness."

The principal question is whether the great body of electors had an opportunity to freely cast their ballots. Many witnesses, some of whom were ad-

herents of the plaintiff, have testified that the election was conducted in an orderly and peaceable manner, and that those who were entitled to vote could and did vote without difficulty. Then there is the fact that a full vote was cast. Besides, it appears that friends of the ticket headed by the plaintiff remained at the polls throughout the day, and that 238 votes were cast in favor of the plaintiff, and 70 votes for the Democratic candidate. There is a claim that Masterson, who is said by some of the witnesses to be a dangerous man, threatened violence to four citizens of Dodge in case they appeared at the polls on election day. It is denied that any such threat was made. It does appear that the men spoken of by Masterson were personal enemies, and that something which was said by them derogatory of himself provoked the making of the threat. Whatever was said by him at that time related only to those four persons; and, if a threat was made as is claimed, and those persons were thereby deterred from voting, it would be insufficient to affect the election. The mass of voters, as we have seen, had a fair opportunity to vote; and, unless a number of voters had been prevented from voting sufficient to have varied the result, the election must stand. McCrary, Elect. §§ 416, 425; *State v. Mason*, 14 La. Ann. 505; *Augustin v. Eggleston*, 12 La. Ann. 366; Cooley, Const. Lim. (5th Ed.) 781.

It is next claimed that illegal votes were received at the Dodge precinct sufficient to destroy the integrity of the poll, or, at least, sufficient to change the result of the election. From the testimony it appears that at that time Dodge City was an outpost of civilization, and that in it there was a considerable number of the transitory and rough element which is to be found in most of the frontier towns. It is probably true, too, that the greater number, though not all, of that class, favored the People's ticket. That there were some illegal votes cast, and some repeating done at that poll, is shown in the testimony; but that any of these illegal votes were cast with the connivance or knowledge of the election board is not sustained by the evidence. A reading of all the testimony convinces us that the judges carefully and conscientiously performed their duty. Neither dishonesty nor incompetency can be imputed to any of them. They were before the court, and gave oral testimony, and we were impressed with the candor and truthfulness of their statements. If there were grounds for the belief that they had knowingly permitted illegal votes to be cast, or by their negligence and inefficiency allowed illegal voting, thus rendering the result uncertain, we would not hesitate to strike out the entire poll of that precinct. It appears, however, that there were numerous challenges made during the day by the friends of the several candidates, and these were properly investigated and disposed of by the board. They rejected those challenged who were not qualified electors; and in one case they detected a man whom they thought was attempting to vote a second time, and, on their own motion, ordered his arrest. In no part of the evidence do we find anything which leads to the belief that they were guilty of either intentional neglect or wrong-doing.

The plaintiff sought to show a sufficient number of illegal votes to change the declared result. We are satisfied from the evidence, as has been said, that some men voted who were not entitled to vote, and probably some voted more than once, but it does not satisfactorily appear for whom or at whose instance the illegal votes were cast. Indeed, a great deal of what is termed direct evidence of illegal voting taken by the commissioner is incompetent. Much of it is in regard to what the witnesses stated that others had said about illegal voting, and the number of times that they had voted. It has been declared that testimony of this character is hearsay, and cannot be considered. *Gilleland v. Schuyler*, 9 Kan. 582. Some of those who stated that they had been offered or given money to vote were prevented by the challengers and election officers from so doing, and in but few instances does it appear for whom the illegal votes were cast. "It has always been held, and is not dis-

puted, that illegal votes do not avoid an election unless it can be shown that their reception affects the result; and where the illegality consists in the casting of votes by persons unqualified, unless it is shown for whom they voted, it cannot be allowed to change the result." *People v. Cicott*, 16 Mich. 283; *Sudbury v. Stearns*, 21 Pick. 148; *Trustees v. Gibbs*, 2 Cush. 39; *Ex parte Murphy*, 7 Cow. 153; *People v. Tuthill*, 31 N. Y. 550; Brightley, Lead. Cas. Elect. 454; *Deloatch v. Rogers*, 86 N. C. 357; *Judkins v. Hill*, 50 N. H. 140; Cooley, *Const. Lim.* (5th Ed.) 780.

If all the illegal votes shown by legal proof to have been cast were subtracted from the vote of the defendant, they would be insufficient to overcome the plurality which he received; and there is no contention by plaintiff, as we understand him, that he has shown by direct evidence specific cases of illegal voting sufficient to change the result. He, however, claims to have shown, by another species of evidence, that enough illegal votes were cast to overcome the plurality of 126 which were credited to the defendant on the returns. He offers in evidence the vote of that precinct on former elections, as well as the registration lists and subsequent votes of Dodge City, and other portions of the territory which constituted Dodge City precinct at the time of the election in 1885. He produces citizens who attempt to identify the voters whose names appear upon the poll-list of the election of 1885, and, when this is done, 348 of the names appearing upon the poll-list of the election of 1885 are unaccounted for, and he claims that he has thereby shown that that number of illegal votes were cast. Testimony of this character is admissible, and may be received for what it is worth, but it is far from being satisfactory or reliable. It is entitled to much less force and weight in a new country, containing a shifting and unsettled population, and where a large immigration is pouring in, than in an older portion of the country, where the population is more settled and stable. The weakness of such testimony is well illustrated in the present case. This contested precinct was a very large one, being 18 miles in length and 18 miles in width, and the city of Dodge was included within its limits. It appears that there was a large influx of population into western Kansas in the year 1885, and that Ford county received its proportion of the same. We refer to the following facts as showing something of that increase. In Ryansville precinct, of the same county, 14 votes were cast in 1884, and in 1885 there were 137 polled; in Howell precinct 29 votes were cast in 1884, and in 1885 there were 59 cast; the vote in Speareville precinct, in 1884, was 199, and in 1885 it was 248; the vote in Dodge precinct, in 1884, was about 525, and in 1885 there were cast for the office of sheriff 1,076 votes. It will thus be seen that the ratio of increase in Dodge precinct was no greater than in other precincts of Ford county. Then, again, it appears that in Dodge precinct, and outside of the corporate limits of Dodge City, there were between six and seven hundred heads of families that had located upon public lands; and, from the certificate furnished by the United States land-office, it appears that there were 902 final entries of public lands in Ford county between the first of March, 1885, and the first of March, 1886. One witness testified that he had between forty and sixty thousand acres of the public lands within that precinct fenced, and until the first of March, 1885, there were but two settlers inside of the inclosure; but the land was ordered to be thrown open, and within 30 days after March 1, 1885, there were nearly 200 settlers upon that tract of land.

In regard to the registration list, which has been compared with the poll-list of 1885, it seems that Dodge City was organized as a city of the second class in March, 1886, and the registration books were opened preparatory to the city election on the twenty-third day of March, and only remained open seven days. It is in testimony that a doubt existed among the voters of the city with regard to the necessity of registration, some believing that no registration was required. As a result of the shortness of time, and the doubt and

prejudice which existed concerning registration, many failed to register. That the registration was then regarded as incomplete is shown by the fact that the books were again opened for the bond election held the latter part of the same month. The census rolls referred to are shown to be equally incomplete. In regard to the identification by witnesses of the names found upon the poll-list of 1885, it may be remarked that the attempt was made several months after the election occurred. One witness, the county clerk, was able to identify nearly one-half of the voters as shown by the returns. Another witness was called, and he was able to identify 105 of the names which the first witness failed to identify. Other witnesses were called who were able to identify a few of those not before identified, but these again were unable to identify many of those which had been previously identified. Possibly, if other witnesses had been called, many others of those found on the list might have been identified. The discrepancies in the identifications in the different witnesses makes manifest of how little value such testimony is. The witness who identified the greatest number stated that the population of the precinct had almost doubled from 1884 to 1885; that there were many new-comers that he recognized by sight, without knowing their names. Other witnesses stated that the great rush of immigration began in the spring of 1885, and continued during the summer of that year. That no more of the names were recognized or identified by these older citizens is not to be wondered at, when the marvelous increase of population, the great scope of territory over which it was distributed, and its transitory character are considered.

As against the inference deducible from the identifications made, there is the fact that the election was, in the main, orderly and peaceable; the fact that the friends of the several candidates were on guard, challenging those that were not deemed to be legal electors; the fact that the one who was challenging in behalf of the plaintiff as well as himself challenged as many as 100 persons during the day; the fact that none of the challenges were disregarded, and that the officers caused the arrest of illegal voters; and the further fact that the votes were received by election officers whose conduct is unimpeached, who saw the voters in person, and in receiving their votes acted publicly, in the presence of the candidates and their friends. The votes were received and counted by the judges in the performance of a sworn duty. And the presumption arises that every ballot which was received and deposited in the ballot-box is a legal vote until there is evidence to the contrary. It has been said that "an election honestly conducted, under the forms of law, ought generally to stand, notwithstanding individual electors may have been deprived of their votes, or unqualified voters been allowed to participate. Individuals may suffer wrong in such cases, and a candidate who was the real choice of the people may sometimes be deprived of his election; but, as it is generally impossible to arrive at any greater certainty of result by a resort to oral evidence, public policy is best subserved by allowing the election to stand, and trusting to a strict enforcement of the criminal laws for greater security against the like irregularities and wrongs in the future." Cooley, *Const. Lim.* 782.

The plaintiff questions the validity of the election, and charges that illegal votes were cast, and it devolves upon him to prove the charge. In this we think he has failed, and judgment must therefore be given in favor of the defendant.

The cases of *Cherrington v. Jernigan, Gaede v. Gallagher, Beard v. Van Tromp*, are similar in character to the one we have been considering. They have been brought to try the title of the parties thereto to other county offices that were voted upon at the same election, and, under an agreement, all of the cases were submitted together, and are to be determined and disposed of upon the testimony taken in the case of *Tarbox v. Sughrue*. It follows that judgment must go in favor of the defendant in each case.

VALENTINE, J., concurring.

HORTON, C. J. I do not agree with the conclusions of fact of the majority of the court concerning the illegal votes cast at the Dodge City election precinct.

(36 Kan. 184)

FISHER v. CARPENTER.

(*Supreme Court of Kansas. February 4, 1887.*)

WAYS—DEDICATION OF STREET—PLAT OF ADDITION TO CITY.

Where a certain map or plat of an addition to a city, together with the surveyor's notes and the proprietor's acknowledgment, is filed in the office of the register of deeds, and a certain piece of land is a part of the land designated by the boundary lines of the map or plat, but there is nothing in the map or plat, or in the surveyor's notes, or in the proprietor's acknowledgment, that would indicate for what purpose such piece of land was intended to be used, *held*, that it cannot be considered as one of the public streets of the city.

(*Syllabus by the Court.*)

Error to district court, Dickinson county.

C. F. Mead, for plaintiff in error. J. R. Burton, for defendant in error.

VALENTINE, J. No brief has been filed or oral argument made in this case on the part of the defendant in error, hence we must rely principally upon the brief and oral argument made by the counsel for the plaintiff in error. It seems that the only question involved in this case is whether a certain piece of land situated in the city of Abilene, Kansas, is a public street, or is the private property of the plaintiff in error, John M. Fisher; and that it is either the one or the other is admitted. That it is not a public street by prescription or limitation is clear beyond all question, under the authority of the following cases: *State v. Horn*, 35 Kan. 717, 12 Pac. Rep. 148; *Smith v. Smith*, 34 Kan. 298, 301, 8 Pac. Rep. 385.

The only question, then, for us to further consider, is whether the land is a public street by dedication or not. Now, it is not such unless it is such by reason of the filing of a certain map or plat, and the surveyor's notes and the proprietor's acknowledgment, in the office of the register of deeds, on July 22, 1870.

Sections 1, 2, and 6 of the act relating to plats of towns and cities (Comp. Laws 1879, c. 78) read as follows:

"Section 1. Whenever any city or town, or an addition to any city or town, shall be laid out, the proprietor or proprietors of such city or town or addition shall cause to be made out an accurate map or plat thereof, particularly setting forth and describing—*First*, all the parcels of ground within such city or town or addition, reserved for public purposes, by their boundaries, course, and extent, whether they be intended for avenues, streets, lanes, alleys, commons, or other public uses; and, *second*, all lots intended for sale, by numbers, and their precise length and width.

"Sec. 2. Such map or plat shall be acknowledged by the proprietor, or, if an incorporated company, by the chief officer thereof, before some court or other officer authorized by law to take the acknowledgment of conveyances of real estate."

"Sec. 6. Such maps and plats of such cities and towns, and additions, made, acknowledged, certified, filed, and recorded with the register, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein expressed, named, or intended for public uses in the county in which such city or town or addition is situate, in trust and for the uses therein named, expressed, or intended, and for no other use or purpose."

The piece of land in controversy is a part of Fisher's addition to the town or city of Abilene. It is about 250 feet in length, and 34 feet wide at the

west end, and 89 feet wide at the east end. It is designated by boundary lines in the map or plat filed in the register's office, but there is nothing in the map or plat, or in the surveyor's notes, or in the proprietor's acknowledgment, that would indicate for what purpose it was intended to be used. The surveyor, in his notes, states that the "dimensions of lots, streets, and alleys are given on the plat," and on the plat the lots are numbered, and two out of three of the streets are named, and figures are used to show the width of the streets and alleys, and the length and width of the lots; but that part of the map or plat representing the piece of ground in controversy is left blank. Under such circumstances, we do not think that the land in controversy can be considered as a public street. *Cook v. Hillsdale*, 7 Mich. 115; *Mayor, etc., of New York v. Stuyvesant*, 17 N. Y. 34; *Robinson v. Coffin*, 6 Pac. Rep. 41. Indeed, under the statute, it could not have been intended for an avenue, street, lane, alley, common, or *other public use*, nor could it have been intended as one of the "lots intended for sale." Therefore it must have been a piece of ground intended to be reserved for the use of the proprietor, and such persons as might succeed to his right.

The judgment of the court below will be reversed, and cause remanded for further proceedings.

(All the justices concurring.)

(36 Kan. 180)

STATE ex rel. PIERCE v. BOARD OF COUNTY COM'RS OF WABAUNSEE CO.

(*Supreme Court of Kansas*. February 4, 1887.)

1. MUNICIPAL CORPORATIONS—SUBSCRIPTION TO RAILROAD STOCK—CONTESTING ELECTION.

Where a private individual brought an action in the name of the state, on his relation, to perpetually enjoin a canvassing board from canvassing the election returns of an election held to authorize a subscription to the capital stock of a railroad company, and to issue bonds in payment therefor, and such private individual has no interest in the subject-matter of the action different in kind from that of the public in general, *held*, that the action cannot be maintained, although the relator may be a resident, a tax-payer, and an elector.

2. SAME—INJUNCTION DISSOLVED.

And in such an action, where a temporary injunction had been granted, *held*, that the court did not err in dissolving the temporary injunction, and in dismissing the action.

3. SAME—COMP. LAWS KAN. 1879, CH. 36, ART. 7.

Article 7, c. 36, p. 405, Comp. Laws 1879, relating to the contests of elections, construed, and held not to apply to the present action.

(*Syllabus by the Court.*)

Error to district court, Wabaunsee county.

Green & Heslin, for plaintiff in error. *W. A. Doolittle and Overmeyer & Safford*, for defendants in error.

VALENTINE, J. This was an action commenced in the district court of Wabaunsee county, Kansas, on September 9, 1886, in the name of the state of Kansas, on the relation of William A. Pierce, a resident, tax-payer, and elector of the township of Maple Hill, in said county, against the board of county commissioners and the county clerk of said county, to perpetually enjoin them from canvassing the election returns of an election held in said township on September 6, 1886, to authorize a subscription for the township to the capital stock of the Chicago, Kansas & Nebraska Railway Company, to the amount of \$27,000, and to authorize the issuance of the bonds of said township to an amount equal to the amount of the stock issued and in payment therefor. A temporary injunction was allowed, but afterwards the defendants moved to dissolve the same, upon the ground that the petition of the plaintiff did not state facts sufficient to entitle him to an injunction or a temporary restrain-

ing order, and also upon the ground that the relator, William A. Pierce, had no legal capacity to maintain the suit, either as relator for the state or as an individual. Upon the hearing of this motion, which was upon the facts set forth in the petition alone, the court sustained the motion, and dismissed the plaintiff's action, at the costs of the relator; and, to reverse these rulings of the district court, the relator, in the name of the state of Kansas and as relator, brings the case to this court.

It seems to be admitted that this action cannot be maintained, nor any relief granted therein, unless the same can be done under chapter 86, art. 7, p. 405, Comp. Laws 1879; and this, for the reason that the relator in the present case is not a public officer, but only a private citizen, and that the supposed injury which he wishes to have restrained is not different in kind from that which will be sustained by the public generally, if the acts which the relator fears, and which he wishes to have restrained, should ever take place. See *Nixon v. School-district*, 32 Kan. 510-512, 4 Pac. Rep. 1017, and the cases there cited.

The title to the above-mentioned act reads as follows: "An act providing for contesting county-seat elections, and all elections other than those held for choosing public officers, and to repeal chapter twenty-seven of the Laws of 1869."

Sections 1 and 5 of said act read as follows:

"Section 1. Whenever any elector or electors of any county, township, or municipal corporation in this state shall consider himself or themselves aggrieved by the result of any election hereafter held, for removing, locating, establishing, or relocating the county-seat of such county, or upon the question of issuing the bonds or loaning the credit of said county, township, or municipal corporation, or for the sale or transfer of any stock or other property owned or held by said county, township, or municipal corporation, as said result may have been or shall be declared by the proper board of canvassers, or if any such elector or electors shall consider himself or themselves aggrieved by the failure or refusal of any board of canvassers to canvass the votes returned from any precinct or precincts as having been cast at any election held for any or either of the purposes hereinbefore named, such election may be contested in the district court of the proper county, as hereinafter provided."

"Sec. 5. Whenever, after any election held for any purpose mentioned in the first section of this act, the board of canvassers shall declare any town, city, or place to have received a majority of the votes cast for the county-seat, or that any question or proposition voted upon at such election to have been adopted, any elector or electors of the proper county, township, or municipal corporation, who may be aggrieved thereby, may commence an action in the district court of the proper county to perpetually enjoin any county officer from moving his office to the city, township, or place so by said board declared to be the county-seat, or to enjoin and restrain the proper officer or officers of such county, township, or municipal corporation from executing, issuing, or delivering any bond or bonds, certificate or certificates, evidencing or importing any debt or liability, or promise to pay, of such county, township, or municipal corporation, or from subscribing any stock for, or from loaning the credit of, such county, township, or municipal corporation, or from selling or transferring any stock or other property of such county, township, or municipal corporation."

These are the only portions of the above-mentioned act which need to be quoted for the purposes of this case.

Does this act authorize this action? We think not. For the purposes of this case, the foregoing sections of the statute may be abridged as follows:

"Section 1. Any elector * * * aggrieved by the result of any election, * * * as said result may have been or shall be declared by the proper

board of canvassers, * * * such election may be contested * * * as hereinafter provided."

"Sec. 5. Whenever, after any election, * * * the board of canvassers shall declare * * * any question or proposition voted upon at such election to have been adopted, any elector * * * aggrieved thereby may commence an action * * * to enjoin and restrain the proper officer or officers * * * from executing, issuing, or delivering any bond or bonds, * * * or from subscribing any stock for, or from loaning the credit of, such county, township, or municipal corporation," etc.

It will be seen from the title to the above-mentioned act that it was intended by the act to provide only for "contesting" elections. The body of the act also shows the same thing. Section 1 of the act provides that, when the "result may have been or shall be declared by the proper board of canvassers," "such election may be contested," *as is subsequently provided in the act*; the language of this portion of the act being in these words, "as hereinafter provided." Section 5, above quoted, provides how the elections mentioned in this act may be contested, and it is the only section which provides for an injunction in elections similar to the one in question, and it provides for an injunction only *after* the election, and when the "board of canvassers shall declare" the "proposition voted upon at such election *to have been adopted*." There is no provision anywhere in the act that authorizes an injunction to restrain the board of canvassers from canvassing the election returns, or from declaring the result of the election. Under this act, an injunction can be allowed only after the election, after the canvass, and only after the result has been declared; and, in such elections as the one in this case, it can be allowed only to restrain the officers from subscribing for stock, or from executing, issuing, or delivering bonds, or from loaning the credit of their county, township, or municipal corporation. Clearly, the court below did not err in dissolving the temporary injunction. There is nothing in the case of *Sabin v. Sherman*, 28 Kan. 289, inconsistent with the views herein expressed. That was a county-seat case, not brought in the name of the state nor under the foregoing statute, but in the name of an individual, and for his own benefit; and the plaintiff in that case, in all probability, had such a *special interest* in the subject-matter of the action that he could have maintained the action if everything else had been in his favor; but the decision of the court below in that case, as in this, was against him, and the decision in that case was affirmed by the supreme court, as the decision of the lower court in this case must be.

It is insisted, however, by the plaintiff, that, even if the temporary injunction was rightfully dissolved, still that the court below erred in dismissing the plaintiff's action, and the case of *Johns v. Schmidt*, 32 Kan. 383,¹ is cited. But that case furnishes no support to the point made by the plaintiff in this case. In that case the plaintiff alleged a good cause of action, and one upon which a judgment could rightfully be rendered, and the plaintiff's petition in that case was such that upon it he was entitled to a trial. But in this case the petition does not state any cause of action, and it is difficult to see how it could be amended so as to make it state any cause of action; nor did the plaintiff ask to amend it, and upon it no trial could have been had, nor any judgment in favor of the plaintiff rendered; and the entire decision of the court below was upon the ground of the insufficiency of the plaintiff's petition to state a cause of action in his favor.

The order and judgment of the court below will be affirmed.

(All the justices concurring.)

¹4 Pac. Rep. 872.

